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WITH KEY-NUMBER ANNOTATIONS

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THE SOUTHEASTERN REPORTER

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(151 Ga. 142)

CURLES et al. v. WADE & BRIMBERRY
et al. (No. 2115.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by the Court.)

1. Wills \S 602, 603(3)—Devise held to give fee, defeasible upon death without children.

The words in the first item of the will vested in George Grover Jones an estate in fee simple, defeasible upon his dying without a child or children. *Gibson v. Hardaway*, 68 Ga. 370; *Daniel v. Daniel*, 102 Ga. 181, 28 S. E. 167; *Chewning v. Shumate*, 106 Ga. 751, 32 S. E. 544; *Hill v. Terrell*, 123 Ga. 49, 51 S. E. 81; *Kinard v. Hale*, 128 Ga. 485, 57 S. E. 761; *Nottingham v. McKelvey*, 149 Ga. 463, 100 S. E. 371; *Slappey v. Vining*, 150 Ga. 792, 105 S. E. 353; and see, for general discussion of similar cases, *Herts v. Abrahams*, 110 Ga. 707, 36 S. E. 409, 50 L. R. A. 361; *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N. E. 644, 51 L. R. A. (N. S.) 477, 494, note.

2. Wills \S 686(3)—Provision that land shall be held in trust is executed when beneficiary becomes 21.

The trust created for George Grover Jones became executed on his arriving at the age of 21 years, which, under the agreed statement of facts, he has attained. *Hollis v. Lawton*, 107 Ga. 102, 32 S. E. 846, 73 Am. St. Rep. 114; *Phillips v. Lowther*, 111 Ga. 852, 36 S. E. 596.

Wills \S 634(8)—Persons to take in case devisee died without children have no vested interest and are not entitled to enjoin waste.

Interveners had no vested interest in the property, and were not entitled to the relief sought by them.

4. Waste \S 5—One having qualified or base fee cannot be restrained.

Having held that George Grover Jones, under the will of his father, took a qualified or base fee in the land, it follows that the court did not err in refusing to interfere by injunction to restrain waste by him or by those proceeding under valid contract authority from him. *Matthews v. Hudson*, 81 Ga. 120, 7 S. E. 286, 12 Am. St. Rep. 805.

Error from Superior Court, Mitchell County; W. M. Harrell, Judge.

Suit by T. W. Curles and others against Wade & Brimberry and others. An injunction was refused, and plaintiffs bring error. Affirmed.

The will of James Jones, dated March 9, 1894, provided in the first item as follows:

"I give, bequeath, and devise to my son, Geo. Grover Jones, the following property, to wit: [Describing, among other things, three lots of land, which form the subject-matter of this suit.] It is my will that all the above property belong and the title vest in my son, Geo. Grover Jones immediately after my death; but if he should die without a child or children, then in that case the above-described property be divided equally among my nieces and nephews."

The fourth item provides:

"It is my will that all the land given to my son Geo. Grover Jones be held in trust for said George Grover Jones, by my brother, A. H. Jones until my son becomes thirty (30) years of age."

James Jones died in 1897. On June 17, 1915, Grover C. Jones by his guardian and D. B. Davis and A. H. Jones as executors of the will of James Jones and as testamentary guardians of Grover C. Jones, granted to Stripling & Ledbetter the right to cut and remove from the land "the pine timber suitable for sawmill purposes and for cross-tie purposes and for wood purposes and for other purposes similar thereto, growing, which measures 12 inches in diameter, two feet above the level of the ground." On December 18, 1915, a similar grant was made by the same persons to Wade & Brimberry, covering all the other timber on the property. On December 21, 1916, Grover C. Jones, D. B. Davis, and A. H. Jones as executors of the estate of James Jones, and A. H. Jones as trustee for Grover C. Jones, conveyed the land by deed to T. W. Curles. On December 11, 1916, fourteen of the nephews and nieces of James Jones joined in a deed conveying to Curles whatever interest they might have in the property. The timber grant to Stripling & Ledbetter was transferred, on June 10, 1919, to Curles. On June 26, 1919, Curles filed a petition against Wade

& Brimberry, a partnership, and the individual members thereof, alleging that they had entered and begun cutting and removing the timber measuring less than 12 inches in diameter 2 feet above the level of the ground; that Grover C. Jones had no right to convey the land or timber unless and until he had a child, and upon his failure to have a child the title would vest after his death in the nephews and nieces of James Jones; that the acts of Wade & Brimberry constituted a trespass against petitioner, who is the absolute owner of the land and timber thereon; that the defendants are insolvent, and unless they are restrained by injunction from cutting and removing the timber he will suffer irreparable loss and damage; and that the damage already done amounts to \$1,000. The prayers were for injunction, and for judgment for the amount of damage already done.

Upon the hearing the following facts were agreed upon: George Grover Jones was the same person as Grover C. Jones; he is living and married, but has never had any child; he was sui juris at the time of the execution of the timber leases mentioned. The plaintiff bought the land and acquired the transfer of the Stripling & Ledbetter lease after the lease to Wade & Brimberry had been recorded, and with knowledge of it. Dink, Roy, and Gus Jones, minors, intervened through their next friend, alleging that as nephews of James Jones they had an interest in the property, contingent upon George Grover Jones dying childless; and that they cannot maintain an action for waste. They prayed that the defendants be enjoined until the happening of the event which would remove the contingency, the birth of a child to George Grover Jones; and that they be permanently enjoined in the event he should die without having had a child. The court refused to grant the injunction, and the plaintiffs excepted.

E. E. Cox, of Camilla, for plaintiffs in error.

Peacock & Gardner and E. M. Davis, all of Camilla, for defendants in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(151 Ga. 117)

BERCKMANS v. TARNOK et al. (No. 1913.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by Editorial Staff.)

1. Corporations \S 560(1)—Court may vacate or modify receiver's contracts with consent of other party.

The court has power to vacate or modify any agreement or contract made by a receiver

appointed to liquidate the assets of a corporation under Civ. Code 1910, \S 2245, and to direct the making of another agreement with the consent of the other party to the contract.

2. Corporations \S 560(5)—Court held not to have abused discretion in granting extension of time to purchaser from receiver.

Where a receiver appointed under Civ. Code 1910, \S 2245, to liquidate the assets of a corporation sold property under an order of the court on deferred payments secured by a mortgage, and upon maturity of the purchase-money notes the purchaser was unable to pay, the court held not to have abused his discretion in granting an extension of time, over the objection of a minority stockholder, and in refusing to order a foreclosure of the mortgage.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit between E. F. Berckmans and Sigmond Tarnok and others. Judgment in favor of the adverse parties, and Berckmans brings error. Affirmed.

W. K. Miller, of Augusta, for plaintiff in error.

Cumming & Harper and Alexander & Lee, all of Augusta, for defendants in error.

GEORGE, J. Under Civil Code 1910, \S 2245, a receiver was appointed for the purpose of liquidating the assets of a corporation expiring by limitation of time. The business of the corporation was that of a nurseryman and horticulturist. There came into the hands of the receiver horticultural stock growing upon lands owned by others. Some months after the appointment of a receiver, the court ordered the receiver to make a sale of the corporate property in its then condition, the sale to be made on time, and the deferred payments to be secured by a mortgage on the property sold. To this order, its terms and conditions, all persons owning stock in the corporation consented. The property was sold by the receiver and purchase-money notes taken for the deferred payments, secured by mortgage on the property sold. Upon the maturity of the purchase-money notes, the purchaser advised the receiver that he was unable to pay the same, and that he would have to surrender the possession of the property unless an extension of time was granted. The receiver applied to the court for direction; and the court, after notice to all parties at interest, and over objection of a holder of the minority of the stock in the dissolved corporation, ordered that the extension of time as requested by the purchaser be granted, and directed the receiver to prepare and present to the court a contract and mortgage carrying out the terms of the judgment. Held:

[1] 1. The court has power to vacate or modify any agreement or contract which the receiver has made, and to direct the making

of another agreement, the opposite party to the contract consenting. High on Receivers (4th Ed.) § 186, and cases cited in note.

[2] 2. Under the evidence in this case the court did not abuse his discretion in granting the extension of time asked by the purchaser, and in refusing to order the receiver to foreclose the mortgage as prayed by the objecting party.

Judgment affirmed.

All the Justices concur.

(151 Ga. 145)

RICHARDS v. NEAL et al. (No. 2129.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error §1005(2)—Approved verdict supported by evidence conclusive.

A judgment refusing a new trial will be affirmed when there is some evidence to support the verdict.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action between W. A. Richards and J. A. Neal and others. Judgment for the latter, and the former brings error. Affirmed.

A. L. Henson, of Calhoun, Maddox, McCamy & Shumate, of Dalton, and M. B. Eubanks, of Rome, for plaintiff in error.

J. G. B. Erwin, Jr., of Calhoun, for defendants in error.

BECK, P. J. There is no assignment of error upon any ruling of the court pending the trial, or upon any portion of the court's charge to the jury; and, there being some evidence to support the verdict, the judgment of the court below refusing a new trial is affirmed.

All the Justices concur.

(151 Ga. 90)

AVERETT et al. v. BOUTWELL. (No. 2022.)

(Supreme Court of Georgia. Feb. 16, 1921.)

(Syllabus by the Court.)

1. Appeal and error §336(1)—Not dismissed because one defendant not made plaintiff in error.

The motion to dismiss the writ of error, because one of the persons named as a defendant in the petition was not made a party plaintiff in error, is without merit. *Jones v. Larimore*, 149 Ga. 825, 102 S. E. 526.

2. Injunction §34—Sale of property as part of estate not enjoined, there being adequate remedy at law.

The petitioner having an adequate remedy at law available, the grant of an interlocutory

injunction against selling or interfering with the possession of the property was error.

Atkinson, J., dissenting in part.

Error from Superior Court, Crawford County; H. A. Mathews, Judge.

Suit by J. J. Boutwell by next friend, against Ed. Averett and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. J. Boutwell, by next friend, brought an equitable petition against Ed. Averett, Mrs. Georgia Hamlin, Mrs. Lula Johnson, and Mrs. Lella Averett, alleging that A. V. Averett, deceased, had given to petitioner a certain mule; that the defendants, as heirs at law of A. V. Averett, were threatening to take possession of the mule, and had advertised the same for sale as a part of the estate of A. V. Averett; that petitioner was just getting ready to commence his crop, and if the mule should be taken away from him he would be unable to proceed, and his damages would be irreparable; that the defendants are insolvent; and that he has no remedy at law. He prayed that the defendants be restrained by injunction from interfering with his ownership and possession of the mule. The answer filed by Mrs. A. V. Averett, who was the mother of the plaintiff and the widow of A. V. Averett, admitted all the allegations of the petition. The answer of the other defendants denied all material allegations of the petition. The evidence introduced by plaintiff tended to support the allegations of the petition (except that the only evidence on the question of insolvency related to Ed. Averett). The evidence offered by the defendants was in contradiction of the allegations of the petition, but they did not offer any evidence on the question of their solvency. Upon the hearing the court granted an interlocutory injunction, and included in his order a requirement that "the defendant Bus Hamlin" [in whose possession the mule then was] deliver the same to Boutwell upon his making bond for the forthcoming of the mule and to answer any judgment which might be rendered for hire of the same upon final trial. Ed. Averett, Mrs. Hamlin, and Mrs. Johnson excepted, assigning error upon the judgment on the grounds that it is contrary to law and the evidence and the principles of equity, because the plaintiff has an adequate remedy at law; because the facts alleged in the petition do not entitle the plaintiff to the relief sought; because the evidence does not authorize injunction; and because the requirement as to delivery of the mule was directed to one not a party to the petition for injunction.

The defendant in error moved to dismiss the writ of error, because Mrs. Lella Averett, a party to the petition for injunction

and substantially interested in the outcome of the case, had not been served with the bill of exceptions, and had not acknowledged or waived service.

Ross & Ross, of Macon, for plaintiffs in error.

Martin & Martin, of Macon, for defendant in error.

GILBERT, J. Judgment reversed. All the Justices concur, except ATKINSON, J., who dissents from the ruling in the second headnote.

(151 Ga. 88)

LOGANVILLE BANKING CO. v. BROADNAX et al. (No. 1942.)

(Supreme Court of Georgia. Feb. 16, 1921.)

(Syllabus by Editorial Staff.)

1. Judgment \S 839—Transfer of judgment and execution need not be under seal.

Under Civ. Code 1910, §§ 4274 and 5969, authorizing the assignment of judgments and executions, a written transfer of a judgment and the execution issued thereon need not be under seal.

2. Judgment \S 850—Assignee of judgment and execution entitled to be substituted in claim case.

Under Civ. Code 1910, §§ 4274 and 5969, where plaintiff during the pendency of a claim case transferred the *fi. fa.* and judgment on which it was based, without recourse, the assignment passed title to the judgment and execution with all of its resulting incidents, including the right of the assignee to be made a party plaintiff and proceed with the prosecution of the case and recover damages if the claim was interposed for delay, and it was improper to order that the case proceed in the name of the original plaintiff for the use of the assignee.

3. Judgment \S 850 — Assignor of judgment cannot proceed against one interposing claim to property for delay.

Where during the pendency of a statutory claim case plaintiff transferred the *fi. fa.* and judgment without recourse, he could not proceed on his own account against the claimant to recover damages on the ground that the claim was interposed for delay.

Certified Question from Court of Appeals.

Suit between the Loganville Banking Company and J. C. Broadnax, trustee, and others. Judgment for the adverse party, and the Banking Company brought error to the Court of Appeals, which certified questions to the Supreme Court. Questions answered.

J. H. Felker, of Monroe, for plaintiff in error.

R. L. Cox and O. Roberts, both of Monroe, for defendants in error.

FISH, C. J. [1] A plaintiff may, bona fide and for a valuable consideration, transfer in writing a judgment and the execution issued thereon to a third person; and the transferee has the same rights as the original plaintiff had, and the transfer or assignment need not be under seal. Civil Code 1910, §§ 4274, 5969. See Thompson v. First State Bank, 102 Ga. 696, 29 S. E. 610.

[2] (a) Where a statutory claim case is pending in the superior court, and the plaintiff transfers, in writing not under seal, a *fi. fa.* and the judgment on which it is based, "without any recourse on us whatsoever," such assignment passes to the assignee the title to the judgment and the execution with all the resulting incidents of the assignment, which include the right of the assignee, as such, to be made a party plaintiff in the case, to proceed with its prosecution to subject the property levied on, and to recover damages from the claimant if it should appear that the claim was interposed for delay only; and it would not be proper to order that the case proceed in the name of the original plaintiff for the use of the assignee.

[3] (b) After such assignment the original plaintiff in *fi. fa.* could not proceed on his own account against the claimant for the purpose of recovering such damages.

The foregoing rulings are made in response to questions certified by the Court of Appeals.

All the Justices concur.

(25 Ga. App. 209)

HINES, Director General of Railroads, v. McWHIRTER. (No. 11210.)

(Court of Appeals of Georgia, Division No. 1. Jan. 27, 1921.)

(Syllabus by Editorial Staff.)

1. Carriers \S 408(4)—Evidence sufficient to support verdict for loss of trunk by passenger.

In an action by a passenger, for loss of her trunk, evidence held sufficient to support verdict for plaintiff.

2. Trial \S 253(3)—Instruction not erroneous as depriving Director General of defense when sued for loss of trunk.

In an action against the federal Director General of Railroads, operating the A. road, for loss of a trunk in the custody of a terminal company acting as agent for such A. road, and for another, the B. road, instruction held not erroneous as depriving defendant of the defense that the trunk was lost by the terminal company as agent for the B. and not as agent for the A. road.

3. Carriers \S 408(7)—Instruction held not erroneous as requiring defendant carrier to satisfy jury he never received trunk.

In an action against the federal Director General of Railroads operating the A. road for

loss of a trunk while in possession of a terminal company acting as agent for the A. road and another, the B. road, instruction that if defendant operating the A. road had satisfied the jury's minds the trunk was never delivered to him, then plaintiff would not be entitled to recover any sum whatever, *held* not erroneous as requiring defendant to satisfy the jury that he, as operator of the A. road, never received the trunk, etc.

4. Carriers \S 408(7)—Instruction not erroneous as imposing unduly high burden of proof on defendant, sued for loss of trunk.

In an action against the federal Director General of Railroads operating the A. road, for loss of a trunk by a terminal company, agent for the A. road and also for the B. road, instruction that plaintiff's presentment of a baggage check given her by defendant operating the A. road makes out a prima facie case for her, the burden shifting to defendant, *held* not erroneous as imposing on defendant, for lack of statement that he must show by the "preponderance" of the evidence that the trunk was never delivered to him, a higher burden of proof than imposed by law.

Error from Superior Court, Madison County; W. L. Hodges, Judge.

Action by Ruby McWhirter against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Judgment affirmed.

The court charged the jury:

"I charge you that if the trunk in question was lost or destroyed while in the possession of the Atlanta Terminal Company, and that said Atlanta Terminal Company was acting at the time of such loss or destruction of such trunk as agent for the defendant Seaboard Air-Line Railroad Company in handling of passengers and baggage, then I charge you that the plaintiff should recover in this case the value of such property lost or destroyed, and that you should so find by your verdict."

Defendant claimed such charge was error because it was admitted by defendant that the Atlanta Terminal Company was the agent of the Seaboard Air-Line Railroad Company at the former's terminal station in Atlanta, in the handling of passengers and baggage, but defendant contended that the terminal company was also the agent of the Southern Railroad Company at the same station in the handling of passengers and baggage, that the trunk never came into the possession of the Atlanta Terminal Company as agent for the Air-Line Railroad Company, and that the latter's baggage check was never placed on the trunk, but that it was lost by the terminal company as the agent for the Southern Railroad Company while the latter's check was still on it, so that the Air-Line Railroad Company never received the trunk and defendant was not liable for its loss, defendant's claim being that the charge deprived him of such defense, and

was an instruction to find for plaintiff if the jury should find that the terminal company was agent for the Air-Line Railroad Company at the time the trunk was lost, irrespective of whether it then held the particular trunk as agent for the Air-Line Railroad Company or as agent for the Southern Railroad Company.

The court also charged the jury:

"On the other hand, if the defendant company has satisfied your mind that the trunk, was never delivered to it, then the plaintiff in this case would not be entitled to recover any sum whatever"

—defendant claiming such charge was error, as requiring him to satisfy the minds of the jury that he never received the trunk without charging that defendant should show by preponderance of the evidence that he never received the trunk.

The court also charged:

"As stated above, when the plaintiff presents a baggage check given to her by the defendant company, then that makes out a prima facie case, and she would be entitled to recover of the defendant company if there is no other evidence introduced. The burden is then shifted to the defendant to show that the baggage was never delivered to it, or that it never lost or destroyed it."

The defendant claimed such charge was erroneous, as placing on him the burden to show the trunk was never delivered to him as operator of the particular road, without charging that he must show by the preponderance of the evidence the trunk was never delivered to him; the claim being that the charge imposed on defendant a higher burden of proof than imposed by law.—Statement by editor.

Berry T. Moseley, of Danielsville, and Erwin, Erwin & Nix, of Athens, for plaintiff in error.

Clarence E. Adams, of Danielsville, for defendant in error.

LUKE, J. [1] 1. This action was against the Director General of Railroads, based upon alleged negligence of the Seaboard Air-Line Railway. It appears from the evidence that on June 4, 1918, the defendant in error purchased a ticket from the agent of the Southern Railway Company at Dunwoody, Ga., to Atlanta, Ga., and also delivered to said agent her trunk, for which she received the company's baggage check. It further appears from the evidence that the trunk was delivered to the Atlanta Terminal Company, which was the baggage agent of the said railway company. On the following day, June 5, 1918, the defendant in error purchased a ticket from the agent of the Seaboard Air-Line Railway from Atlanta, Ga., to Comer, Ga., and surrendered the baggage check referred to the Atlanta Terminal Com-

pany for one from Atlanta to Comer, Ga. The petition alleges that the defendant in error has never received the trunk from the Seaboard Air-Line Railway. It appears from the evidence that the Atlanta Terminal Company was acting as the agent of the Seaboard Air-Line Railway in the issuance of said baggage check, and was also the agent of the Southern Railway Company in receiving same. This is shown by the contract existing between the various railroads coming into the Atlanta Terminal Station. The verdict of the jury in favor of the plaintiff was not without evidence to support it.

[2-4] 2. We have examined all the assignments of error, and find no error requiring a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 286)

LOUISVILLE & N. R. CO. v. LOVELACE.
(No. 11580.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error §1099(1)—Former decision is the law of the case.

The holding on a former appeal that the overruling or dismissal of an oral motion for a new trial terminated the court's jurisdiction and that certiorari might be brought within 30 days of the judgment is the law of the case.

2. Courts §190(4)—Petition for certiorari to municipal court need not point out grounds of motion for new trial and exceptions unnecessary.

While a petition for certiorari to review a judgment overruling an oral motion in the municipal court for a new trial must state the grounds of the motion and contain plain and distinct assignments of error upon each ruling complained of, yet, where the petition complains only of the original verdict and judgment, it is unnecessary to point out the grounds of the motion or to except to the action of the trial judge in overruling them.

3. Courts §190(4)—Petition for certiorari must set forth errors of law.

Where the original judgment of the municipal court of Atlanta is alleged to be erroneous, the petition for certiorari must specifically set forth the errors of law complained of, except where it is alleged to be erroneous because of some erroneous antecedent ruling or decision.

4. Courts §190(3½)—General exception to judgment sufficient when erroneous because of antecedent ruling or decision.

Where a final judgment of the municipal court of Atlanta is alleged to be erroneous only because of some erroneous antecedent rul-

ing or decision, a general exception to the judgment is sufficient on petition for certiorari, provided specific assignments of error are made and preserved to such antecedent rulings.

5. Courts §190(8)—Admission of evidence in municipal court not ground for reversal if fact proved by other evidence.

Even though testimony be inadmissible, its admission is not ordinarily ground for setting aside the judgment of municipal court on certiorari if the fact shown thereby is supported by other legal evidence to which no objection was made.

6. Carriers §135—Measure of damages for loss or destruction of shipment or specific part thereof stated.

Where a suit is not for deterioration or depreciation in the market value of a shipment, but for the total loss or destruction of the whole shipment or a specific definitely ascertained part thereof, as of a specified quantity of potatoes alleged to be wholly decayed and worthless, the measure of damages for unreasonable delay is not that given in Civ. Code 1910, § 2773, but the full market value of the goods at destination at the time when they should have been delivered with interest, deducting any unpaid cost of transportation.

7. Courts §190(8)—Instruction in municipal court on measure of damages referring to "reasonable value" instead of "market value" harmless.

An instruction in municipal court on the measure of damages for delay in transportation of potatoes which used the term "reasonable value" instead of "market value" was harmless, where there was no evidence of any difference between reasonable and market value, and there was ample evidence of value in excess of the amount recovered (citing Words and Phrases, Market Value).

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Reasonable Value.]

8. Courts §190(8)—Verdict in municipal court for damages for delay less than would have been warranted not so excessive as to be reversible error.

In an action for delay in transportation of potatoes involving the question of their market value, a verdict in municipal court for an amount smaller than would have been warranted by some of the evidence will not be set aside as excessive, especially where the excess claimed is only the difference between \$118.50 and \$130; the question of value being peculiarly for the jury.

9. Trial §252(1)—Inapplicable instructions properly refused.

Requested instructions which, so far as not fully covered by those given, were inapplicable to the facts, were properly refused.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by T. A. Lovelace against the Louisville & Nashville Railroad Company. Judg-

ment for plaintiff, and defendant brings error. Affirmed.

Tye, Peeples & Tye, of Atlanta, for plaintiff in error.

McCallum & Sims, of Atlanta, for defendant in error.

JENKINS, P. J. [1] 1. In a former decision in this case (24 Ga. App. 616, 617, 101 S. E. 718) it was held and became the "law of the case" that, "after an oral motion for a new trial in the municipal court of Atlanta has been finally disposed of, either by having been overruled or dismissed, the jurisdiction which that court had over the case thereby ceases, and the original judgment stands as final," and that, where in that court a "motion for new trial is made and overruled, certiorari afterwards lies to the original judgment rendered therein, if presented within 30 days from the rendition of the judgment," in order to correct errors of law. See, also, *Johnston v. Brenau College*, 146 Ga. 182, 91 S. E. 85; *Johnson v. James*, 19 Ga. App. 118, 91 S. E. 220; *Young v. Broyles*, 16 Ga. App. 356, 85 S. E. 366.

[2-4] 2. While a petition for certiorari to review a judgment overruling an oral motion for a new trial in the municipal court of Atlanta must state the grounds of the motion, and contain plain and distinct assignments of error upon each ruling complained of, so that a general assignment of error upon the ground that the judgment overruling the motion for new trial was "contrary to law, the principles of equity and justice," and without stating what grounds of error were urged in such motion, will not suffice (*Green v. Patterson*, 25 Ga. App. 374, 103 S. E. 437; *Holcomb v. Finch*, 25 Ga. App. 261, 103 S. E. 38; *Citizens' Banking Co. v. Paris*, 119 Ga. 517, 46 S. E. 638; *Civil Code* 1910, § 5183), yet, where the petition for certiorari complains only of the original verdict and judgment, it is unnecessary to point out the grounds of the motion or to except to the action of the trial judge in overruling the same. *Louisville & Nashville R. Co. v. Lovelace*, supra. However, where the original judgment is alleged to be erroneous in itself, the petition for certiorari therefrom must specifically set forth the errors of law complained of, except in a case where the final judgment is alleged to be erroneous only because of some erroneous antecedent ruling or decision, when a general exception to the judgment itself will be sufficient, provided specific assignments of error are made and preserved to such antecedent rulings. *Lyndon v. Ga. Ry. & Electric Co.*, 129 Ga. 353, 58 S. E. 1047. The petition for certiorari in the instant case complies with these rules of practice.

[6] 3. Even if testimony as to a certain fact be inadmissible under the application of the strict rules of evidence, its admission is

not ordinarily a ground for setting aside the final judgment, if such fact be supported by other legal evidence to which no objection was made. *Matthews v. Richards*, 19 Ga. App. 489, 91 S. E. 914 (2); *Southern Ry. Co. v. Ward*, 131 Ga. 21, 61 S. E. 913 (4); *County of Butts v. Hixon*, 135 Ga. 26, 27, 68 S. E. 786 (2); *Copeland v. Ruff*, 20 Ga. App. 217, 92 S. E. 955 (1).

[8] 4. Where a suit is not for deterioration or depreciation in the market value of a shipment of goods, but for the total loss or destruction of the whole shipment, or of a specific, definitely ascertained part thereof (as of so many bushels of potatoes alleged to be wholly decayed and worthless), the measure of damages for unreasonable delay in transportation, defined by *Civil Code* 1910, § 2773, as "the difference between the market value at the time and place they should have been delivered and the time of actual delivery," is not strictly applicable; and in such a case the measure of damages is equivalent to what the rule would be where the property is not delivered or is lost in transit—that is, the full market value of the goods at destination at the time when they should have been delivered, with interest from that time, deducting (if unpaid) the cost of transportation. *Albany & Northern Ry. Co. v. Merchants' Bank*, 137 Ga. 391, 73 S. E. 637 (5); *Atlantic & Birmingham Ry. Co. v. Howard Supply Co.*, 125 Ga. 478, 54 S. E. 530 (2); *Southern Express Co. v. Briggs*, 1 Ga. App. 294, 57 S. E. 1066 (4).

[7] 5. While a charge, "If you find for the plaintiff, he would be entitled to recover of the defendant the reasonable value of the potatoes in Atlanta, Ga., if they had been delivered to the plaintiff in a marketable condition in a reasonable time after delivery to the carrier," might be subject to some criticism as not precisely stating the measure of damages in the case on trial, although the terms "reasonable value" and "market value" by some authorities have been held equivalent (2 *Bouvier's Law Dictionary*, 2097; 5 *Words and Phrases*, 4383-4387), yet, if such charge was error, it was harmless to the defendant, there being no evidence of any difference between the reasonable or actual value and the market value, and there being ample evidence of value at the points both of destination and shipment in excess of the amount recovered. *Rome R. Co. v. Sloan*, 39 Ga. 636 (4); *Ga., Fla. & Ala. Ry. Co. v. Blush Milling Co.*, 15 Ga. App. 142, 82 S. E. 784 (11); *Atlantic Coast Line R. Co. v. Goodwin*, 1 Ga. App. 351, 357, 57 S. E. 1070.

[8] 6. The question as to the value of an article being peculiarly for the jury (*Georgia Northern Ry. Co. v. Battle*, 22 Ga. App. 665, 666, 97 S. E. 94), and the jury having found for the plaintiff an amount smaller than that which would have been warranted by some

of the evidence, the verdict and judgment will not be set aside as excessive, especially where the excess claimed by counsel is only the difference between \$118.50 and \$130 (Ala. Great So. R. Co. v. McKenzie, 139 Ga. 410 [2b], 413, 77 S. E. 647, 45 L. R. A. (N. S.) 18; Meeks v. Carter, 5 Ga. App. 421, 63 S. E. 517 [3]).

[9] 7. The verdict was warranted by the evidence. Even if the requests to charge were in proper form, under the ruling in Western Union Telegraph Co. v. Owens, 23 Ga. App. 173, 98 S. E. 116, the requests, so far as not fully covered by the instructions given, were inapplicable to the facts as disclosed by the record.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 303)

WILSON v. CLARK. (No. 11626.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)

(Syllabus by the Court.)

1. Trial \Leftrightarrow 259(1)—Failure to charge on contributory negligence and diminution of damages held not error in absence of request.

The failure of the trial judge to charge the law as to contributory negligence on the part of the plaintiff, and as to diminution of damages on account of such negligence, was not error, under the facts of this case, in the absence of a timely and proper written request to charge on the subject. Ala., etc., R. Co. v. Brown, 138 Ga. 328, 75 S. E. 330 (6, 7); Savannah Electric Co. v. Crawford, 130 Ga. 421 (1), 424, 60 S. E. 1056.

2. Appeal and error \Leftrightarrow 730(1)—Assignment of error complaining of charge held too vague and indefinite.

An assignment of error that a charge was not such "as the law and facts of the case at bar called for" is too vague, general, and indefinite to present any question for the determination of this court. Paulk v. Speer, 143 Ga. 621, 85 S. E. 867 (2); Odum v. Rutledge, 16 Ga. App. 350, 85 S. E. 861; Davidson v. Waxelbaum, 2 Ga. App. 432, 58 S. E. 687, 688 (3); Chatman v. State, 8 Ga. App. 842, 843, 70 S. E. 188 (3).

3. Appeal and error \Leftrightarrow 299—Trial \Leftrightarrow 171—Refusal to direct verdict not reversible error; no direct exception lies from refusal to direct verdict.

Refusal to direct a verdict is not reversible error, and no direct exception lies therefrom, since such evidential questions merge in the motion for a new trial. Bennett v. Paten, 148 Ga. 66, 95 S. E. 690 (3b); Smith v. Leverett, 22 Ga. App. 289, 291, 96 S. E. 8.

4. Certiorari \Leftrightarrow 68—Petition properly overruled when evidence supported verdict and judgment.

Whether or not, under the application of settled rules of practice, this court on its own motion should refuse to consider the assignments of error in this case (see, in this connection, Holcomb v. Finch, 25 Ga. App. 261, 103 S. E. 38; Green v. Patterson, 25 Ga. App. 374, 103 S. E. 437; Louisville & Nashville R. Co. v. Lovelace, 26 Ga. App. —, 106 S. E. 6; Lyndon v. Ga. Ry. & Elec. Co., 129 Ga. 353, 58 S. E. 1047; Wakefield v. Lee, 18 Ga. App. 648, 90 S. E. 224), this court cannot say, after an examination of the record, that there was not some evidence, however conflicting, to support the verdict and judgment; and the judge of the superior court did not err in overruling the petition for certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. M. Clark against S. M. Wilson. Judgment for plaintiff, and defendant brings error. Affirmed.

Paul L. Lindsay, of Atlanta, for plaintiff in error.

Branch & Howard and Bond Almand, all of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 216)

J. C. LYSLE MILLING CO. v. WHITFIELD GROCERY CO. (No. 11496.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 27, 1921.)

(Syllabus by Editorial Staff.)

1. Trial \Leftrightarrow 143—Direction of verdict on conflicting evidence erroneous.

Where evidence as to material facts was conflicting, court erred in directing verdict for the defendant.

2. Evidence \Leftrightarrow 471(9)—Testimony of alleged broker as to reason defendant canceled contract properly rejected.

In an action for damages for failure to receive flour, court did not err in rejecting testimony of an alleged broker, witness for plaintiff, as to the reason defendants gave for canceling the contract, answer being: "They virtually agreed that the reason why they didn't take the flour was on account of declined price. The market price was off \$1 a barrel."

3. Evidence \Leftrightarrow 471(30)—Testimony as to agency held not a conclusion.

In an action for damages for failure to receive goods purchased from plaintiff, court did not err in admitting on redirect examination of the proprietor of defendant, "Did E. in any way whatever represent you in this transaction?" answer, "Not at all," as against an objection that answer was a conclusion of the witness.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by the J. C. Lysle Milling Company against the Whitfield Grocery Company. Judgment for defendant, and plaintiff brings error. Reversed.

The grounds of the amended motion for new trial were:

"(1) Because the court erred in rejecting and ruling out the following testimony of E. E. Epps, the alleged broker, and witness for plaintiff on direct examination, to wit:

"Q. What reason did they give you for canceling the contract? A. Well, they virtually agreed that the reason why they didn't take the flour was on account of declined price. The market price was off \$1 a barrel.' Said testimony was being read to the jury from depositions of said witness after proper notice had been given to defendant for their execution, and at which defendant failed to appear. Said answer related to a part of a conversation witness had with proprietor of defendant at Milledgeville, place of defendant's residence, after defendant had given notice of its refusal to accept the flour, as to why it refused to accept the same. The remainder of the conversation and answer to said question the court admitted in evidence.

"(2) Because the court erred in admitting on redirect examination the following question and answer of the witness C. H. Whitfield, proprietor of the defendant, to wit (said witness being for defendant): 'Q. Mr. Whitfield, did Epps in any way whatever represent you in this transaction? A. Not at all.' The objection being then and there urged at the time that the same was a conclusion of the witness as to the construction on the law of the case, and that the same was an opinion of the witness."

—Statement by editor.

O. J. Tolnas, of Athens, and Sibley & Sibley, of Milledgeville, for plaintiff in error.

Allen & Pottle, of Milledgeville, for defendant in error.

LUKE, J. [1] 1. The evidence as to material facts in the case was conflicting, and the court erred in directing a verdict for the defendant.

[2, 3] 2. The amendment to the motion for a new trial is without merit.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 214)

PAYNE v. DEMOTT. (No. 11803.)

(Court of Appeals of Georgia. Feb. 15, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1002—Master and servant \S 286(39), 289(37)—Negligence and contributory negligence for jury on conflicting evidence.

Questions as to negligence on the part of a master in giving an order to his servant to per-

form a particular service, and peril in obedience on the part of the servant, and as to the exercise of ordinary care by the servant in discovering the danger that might result from compliance with the order, where there is a conflict in the evidence, are for exclusive solution by the jury, and where there is any evidence to support the verdict this court cannot interfere.

2. Commerce \S 27(8)—Master and servant \S 276(1)—Evidence must show engagement in interstate commerce to justify recovery on federal act; employé repairing engine not engaged in interstate commerce.

Where, in a suit against a common carrier for personal injuries to an employé, the petition contains two counts, one based on the state law and the other on the federal Employers' Liability Act (U. S. Comp. St. \S 8657-8665), and a verdict in favor of the plaintiff is based expressly on the latter count, the evidence must show that at the time of the injury the carrier was engaged in interstate commerce, and that the injured employé was also then employed in interstate commerce. In the instant case the evidence negatives these two essential facts.

Error from City Court of Thomasville; H. H. Merry, Judge pro hac.

Action by G. P. Demott against J. B. Payne, agent. Judgment for plaintiff, and defendant brings error. Reversed.

This action was brought against the Director General of Railroads, operating the Atlantic Coast Line Railroad. The allegations of the plaintiff's petition, as amended, were in substance as follows: He was employed by the defendant as a boiler maker, and it was his duty to do general repair work on the defendant's boilers when ordered to do so by his superior officers. On July 30, 1919, at 10 o'clock p. m., he was directed by his superior officer, the night foreman of the defendant's shops, to do certain work on the boiler of engine No. 1280. It was the foreman's duty to have the steam of all boilers blown off and the boilers sufficiently cooled to make it safe to work inside the boilers before ordering the plaintiff to work therein. The boiler of this engine had not been blown off and sufficiently cooled to render it a safe place for him to work, but was so hot as to make it impossible for him to perform the required work without incurring serious personal injuries. He entered the boiler to perform his duties, and then discovered that the boiler was too hot, and came out, but as a result of the heat he was injured as particularly described. The foreman misled him in stating to him, when directing him to go into the boiler, that the engine was in proper condition for him to go into it, and that it had been standing there since 4 o'clock in the afternoon (the time then being 10 o'clock at night), when in truth the engine had been

there and the fire removed therefrom not over 40 minutes, and the boiler had not been sufficiently cooled to make it a safe place to work. It was alleged that this fact was known to the defendant, or could have been known by the exercise of ordinary diligence, while it was not known to the plaintiff and could not have been known by the exercise of ordinary care, and that the plaintiff did not have equal means with the defendant of knowing of the dangerous condition of the boiler. The petition contained two counts, substantially the same as to the allegations stated above, one based upon the state law, and the other upon the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), it being alleged that engine No. 1280 was engaged in interstate commerce, and that the plaintiff was engaged in interstate commerce while working on the boiler of the engine. A demurrer to the petition was overruled, the trial resulted in a verdict for \$4,000 on the count based upon the federal Employers' Liability Act, the defendant's motion for a new trial was overruled, and the movant excepted to the rulings stated. In this court it was insisted that the judgment should be reversed for two reasons: (1) Because the plaintiff had equal means with the defendant of knowing the dangerous condition of the boiler, from its heat, and by the exercise of ordinary care might have known thereof, and therefore cannot recover for his injuries resulting from entering the boiler. (2) Because the evidence failed to show that the engine upon which plaintiff was working was engaged in interstate commerce, and therefore the plaintiff was not entitled to recover upon the count of the petition upon which the verdict was specifically found.

Merrill & Moore, of Thomasville, and Ben-net & Branch, of Quitman, for plaintiff in error.

Hay, Joiner & Hammond, of Thomasville, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. The view we take of the second question makes it unnecessary to consider at length the questions of law arising on the demurrer and the liability of the defendant under the evidence. It is sufficient to state that in the opinion of this court the allegations of the petition set out a cause of action, and these allegations were substantially proved by plaintiff. The issues presented by the evidence, under the statutes of this state and the decisions of the Supreme Court and of the Court of Appeals, as to the questions of diligence and negligence, are for solution by the jury, and we cannot hold that there was no evidence to support the verdict. Civil Code 1910, §§ 3130, 3131; Atlanta & Birmingham Air Line Ry Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; Southern Cotton-Oil Co. v. Gladman, 1 Ga. App. 259, 58 S. E. 249;

Cherokee Brick Co. v. Hampton, 16 Ga. App. 53, 84 S. E. 328; Grant v. Royster Guano Co., 15 Ga. App. 758, 84 S. E. 161.

[2] 2. We think the evidence failed to show a case of liability under the federal Employers' Liability Act, and for this reason the verdict on that count was not authorized. Under this act it is essential to a recovery that at the time of the injury the carrier was engaged in interstate commerce, and that the injured employé was then also employed by such carrier in interstate commerce. It is conceded that the defendant was an interstate carrier. Was the plaintiff at the time of the injury employed by the carrier in interstate commerce? He insists that he was, because he was injured while working in an engine which was then engaged in interstate commerce. He was injured on July 30, 1919, while working on engine No. 1280. The only evidence showing the use of this engine is contained in the train sheet. This shows that this engine was a part of a work train with limits entirely within the state of Georgia from July 1, 1919, to December, 1919. The only times during the period from July 1 to December 31, 1919, in which it was moving interstate was on August 2, when it ran as extra No. 1280 from Bainbridge, Ga., to Dothan, Ala., and on September 9, from Thomasville, Ga., to Montgomery, Ala. At the time the work was done on the engine by the plaintiff it had completed an intrastate trip, and had been brought in for repairs. It was then what is known in railroad parlance as a "dead engine," having no fixed destination or work. It is fairly inferable from the evidence that the next trip the engine made after the plaintiff was injured was interstate, but this was on August 2, three days after the plaintiff had been hurt, and after he had discontinued his work on the engine. Can it be said that this fact is enough to bring it under the rule announced by the courts on the subject now under consideration? The construction given to the interstate statute has been quite liberal in behalf of injured employés, but we have found no decision which goes to this limit.

The Supreme Court of the United States in the case of Minneapolis & St. Louis R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, said:

"The injury occurred while plaintiff was repairing an engine. The engine had been used in interstate commerce before the injury, and was so used afterwards, but there was nothing to show that it was permanently or specially devoted to such commerce, or assigned to it at the time. Held, not a case within the federal Employers' Liability Act."

In the opinion Mr. Justice Holmes used the following language pertinent to the point now under discussion:

"An engine as such is not permanently devoted to any kind of traffic, and it does not ap-

pear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business, and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as should happen. At the moment it was not engaged in either, its character as an instrument of commerce depended on its employment at the time, and not upon remote probabilities or upon accidental later events."

This decision of the court of the highest authority on the construction of interstate statutes would seem to be conclusive of the instant case. In a decision of the Supreme Court of Oklahoma, in *Chicago, R. I. & P. Ry. Co. v. Cronin* (Okla.) 176 Pac. 919, the court said:

"It is contended that the judgment must be reversed for the reason that the trial court tried the cause as governed by the law of the state and not the federal Liability Act. * * * the theory of the company being that Cronin was engaged in interstate commerce because he was working on an engine which, when in service, pulled an interstate passenger train. The engine had been taken out of service and placed in the shop for repairs. It was not being used in commerce of any kind; it was 'dead.' The fact that the repairs had been made and the engine placed back in service in time to make its regular trip from Sayre, Okl., to Amarillo, Tex., does not necessarily mean that the engine was not out of service in the meantime. We cannot agree with the plaintiff in error that this broken-down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was 'dead,' undergoing the repairs necessary to placing it in commerce."

In the instant case the engine when in service, before the repairs, had been engaged exclusively in intrastate commerce. In *Hardy v. A. & W. P. R. Co.*, 20 Ga. App. 308, 93 S. E. 18, this court followed the decision of the Supreme Court of the United States in *Minneapolis & St. Louis R. Co. v. Winters*, supra. In the *Hardy* Case the plaintiff's husband, at the time of his death, was engaged in guarding for the night a switch engine which on the day before had been engaged in interstate commerce and the day after was engaged in interstate commerce. His duties were to guard the engine, to put water and coal in it, and to keep up the fire so that it could be used as a switch engine the next day in switching both interstate and intrastate commerce. This court held that he was not engaged in interstate commerce.

Applying to the undisputed facts in the instant case the construction of the federal statute made in the cases cited, it is clear that the plaintiff was not engaged in interstate commerce at the time of his injuries, and therefore he was not entitled, by the ex-

press terms of the act, to the verdict. 35 Stat. 65, c. 149 (U. S. Comp. St. §§ 8657-8665). Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 249)

CARTY v. STATE. (No. 11373.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 28, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law — 302(4)—Nolle prosequi as to some counts works no acquittal.

A nolle prosequi as to some of the counts in an indictment works no acquittal, but leaves the prosecution just as though such counts had never been inserted in the indictment.

2. Criminal law — 302(4)—Demurrer not sustained where there was nolle prosequi as to improper counts.

Where two counts of an indictment charged simple larceny and two other counts charged larceny after trust and there was a nolle prosequi as to the counts charging simple larceny, court properly overruled a demurrer on the ground that there was an improper joinder of counts.

3. Embezzlement — 35 — Purpose of trust in prosecution for larceny after trust must be shown as alleged in indictment.

Where indictment charged offense of larceny after trust, or that the defendant "after having been intrusted by T. with twelve hundred dollars in money, * * * the property of said T., for the purpose of applying same to the use and benefit of said T., did fraudulently," etc., conviction of larceny after trust was not authorized by proof that the money was to be applied for the benefit of F., the son of T., to settle some debts and executions against F.

Error from Superior Court, Lowndes County; John D. Humphries, Judge.

H. J. Carty was convicted of larceny after trust, and brings error. Reversed.

Counts 1 and 3 of the indictment charged the offense of larceny after trust, and counts 2 and 4 charged simple larceny. Defendant demurred to the indictment on the ground that the offense charged in 1 and 3 could not be joined in the same indictment with offense charged in counts 2 and 4.—Statement by Editor.

Milner & Farkas and Pottle & Hofmayer, all of Albany, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, and J. B. Copeland, of Valdosta, for the State.

PER CURIAM. [1] A nolle prosequi as to some of the counts in the indictment works no acquittal but leaves the prosecution just as though such counts had never been insert-

ed in the indictment. *Dealy v. United States*, 152 U. S. 539 (1), 14 Sup. Ct. 680, 38 L. Ed. 545; *Martin v. State*, 10 Ga. App. 795, 74 S. E. 304 (1), and authorities cited. See, also, 20 Standard Encyclopedia of Procedure, 655 (1). Under this ruling the court did not err in permitting counts 2 and 4 of the indictment to be quashed.

[2] 2. After counts 2 and 4 of the indictment were quashed, the remaining counts were not subject to the demurrer interposed, and the court did not err in overruling it.

[3] 3. The indictment charged the offense of larceny after trust, for that the defendant, "after having been intrusted by Thomas A. Gary with twelve hundred dollars in money, of the value of twelve hundred dollars, the property of said Thomas A. Gary, for the purpose of applying the same to the use and benefit of the said Thomas A. Gary, did fraudulently convert the same to his own use," contrary to the law, etc. The evidence in this case did not show the trust as alleged, but conclusively showed that the sum of money turned over to the defendant was to be applied for the benefit of Frank Gary, the son of Thomas A. Gary, to settle some debts and executions against Frank Gary. Therefore the conviction of larceny after trust is not authorized, because the proof shows that the purpose of the trust was different from that alleged in the indictment. See *White v. State*, 19 Ga. App. 230, 91 S. E. 280 (3), and cases cited.

For this reason alone the judgment of the court overruling the motion for a new trial is reversed.

BROYLES, C. J., and LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 283)

JACKSON v. GOLDIN. (No. 11545.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \Leftrightarrow 1068(4)—Statement in charge as to damages harmless when verdict for defendant.

In an action for a personal injury, a statement in the charge that the evidence was insufficient to authorize the submission of the question of permanent incapacity to labor and to earn money was harmless, where the verdict was for defendant.

2. Electricity \Leftrightarrow 14(1)—Duty to exercise high degree of care does not change rule requiring only "ordinary care."

While a high degree of care is required of one maintaining a highly dangerous instrumentality such as electricity to prevent injury to persons likely to come in contact with it, this does not affect the rule that such a person is

required to exercise only ordinary care, as "ordinary care" is that reasonable care and caution which an ordinary cautious and prudent person would exercise under the same or similar circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

3. Trial \Leftrightarrow 260(8)—Charge as to duty respecting electricity held to cover requested charge; "ordinary care."

In an action for injuries from electricity, a charge that defendant was required to exercise ordinary care, defined as that care that every prudent man would exercise under the same or similar circumstances, properly instructed the jury as to the degree of care, and a failure to charge "as to the duty of the master to exercise due care and diligence for the safety of his employes according to the character of the instrument" was not error.

4. New trial \Leftrightarrow 70—Motion properly overruled when evidence authorized verdict.

When the evidence authorized the verdict for defendant and no error of law appeared, the overruling of plaintiff's motion for a new trial was not error.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Hattie Jackson against David Goldin. Judgment for defendant, and plaintiff brings error. Affirmed.

Hill & Adams, of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

STEPHENS, J. [1] 1. A verdict for the defendant is necessarily a finding against the plaintiff's right to recover, and therefore any alleged error upon the subject of the amount of damages is harmless, unless it is in some way calculated to affect the verdict upon the question. *McBride v. Georgia Ry. & Electric Co.*, 125 Ga. 515, 54 S. E. 674. Where in a personal injury suit a verdict had been rendered for the defendant, thus negating the plaintiff's right to recover, a statement made by the court in charge to the jury to the effect that the evidence was insufficient to authorize the submission to them of the question of permanent incapacity to labor and to earn money could not have influenced the jury upon the question of liability, and was therefore harmless. An exception upon the ground that this statement amounted to an expression of opinion on the facts is without merit.

[2, 3] 2. While a high degree of care to prevent injury is required of one maintaining a highly dangerous instrumentality, such as electricity, where other persons are likely to come in contact with it, this does not in any way affect the rule that the person maintaining such instrumentality is required to exer-

dise only ordinary care. Ordinary care is only that reasonable care and caution which an ordinary cautious and prudent person would exercise under the same or similar circumstances. Where the plaintiff seeks to recover for injuries received as a result of the defendant's alleged negligent maintenance of an electrical apparatus, a charge by the court that the defendant in maintaining such apparatus was required to exercise "ordinary care," which the court defined as being "that care that every prudent man would exercise under the same or similar circumstances," properly instructed the jury as to the degree of care resting on the defendant, and a failure to charge "as to the duty of the master to exercise due care and diligence for the safety of his employes according to the character of the instrument" was not error.

[4] 3. The evidence authorized the verdict for the defendant, and, no error of law appearing, the court did not err in overruling the plaintiff's motion for a new trial.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 157)

GLASS v. STATE. (No. 11270.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 25, 1921.)

(Syllabus by Editorial Staff.)

1. Indictment and Information \S 110(3)—Sufficient if in language of statute.

Where an indictment is in the language of the statute, and so plainly charged the crime that the jury must have understood the nature of the offense charged, it is not subject to demurrer (Pen. Code 1910, \S 954).

2. Indictment and Information \S 110(18)—Sufficiency of description of automobile with altered motor number.

An indictment for having in possession an automobile the motor number of which has been removed or altered need not describe the automobile with such particularity as is required in cases of simple larceny, the offense charged being a felony and of the nature of a compound larceny, and that indictment, which was in language of statute, did not allege original motor number or the number as altered, did not make it demurrable.

3. Criminal law \S 1160—Approved verdict, supported by evidence, conclusive.

Where the verdict is authorized by evidence, though conflicting and unsatisfactory, and the verdict has the approval of the trial court, it will not be disturbed on writ of error.

Luke, J., dissenting in part.

Error from Superior Court, Fulton County;
John D. Humphries, Judge.

R. W. Glass was convicted of having possession of a motor vehicle having motor number removed or altered, contrary to the provisions of Act Aug. 19, 1918, and he brings error. Affirmed.

Westmoreland & Smith, Jas. L. Anderson, and R. J. Jordan, all of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

PER CURIAM. [1, 2] 1. It was not error to overrule the demurrer to the indictment. The indictment charged the crime in the language of the statute, and so plainly that the jury must have understood the nature of the offense charged. It was therefore not subject to demurrer. Penal Code (1910) \S 954. The description of the automobile was sufficient. *Adams v. State*, 21 Ga. App. 152, 94 S. E. 82, and citations. This offense was a felony, and of the nature of a "compound larceny," and in such a case the description of the stolen property need not be as particular as in cases of simple larceny. *Cannon v. State*, 125 Ga. 785, 54 S. E. 692.

[3] 2. The assignments of error in the motion for a new trial are not of such merit as to require a new trial. The evidence was conflicting and not altogether satisfactory, but we cannot say that there was no evidence authorizing the verdict, which has the approval of the trial judge. It was not error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

LUKE, J. (dissenting). In this case the indictment charged—

"R. W. Glass with the offense of felony, for that the said accused, in the county of Fulton and state of Georgia, on the 12th day of February, 1919, did knowingly buy, steal, receive, conceal, and have in his possession a Ford touring model automobile, of the value of \$580.00, and the property of A. C. Porterfield, from which the motor number—the same being a mark of identification—had been removed and altered for the purpose of concealment and misrepresenting the identity of said automobile, contrary to the laws of said state," etc.

The accused demurred specially, upon the ground that the indictment did not set out either the original number of the automobile or the number as altered or removed, and the judgment overruling the demurrer is here for review upon proper assignments of error. As pointed out in paragraph 1 of the decision, the majority of the court agree with the ruling of the trial court upon the demurrer. To this judgment and opinion of the majority of the court this writer does not agree.

The indictment is based on an act ap-

proved August 19, 1918 (Ga. Laws 1918, p. 264). The act provides in part as follows:

"It shall be unlawful to buy, steal, sell, receive, or dispose of, conceal, or have in possession, any automobile, motor-vehicle, bicycle, motorcycle, or any other machine propelled by gasoline or electricity in this state, from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed for the purpose of concealment or misrepresenting the identity of said motor vehicle, automobile, bicycle, motorcycle or other such machine."

A violation thereof is punishable by confinement in the penitentiary. The indictment in this case states the offense in practically the terms and language of the statute, and such a statement of the offense is usually deemed, under section 954 of the Penal Code, sufficiently technical and correct. But where the indictment charges simple larceny, or a substantially similar offense, it must, in addition to using the language of the statute, describe the subject-matter of the offense with sufficient certainty to individualize the transaction, reasonably inform the defendant of the instance meant, enable the jury to say whether the indictment and the evidence relate to the same chattel, and, in the event of a subsequent prosecution for the same offense, put the court in position to determine the identity of the subject-matter of the two indictments. See, in this connection, *Walthour v. State*, 114 Ga. 75, 39 S. E. 872; *Brown v. State*, 116 Ga. 559, 42 S. E. 795; *Melvin v. State*, 120 Ga. 490, 48 S. E. 198; *Bright v. State*, 10 Ga. App. 17, 72 S. E. 519.

In the case that we have here for review, the motor number, rather than the automobile itself, is the subject-matter of the offense; but in my opinion the indictment contains insufficient description of either. The description "Ford touring model automobile" is no more sufficient to put the defendant on notice of what Ford automobile than if the indictment, if it had been an indictment for larceny, had undertaken to describe "one mule," or "one wagon," or "one law book," etc. The indictment in this case contains absolutely nothing to show what the motor number originally was, or what it was as altered, and nothing to distinguish either of such numbers from any possible group of figures that may be found on the motor of any "Ford touring model automobile." In *Walthour's Case*, supra, it was held that "a lot of cordwood," of a stated value and ownership, was an insufficient description to withstand a timely special demurrer. In *Brown's Case*, supra, it was held that "a certain lot of brass fittings, to wit, 400 pounds," of a stated value, and the ownership, was likewise insufficient. In *Bright's Case*, supra, this court made a similar ruling with respect to "100 pounds of seed cotton," the value and ownership of which were distinctly alleged.

The question now is: Do the words "a Ford touring model automobile," in connection with a stated value and ownership of the machine, constitute a sufficient description of the subject-matter of an indictment for a violation of the act of 1918?

The purpose of this act may be gathered from history, as well as from its own terms. When automobiles and other machines mentioned in this act first began to be used and stolen in this state, the thieves, if caught and convicted, could be punished only as for a misdemeanor, and that by reason of the omnibus provision against simple larceny now appearing as section 171 of the Penal Code. But by the year 1916 motor vehicles had come into such general use, and, because of their nature and value, had become so attractive to thieves, that the Legislature of this state made the larceny of "any automobile, locomobile, motorcycle, and other like vehicles propelled by electricity or gasoline," a felony, punishable by imprisonment in the penitentiary for not less than one year nor more than five years. See Ga. Laws 1916, p. 154. It was next discovered that the number of machines, in general use, of every make and model, was so great that the owner of a machine was often unable to identify it except by some distinguishing number or identification mark placed thereon, either by the manufacturer or by the owner or at his instance. By taking advantage of that situation a thief, unless detected in the act of stealing, could easily and quickly get the stolen machine to some private place, not infrequently the garage of an accomplice, and there remove or alter all distinguishing numbers and identification marks found on the machine, which, when done, rendered both the thief and his accomplice practically safe and secure from the danger of detention usually attending the possession of stolen property. In that situation professional thieves could, and did, ply their trade in the larger cities of the state with no greater risk to themselves than in sparsely settled rural communities. To meet this situation, and destroy that advantage of thieves, the General Assembly passed the act of 1918, making the bare possession of a machine from which a distinguishing number or identification mark has been unlawfully removed, or on which it has been unlawfully altered, a crime of the same degree, and meriting the same punishment, as the stealing of such a machine. An indictment which charges the commission of this offense is not good, as against a timely special demurrer, where it does not allege with the definiteness known to the grand jury the numbers or identification mark altered or changed. The crime consists in changing, covering, or altering the numbers or identification marks. In my opinion, the special demurrer of the defendant in this case, was good and should have been sustained.

I do not dissent from the view expressed by the majority of the court in paragraph 2 of the decision, for the reason that there is some slight evidence to authorize the conviction of the defendant, if the view with respect to the sufficiency of the indictment is correct as announced in paragraph 1. To my mind a reading of the evidence and record in this case emphasizes the error in overruling the demurrer. I do not think there is merit in any of the special grounds of the motion for a new trial.

(26 Ga. App. 210)

CENTRAL OF GEORGIA RY. CO. v. MILLER & LIPSHITZ. (No. 11233.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 27, 1921.)

(Syllabus by Editorial Staff.)

1. Courts \S 190(3/2) — No review of failure to strike answer in municipal court in absence of ruling.

Where on motion made to strike answer in municipal court attorney for defendant produced copy of suit served, and stated that it was not verified, and after such statement motion was not further insisted on by plaintiff's attorney, and court was of opinion that point was not being further insisted upon, and made no definite ruling on the motion, it could not be said that the court erred.

2. Appeal and error \S 1058(1)—Error in ruling out evidence as to contents of bills of lading harmless.

There was no error in ruling out testimony of a witness as to the contents of a bill of lading, where it was subsequently introduced in evidence.

3. Trial \S 109 — Judgment properly entered on counterclaim on admission by plaintiff's attorney.

Where plaintiff's attorney stated in open court that if plaintiff was not entitled to recover, then defendant should recover the sum of \$30 and costs under his counterclaim, and that there was no controversy about such claim being correct, if the contention of the plaintiff was not correct, plaintiff cannot complain that court was without power to enter judgment for the \$30 and costs in favor of defendant, although the latter introduced no evidence.

4. Evidence \S 317(6)—Testimony as to statements by others regarding market value properly ruled out.

Testimony of witness that he inquired around among different iron dealers of the town as to the market value on the date in question,

and was informed that it was \$18 a ton, was properly ruled out upon motion, based on ground that market value could not be proved in such manner.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Petition for certiorari by the Central of Georgia Railway Company to review an adverse judgment in the case of petitioner against Miller & Lipshitz. From a judgment overruling the petition for certiorari, petitioner brings error. Affirmed.

After case was called for trial and both parties announced ready, plaintiff moved to strike answer on ground that it was not verified as required by rules of the municipal court, and defendant's attorney produced a copy of the suit served, and stated that it was not verified, and after this statement the motion was not further insisted on by plaintiff's attorney, and the court, being of the opinion that the point was not being further insisted upon, made no definite ruling on the motion. An agent of plaintiff testified concerning the transaction between plaintiff and defendant, and court ruled out such part of the testimony as related to the contents of a bill of lading, which was subsequently admitted in evidence. The attorney for the plaintiff stated in open court that if the Central of Georgia Railway Company was not entitled to recover, then defendant should recover the sum of \$30 and costs, and that there was no controversy about defendant's claim for such amount being correct, if the contention of the railway company was not correct. After argument the court granted defendant's motion for judgment for \$30 and costs. The court ruled out testimony of witness that he inquired around among different iron dealers of the town as to the market value, and was informed that it was \$18 a ton, on the ground that the market value could not be proved in any such manner.—Statement by editor.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

LUKE, J. [1-4] Considering the petition for certiorari, and the answer of the trial judge thereto, for no reason assigned was it error for the judge of the superior court to overrule the petition for certiorari.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 273)

WHITTEMORE v. STATE. (No. 11951.)(Court of Appeals of Georgia, Division No. 1.
Jan. 28, 1921.)*(Syllabus by Editorial Staff.)*

1. Homicide \S 122—One has right to shoot to protect sister from felony.

One, acting under the fears of a reasonable man that the life of his sister is in danger, or that a felony is being attempted upon her person, and under the belief of a reasonable man that it is necessary to shoot in order to save her life or to prevent the commission of a felony upon her person, may shoot the assaulting party.

2. Homicide \S 122—Apparent danger in law of defense of another same as real danger.

In a prosecution for shooting at another, court did not err in instructing, "I charge you that an apparent danger is the same as a real danger."

3. Homicide \S 122—Police officer may lay hands on a woman who is assaulting another.

If a woman, together with her brother, was endeavoring to make an assault upon the person of another man, it was the duty of police officer to restrain her, and he had the right to lay his hand upon her with the intent to restrain her from the commission of assault, without being guilty of either a felony or a misdemeanor, and the brother would not be justified in shooting him for so doing.

4. Homicide \S 122—That a man assaulted was carrying pictures of sister, no justification for shooting at officer protecting him.

That a person assaulted by defendant and his sister had taken pictures of the sister and was carrying them in his watch did not justify, mitigate, or excuse shooting an officer, who laid hands upon the sister to restrain her from the commission of the assault.

Error from Superior Court, Whitfield County; M. O. Tarven, Judge.

Jim Whittemore was convicted of shooting at another, and brings error. Affirmed.

The court charged that if defendant was acting under the fears of a reasonable man that the life of his sister was in danger, or that a felony was being attempted upon her person, and under the belief of a reasonable man thought it was necessary to shoot in order to save her life, or in order to prevent the commission of a felony upon her person, and under these circumstances shot some one, he would not be guilty of an offense. The court further charged that an apparent danger is the same as a real danger. The court also charged that if the sister of defendant, together with defendant, was endeavoring to make an assault upon another person, it was the duty of an officer to restrain her, if possible to do so, from the commission of the assault, and he would not

be guilty of an offense in laying his hand upon her with intent to restrain her. Court also charged:

"That any occurrence such as is referred to in the statement of the defendant and perhaps in the evidence, relative to the taking of certain pictures of defendant's sister by one M. and his carrying these pictures or either of them, in his watch, could not be considered by you as offering justification, mitigation or excuse for the shooting which you have under investigation."

—Statement by editor.

Geo. G. Glenn and Maddox, McCamy & Shumate, all of Dalton, for plaintiff in error.

Jos. M. Lang, Sol. Gen., of Calhoun, for the State.

LUKE, J. [1-4] Under the evidence for the state and the defendant's statement, the jury were authorized to convict the defendant of shooting at another. Their verdict has the approval of the trial judge. For no reason assigned did the court err in admitting or refusing to admit testimony as complained of, or in the conduct of the trial, or in charging the jury. See *Beddingfield v. State*, 13 Ga. App. 623, 79 S. E. 581. It was not error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 178)

HINES v. PORTER. (No. 11887.)(Court of Appeals of Georgia, Division No. 1.
Jan. 25, 1921.)*(Syllabus by Editorial Staff.)*

1. Appeal and error \S 773(2)—Failure to comply with rule not ground for dismissal of a writ of error.

A failure to comply with rule 15 of the Court of Appeals (57 S. E. xi), relating to filing and service of briefs, is not a ground for the dismissal of a writ of error.

2. Certiorari \S 70(4)—Assignment of error in bill of exceptions held sufficient.

An assignment of error in a bill of exceptions that judge of superior court erred in dismissing certiorari held to sufficiently show that the ruling was excepted to.

3. Certiorari \S 70(5)—Dismissal of certiorari for delay in application not reversible error where result would be same on merits.

A judgment dismissing certiorari will not be reversed because the superior court erred in dismissing it on the ground that it did not affirmatively appear that certiorari had been applied for within 30 days from the date of the judgment complained of, where it is apparent from an examination of the entire record that practically the same result, the overruling of

the certiorari, would and ought to have been reached if the same had been heard upon its merits.

4. Costs \S 262—No damages for delay where court not convinced writ of error was prosecuted for delay only.

Appellate court not being convinced that a writ of error was prosecuted for the purpose of delay only, a request of defendant in error that damages be awarded him was denied.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by D. C. Porter against J. K. Hines. From a judgment of the superior court dismissing certiorari brought to review a judgment for plaintiff, defendant brings error. Affirmed.

The bill of exceptions, among other things, stated:

"On the said hearing on August 19, 1920, counsel for said D. C. Porter moved to dismiss the said certiorari on the ground that it did not affirmatively appear that the certiorari was applied for within 30 days from the rendition of the judgment complained of. On said day the court sustained said motion and dismissed said certiorari, to which ruling J. K. Hines, plaintiff in said certiorari, then and there excepted and now excepts and assigns the same as error, on the ground that it does affirmatively appear from the application for said certiorari and the papers in said case the same was applied for within 30 days from the rendition of the judgment complained of, it being alleged in the petition for certiorari that it was applied for within 30 days from the rendition of said judgment, and it further appearing that the execution issued upon the foreclosure of the lien sought to be enforced was made returnable to the April term, 1919, of the justice court of the 977th district G. M. of said county, to be held on the 28th day of April, 1919, being the fourth Monday in April, 1919, thus showing that the terms of said justice court were held on the fourth Monday in each month, and it further appearing from the record in said case that the judgment complained of was rendered at the May term, 1919, of said justice court, being one of the regular monthly terms of said justice court, and which was necessarily held on the fourth Monday in May, 1919, or on May 26, 1919."

—Statement by editor.

W. S. Erwin, of Clarkesville and Hines, Hardwick & Jordan, of Atlanta, for plaintiff in error.

J. C. Edwards & Sons, of Clarkesville, for defendant in error.

BROYLES, C. J. [1] 1. A failure to comply with rule 15 of this court (57 S. E. xi), relating to filing and service of briefs, is not a ground for the dismissal of a writ of error. Rogers v. Mayers, 3 Ga. App. 69, 59 S. E. 309.

[2] 2. The motion to dismiss the bill of exceptions on the ground that the assignment

of error therein is legally insufficient is without merit. The ruling of the judge of the superior court in dismissing the certiorari was distinctly excepted to and specifically assigned as error in the bill of exceptions, and the alleged reasons why such ruling was error were clearly stated therein.

3. The remaining ground of the motion to dismiss the bill of exceptions is without substantial merit.

[3] 4. Conceding, but not deciding, that the court erred in holding that it did not affirmatively appear that the certiorari had been applied for within 30 days from the date of the judgment complained of and in dismissing the certiorari on that ground, the judgment of dismissal will not be reversed by this court, since it is apparent from an examination of the entire record that practically the same result, viz. the overruling of the certiorari, would and ought to have been reached if the same had been heard upon its merits. See, in this connection, McPherson v. Stroup, 100 Ga. 228, 28 S. E. 157; Matthews v. City of Thomaston, 21 Ga. App. 496, 94 S. E. 631, and authorities there cited.

[4] 5. This court not being convinced that the writ of error was prosecuted for the purpose of delay only, the request of defendant in error that damages be awarded him is denied.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 190)

BUSSELL v. WILLIAMS. (No. 11913.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 25, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 302(1)—Ground of motion for new trial not considered unless complete.

Ground of a motion for new trial will not be considered unless complete and understandable within itself.

2. Appeal and error \S 302(3)—Ground of motion for new trial, complaining of exclusion of evidence, too incomplete for consideration.

First and second amendment to defendant's motion for new trial, alleging the court erred in excluding certain evidence from the consideration of the jury, held too incomplete for consideration by the Court of Appeals, not showing on what ground the evidence was excluded, or wherein the trial court erred, and because the materiality of the evidence could not be ascertained without examination of other parts of the record.

Error from City Court of Dublin; R. D. Flynt, Judge.

Action by Jim Williams against H. N. Bussell. From judgment for plaintiff, defendant brings error. Reversed.

Defendant's amended motion for new trial follows:

(1) Because the court excluding from the consideration of the jury the following legal and material evidence offered by H. N. Bussell in his own behalf as follows, to wit: "It was worth at least \$12.50 per month to feed a mule from June until December, 1917, and on account of Jim Williams leaving me, the mule he would have worked was a dead loss to me, and yet I had to feed him with expense of at least this amount. I would have made in cotton, corn, velvet beans and general farm products at least the value of the feed of this mule more than I did make if I had had the services of Jim Williams under his contract."

The court excluded this evidence upon the objection of counsel that it related to damages too remote and speculative to be the basis of recovery.

(2) Because the court excluded from the consideration of the jury the following material and legal evidence offered by H. N. Bussell in his own behalf as follows: "Jim Williams leaving me at the season of the year he did caused me to lose at least a bale of cotton that I would have been able to have made more than I did make by the grass taking my crop and my inability to properly cultivate it without the labor of Jim Williams. With the labor of Jim Williams I would have been able to have kept the crop sufficiently clear of grass and to have given it sufficient cultivation to have made at least an additional bale of cotton of the value of \$100."

The court excluded said evidence on the objection of the counsel that the evidence related to damages too remote and speculative to be the basis for recovery in said case.—Statement by editor.

J. S. Adams and R. Earl Camp, both of Dublin, for plaintiff in error.

BROYLES, C. J. [1] 1. Under repeated rulings of this court and of the Supreme Court a ground of a motion for a new trial will not be considered unless it is complete and understandable within itself.

[2] (a) A ground based upon the exclusion of material evidence is too incomplete to be considered, unless it not only shows on what ground the evidence was excluded, but wherein the court erred in excluding it. Furthermore, where the materiality of the evidence excluded cannot be ascertained without an examination of other parts of the record, such a ground is too indefinite to raise any question for the consideration of this court. *Central of Georgia Railway Co. v. Jaques & Tinsley*, 23 Ga. App. 396, 98 S. E. 357 (2); *Corona v. De Laval Separator Co.*, 24 Ga. App. 683, 102 S. E. 44 (1); *Summerlin v. State*, 25 Ga. App. 568 (1b), 103 S. E. 832. Under the above rulings, neither the first nor the

second ground of the amendment to the motion for a new trial in the instant case can be considered.

2. The evidence (as contained in the record) not demanding the verdict returned, the court erred in withdrawing the case from the jury and in directing them to return a verdict for the plaintiff.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 306)

WILCOX v. BOWEN. (No. 11649.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)

(Syllabus by Editorial Staff.)

New trial — 85—Absence of defendant who could testify to material matters held to require new trial.

Where defendant, whose counsel had unsuccessfully moved for a continuance, applied for a new trial on the ground that on the day of the trial he was ill and unable to attend court or notify the court or counsel of his condition, and showed that he would testify denying liability or the receipt of notice necessary to authorize attorney's fees and showing payment of one of the notes sued on, and diligence by defendant and his counsel was affirmatively shown, the motion should have been granted, though his testimony as to payment of such note may have been inadmissible.

Error from Superior Court, Benhill County; O. T. Gower, Judge.

Action by W. R. Bowen, administrator, against J. W. Wilcox. Judgment for plaintiff, and defendant brings error. Reversed.

D. E. Griffin, of Fitzgerald, for plaintiff in error.

A. J. & J. C. McDonald and Vessie Jones, all of Fitzgerald, for defendant in error.

JENKINS, P. J. 1. Where on the trial of a case counsel for the defendant made a formal motion for a continuance on the ground of the absence of the defendant, and stated in his place that such absence was for "reasons unknown to counsel," that he "needed the assistance of his client and could not safely go to trial" without him, and that the defendant was a witness to certain material facts; and where the motion was overruled, the case proceeded to trial, and the court directed a verdict for the plaintiff, and where the defendant in his motion for new trial showed that on the day of trial and for two days thereafter he was ill, in a semiconscious condition, and unable to attend court or to notify the court or counsel of his condition, that he had a meritorious defense, and, if he

had been present at the trial, "would have sworn that he received no notice of the intention of the plaintiff to file said suit," and that the note for \$750 sued on included the \$250 note also sued on, and that the latter note had in this way been satisfied, and where these grounds of the motion for a new trial were supported by uncontroverted affidavits of the defendant and others, and where the defendant and his counsel both affirmatively showed the exercise of due diligence, it was error to refuse the grant of a new trial upon the grounds thus shown, even though, as the court recited in the order denying a new trial, the evidence by the defendant as to the payment of the \$250 may have been inadmissible because relating to transactions between defendant and the deceased payee of the notes, since, as the judge subsequently pointed out in the bill of exceptions, he did not thus mean to indicate that other material testimony by the defendant denying his liability and denying receipt of notice for attorney's fees as set up in his motion for new trial and affidavits would be inadmissible. *White v. Martin*, 63 Ga. 659; *Thrasher v. Anderson*, 45 Ga. 538; *Smith v. Brand*, 44 Ga. 588; *Peacock v. Usry*, 52 Ga. 354.

2. Other assignments of error as to the admissibility of certain evidence in the previous trial, not relating to matters likely to arise in a subsequent trial, are not passed upon.

Judgment reversed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 134)

MUTUAL FERTILIZER CO. v. F. M. WHITE & SON. (No. 11567.)

(Court of Appeals of Georgia, Division No. 2. Jan. 20, 1921. Rehearing Denied Feb. 15, 1921.)

(Syllabus by Editorial Staff.)

Execution ⇨ 185—Bond conditioned to pay all damages sustained, if claim made for delay held sufficient.

A bond executed by the claimant in a claim case, conditioned to pay all damages which plaintiff might sustain if it should appear that the claim was made for delay, complied substantially with Civ. Code 1910, § 5158, requiring the bond to be conditioned for payment of the damages which the jury may assess in view of section 4, subd. 6, as to substantial compliance, and sections 5169 and 5173, relative to damages in case of claims made for purposes of delay.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action between Mutual Fertilizer Company and F. M. White & Son. From the judgment, the Fertilizer Company brings error. Affirmed.

Franklin & Langdale, of Valdosta, for plaintiff in error.

E. K. Wilcox, of Valdosta, for defendant in error.

STEPHENS, J. 1. A bond executed by the claimant in a claim case, conditioned to pay to the plaintiff in *fi. fa.* all damages which the latter "may sustain * * * in case it should appear that said claim was made for the purpose of delay only," substantially complies with Civ. Code 1910, § 5158, which provides that the bond required of the claimant shall be "conditioned to pay the plaintiff all damages which the jury on the trial of the right of property may assess against him in case it should appear that said claim was made for the purpose of delay only." Civ. Code 1910, § 4 (6). Whatever damages a jury may in such a case "assess" will, in contemplation of law, be such damages as the plaintiff in *fi. fa.* has "sustained," and therefore are recoverable under the bond. See, in this connection, Civ. Code 1910, §§ 5169, 5173; 5 Cyc. 751.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 319)

SULLIVAN v. B. H. LEVY BRO. & CO.
(No. 11827.)

(Court of Appeals of Georgia, Division No. 2. Feb. 15, 1921.)

(Syllabus by the Court.)

Certiorari ⇨ 16—Refusal to sanction petition proper when error not assigned on final judgment.

Where the assignments of error were as to specified rulings of the trial court preceding the final judgment, and there was no assignment of error to the final judgment because of additional error in it, nor because of the antecedent error complained of, the judge of the superior court did not err in refusing to sanction the petition for the writ of certiorari. *McCrane v. Shipp*, 10 Ga. App. 544, 73 S. E. 701; *Lyndon v. Ga. Ry. & Elec. Co.*, 129 Ga. 353, 58 S. E. 1047.

Error from Superior Court, Glynn County; J. P. Highsmith, Judge.

Action between Albert Sullivan and B. H. Levy Bro. & Co. Judgment for the adverse parties, and Sullivan brings error. Affirmed.

Frank H. Harris, of Brunswick, for plaintiff in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 307)

CONNELL v. WADDELL. (No. 11655.)(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)*(Syllabus by the Court.)*

Exceptions, bill of \S 58(4)—Nonresidence of defendant in error must appear when bill is left at attorney's residence during his absence from county.

Where proof of service of a bill of exceptions is to the effect that a copy thereof was left at the residence of the attorney for the defendant in error during the attorney's absence from the county, it must also affirmatively appear that the defendant in error (unless the defendant in error is the state) is a nonresident of the county where the bill of exceptions was sued out. Civil Code 1910, \S 6160, subd. 2; Bank of S. W. Ga. v. Tillman, 94 Ga. 731, 20 S. E. 4. Such fact of nonresidence not being made to appear in the instant case, the motion to dismiss the bill of exceptions must necessarily be granted.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Suit between J. T. Connell and J. S. Waddell. Judgment for Waddell, and Connell brings error. Writ of error dismissed.

Taylor Smith, of Bremen, for plaintiff in error.

Griffith & Matthews, of Buchanan, for defendant in error.

JENKINS, P. J. Writ of error dismissed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 304)

SMITH v. BRADSHAW. (No. 11627.)(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)*(Syllabus by the Court.)*

1. Frauds, statute of \S 129(1)—Negotiation for resale of personal property as contemplated not sufficient part performance.

Where it is agreed in an oral contract for the sale of goods that the seller is not to perform until the purchaser has negotiated a contract for a resale, the negotiation of such a contract for resale by the purchaser in compliance with the condition is not such a part performance of the original contract as will take it out of the statute of frauds, if there has been no acceptance and receipt of a part of the goods by the buyer, nor any giving of earnest money to bind the bargain, or any part payment; such part performance by the buyer not being such part performance of the contract as would render it a fraud of the party refusing to comply. Civ. Code, 1910, \S 3222, subd. 7, and section 3223, subd. 3.

2. Frauds, statute of \S 90(4)—Sale by two parties held separate contracts, so that delivery under one was not sufficient part performance of other.

Where two parties simultaneously agree with a third party to sell to the latter certain goods, which are in two separate and distinct lots, one lot being the property of one of the sellers and the other lot being the property of the other seller, the transaction constitutes two separate and distinct contracts, although one of the sellers is the agent of and acts for the other seller and only one agreement is made, and a delivery by one of the sellers of the goods bought is not such a part performance of the contract of the other party as will take the latter contract out of the statute of frauds.

3. Frauds, statute of \S 150(3) — Petition properly dismissed on demurrer, when showing that contract is oral, and not showing that it is taken out of statute.

In a suit by the purchaser against one of the parties to such a contract, where it appeared from the petition that the contract sued on was in parol, and it did not appear that the contract was taken out of the statute of frauds, the petition was properly dismissed upon demurrer, upon the ground that the contract sued on was not enforceable, as being within the statute of frauds.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by S. H. Smith against H. J. Bradshaw. Judgment for defendant, and plaintiff brings error. Affirmed.

Bunn & Trawick, of Cedartown, and Willingham, Wright & Covington, of Rome, for plaintiff in error.

Maddox & Doyal and Nathan Harris, all of Rome, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 319)

GRINER et al. v. SMITH. (No. 11818.)(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)*(Syllabus by Editorial Staff.)*

1. Sheriffs and constables \S 102, 106—Deputy sheriff, not seizing property or arresting defendant, is liable for eventual condemnation money.

Under Civ. Code 1910, \S 5151, a deputy sheriff, having bail trover process for execution, is liable for the eventual condemnation money if he does not seize the property, or arrest defendant and imprison him until the property is produced or a forthcoming bond given, and he cannot defeat liability by showing that he made personal service on defendant, took defendant's bond to attend court, or did not arrest defendant or require a forthcoming bond because defendant could not produce the property.

2. Sheriffs and constables \S 166—Rule or suit maintainable against deputy, without joining sheriff.

Under Civ. Code 1910, \S 4920, a deputy sheriff can be ruled, or suit can be brought on his official bond, without making the sheriff a party.

3. New trial \S 102(1)—Diligence in discovering new evidence necessary.

Alleged newly discovered evidence, which by the exercise of ordinary diligence could have been discovered before trial by the movant or his counsel, is not a sufficient ground for a new trial.

Error from City Court of Nashville; W. R. Smith, Judge.

Action between J. B. Griner and others and J. D. C. Smith, administrator. Judgment for Smith, and Griner and others bring error. Affirmed.

W. D. Bule, of Nashville, for plaintiffs in error.

R. A. Hendricks, of Nashville, for defendant in error.

HILL, J. [1] 1. In "bail trover" the deputy sheriff, in whose hands the process has been placed for execution, is bound either to seize the property sued for or to arrest the defendant and imprison him until the property is produced or a bond is given for its forthcoming. Where he fails, without good excuse, to perform either one of these statutory requirements, he is liable for the eventual condemnation money recovered in the trover suit; and when sued on his official bond by the plaintiff in the trover suit, he cannot successfully defend by showing that he made personal service on the defendant, or took a bond from the defendant to attend court, or that he did not arrest the defendant or require him to give a forthcoming bond, because the property sued for was not in the defendant's possession and he could not produce it. Civ. Code 1910, \S 5151; Snell v. Mayo, 62 Ga. 744; De Longchamp v. Hicks, 25 Ga. 200.

[2] 2. A deputy sheriff can be ruled, or suit be brought on his official bond, without making the sheriff a party. Civ. Code 1910, \S 4920; Varner v. Wooten, 38 Ga. 575.

[3] 3. It being manifest that the alleged newly discovered evidence could have been discovered before the trial, by the exercise of ordinary diligence either by the movant or his counsel, there was no error in overruling the ground of the motion for a new trial based on such evidence.

4. The verdict was demanded by the evidence and no error of law appears.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 323)

LOVELL v. PACE. (No. 11861.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)

(Syllabus by the Court.)

Justices of the peace \S 91(3)—Sales \S 1(1)

—Cause of action held sufficient to show suit on account; relationship of debtor and creditor created by purchase of injured cow.

The action in the justice's court was sufficient to show a suit on account, and the judge of the superior court did not err in sustaining the certiorari.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Action by W. B. Pace against J. P. Lovell. The suit was dismissed in justice's court, but certiorari was sustained, and the case remanded for a new trial by the superior court, and defendant brings error. Affirmed.

This case originated in a justice's court. The cause of action attached to the summons was as follows:

"J. P. Lovell to W. B. Pace, Debtor.

1919.
May 19. To one cow damaged by auto, sold..\$100 00
Credit by money from cow..... 35 00

Bal. due\$ 65 00"

The defendant demurred to the cause of action upon the following grounds:

"(1) The summons and account attached fail to state either jointly or considered separately any liability against debt.

"(2) No reasons are shown why the defendant is liable for the killing of the milk cow.

"(3) Defendant demurs especially to the account sued on, upon the ground that the facts stated do not inform the defendant as to the nature of the account, or why defendant is chargeable with the killing of the cow.

"(4) Plaintiff's action sounds both of the nature of suit on contract and on tort, and defendant is unable to ascertain from the summons and account the particular nature of the charge against him."

Before judgment on the demurrer the plaintiff by leave of the court filed the following amendment, to meet the demurrer:

"1. Plaintiff amends his said suit and account by adding the following: On the 19th day of May, 1919, plaintiff's grandson was driving a cow, property of plaintiff, worth \$125, in the public road near Leary, when said cow was struck by an automobile driven by the son of defendant, Jim, a minor, who recklessly drove said car against said cow, breaking her leg; said boy acting at the instruction and command of his father to take a passenger to Leary. Whereupon plaintiff called upon defendant and, apprising him of the damage done to his said cow by said son, told defendant that the cow was then defendant's, and would take \$100 for her, whereupon defendant agreed to give \$100 for her, and requested plaintiff to sell the cow to the marketman for him, and

whatever it brought him he would pay the balance, and plaintiff, acting upon said agreement, thus losing two hours from his plow in busy time, so sold said cow to the marketman, Mr. Taylor, for the sum of \$40, and received from him the sum of \$35, which sale defendant is indebted for the balance of said account, \$65, as well as the balance of said damage to plaintiff by the authorized act through his said son, driving said car."

The justice sustained the demurrer—

"upon each and every ground, the plaintiff having amended his cause of action."

Plaintiff sued out his petition for certiorari to the judgment sustaining the demurrer and dismissing his suit. Certiorari was sued out, and the judge of the superior court sustained the certiorari and remanded the case for another hearing.

E. L. Smith, of Edison, for plaintiff in error.

C. J. Taylor, of Valdosta, for defendant in error.

HILL, J. (after stating the facts as above). After careful consideration we are constrained to affirm the judgment of our learned brother of the superior court. The action as originally brought in the justice's court, when considered in the light of the rule of liberal construction of actions in justice's court, was sufficient without amendment to show a suit on account. When the amendment was filed, the cause of action was luminous with light and perspicacity of pleading. That the plaintiff undertook to give the entire history of the transaction, and to show the result of the collision between the cow and the car, might have been well treated as historical inducement. We are not surprised that the learned and experienced judge of the superior court came to the conclusion, aided by the allegations of the amendment, that the cause of action was for the price which defendant had agreed to give for the cow after deducting the damage to her caused by the automobile. When the plaintiff informed the defendant what had been done to his cow by his car, the latter, with commendable fairness, at once bought the damaged cow and instructed the plaintiff to sell her for him, and deduct the amount received; the defendant stating that he would pay the balance. Acting on the instructions of the defendant, the plaintiff sold the cow which the defendant had so taken off his hands, and, after deducting the amount received for beef, brought suit for the balance of the purchase price. The transaction was complete when defendant bought the damaged cow from the plaintiff, and the relationship of debtor and creditor thus arose.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 310)

FAIR & MARTIN, Inc., v. BREWER.
(No. 11795.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)

(Syllabus by the Court.)

1. Evidence ⇨123(2)—Sales ⇨168(2), 181 (10)—Duty of buyer to examine goods and give prompt notice of rejection; letter of rejection admissible as *res gestæ* and on question of diligence, though telegram did not reject.

"It is the duty of the buyer to act promptly in making an examination of goods sent on his order, to see whether they comply therewith, and to give prompt notice to the seller of their rejection, if found defective, if he intends to avail himself of that remedy." Where a buyer, upon reception of goods sent on his order and after inspection of the goods, telegraphed immediately to the seller that he found them defective in certain particulars, but did not explicitly state that for this reason he rejected them, a letter, written by the buyer on the second day after the sending of the telegram, confirming the telegram and making clear and certain the rejection of the shipment, was admissible as evidence in behalf of the buyer: (a) As a part of the *res gestæ* of the transaction; and (b) as relating to the question of due diligence in giving notice of the rejection of the goods.

2. Sales ⇨161—Notice to carrier to divert shipment equivalent to transfer of bill of lading.

Where a consignor sells the goods while in transitu to a person other than the original consignee, and directs the carrier, while still in possession of the goods, to deliver them to such purchaser, the carrier is bound to follow the direction.

(Additional Syllabus by Editorial Staff.)

3. Sales ⇨218½—Seller suing for price of goods rejected must show transfer of title.

A seller, suing to recover the contract price of goods rejected by the buyer, must affirmatively show that title has passed to the purchaser.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Thomas Brewer against Fair & Martin, Incorporated. Judgment for plaintiff, and defendant brings error. Reversed.

This is a suit on open account against Fair & Martin, Incorporated, for the contract price of a car of tomatoes. There was a verdict for the plaintiff, and the defendant's motion for a new trial was overruled. The contract for the purchase of the tomatoes is contained in letters and telegrams between the parties. On April 18, 1917, the defendant, in Atlanta, telegraphed to Brewer, the plaintiff, in Homestead, Fla., asking for prices on tomatoes which Brewer might have "rolling"; that is to say, that were on board cars coming north

from Florida, which could be diverted to them in Atlanta. In reply Brewer, on April 22, wired that he had a car of tomatoes going west, "rolled Saturday night," containing 197 crates of "fancy," 183 crates of "choice," and 47 crates of "seconds," quoting prices on each grade. The terms "fancy," "choice," and "seconds" are current with the trade, describing grades of tomatoes. On April 23, Fair & Martin telegraphed in reply:

"Divert us car tomatoes shipped Saturday prices quoted confirm quick."

Replying to this telegram, Brewer, on April 24, wired:

"F. o. b. sale here confirmed Southern 120632 passed Jacksonville today and diverted to you. Tomatoes packed to color in ten days, inspect accordingly."

On the day of the arrival of the car, April 25, Fair & Martin made inspection of the tomatoes, and wired to Brewer:

"Southern 120632 arrived. Inferior quality large per centage showing black spots some green stock showing decay."

This telegram was followed by a letter from Fair & Martin to Brewer, dated April 27, 1917:

"On the 25th we wired you that car of tomatoes Southern 120632 arrived and was rejected account of inferior quality. A large percentage showing black spots, and some of the green stock were showing decay. We regret very much that we should have trouble on our first car, but trust to be more successful next time. We can only use good stuff."

This letter was excluded from evidence, on the defendant's objection that it was a self-serving declaration and drew conclusions as to previous correspondence and construed previous correspondence. This ruling is complained of in the motion for a new trial, the defendant insisting that the letter should have been admitted because it gave due and timely notice to Brewer of the rejection of the shipment on account of the inferior condition of the tomatoes, and because it confirmed the telegram as to their inferior quality, and met the objection to that telegram that it was ambiguous on the point of rejection, making clear that the tomatoes were rejected because of inferior quality.

Another contention of the defendant was that, this being a suit on open account, the plaintiff must show that the title to the tomatoes had become vested in the defendant when the suit was brought, and that the plaintiff had failed to carry this burden. The evidence of the plaintiff showed that the bill of lading had been taken by the seller in his own name, and that the car of tomatoes was consigned to his own order, and there was no evidence that it had been transferred to the defendant. The evidence did not show what had become of the bill of lading. The court charged that—

"If the railroad company agreed to and did offer to deliver the car to defendant without transfer of this bill of lading, then the failure to transfer the bill of lading would not of itself defeat the plaintiff's right of recovery, if he was otherwise entitled to recover."

Error is assigned on this charge, on the ground that there was no evidence on which to base it.

Austin & Boykin, of Atlanta, for plaintiff in error.

Green, Tilson & McKinney and C. W. Hager, all of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above) [1] 1. We think the court erred in excluding from evidence the letter of the defendant to the plaintiff, dated April 27, 1917. No objection was made to the introduction of this letter on the ground that it was a letter-press or carbon copy, and not the original. The objections urged were:

"That the letter was irrelevant and immaterial, and that it contained self-serving declarations, and drew conclusions as to previous correspondence and construed previous correspondence between the parties, and that the telegram which the letter sought to construe was in evidence and was the best evidence."

This letter was relevant and material on one of the controlling issues in the case. It is well established that—

"It is the duty of the buyer to act promptly in making an examination of goods sent on his order, to see whether they comply therewith, and to give prompt notice to the seller of their rejection, if found defective, if he intends to avail himself of that remedy." 23 Ruling Case Law, 1434, § 257.

Fair & Martin had ordered the shipment of tomatoes diverted to them from the original destination, and this had been done by Brewer. As soon as the carload of tomatoes arrived in Atlanta, Fair & Martin inspected them to see if they were as represented. This they had the right to do, and had been requested to do by Brewer. Immediately after inspection, Fair & Martin wired Brewer that the tomatoes were of "inferior quality, large percentage showing black spots, some green stock showing decay." This telegram was clear as to the complaint that the tomatoes were of inferior quality, but it did not show that for this reason they were rejected by the purchaser. The letter following the telegram removed all doubt on this point, and made positive and clear the rejection of the tomatoes for the reason stated in the telegram and repeated in the letter. The letter following the telegram was a part of the res gestæ of the transaction. The evidence as to the quality of the tomatoes was in conflict. The character of the shipment made imperative the enforcement of the rule of law that the purchaser should give prompt notice to the seller of the rejection, and of the reason therefor. This point was in sharp issue be-

tween the parties, and the letter was illustrative of this issue, and should have been admitted. Besides, the letter was admissible without reference to the previous telegram. It was pertinent to the legal question as to whether the purchaser had exercised due and proper diligence in giving the seller notice of the rejection of the tomatoes because of their alleged defective condition, and this was for the jury to determine.

[2, 3] 2. The second assignment of error is without merit. There was evidence upon which to predicate the instruction that—

"If the railroad company agreed to and did offer to deliver the car to defendant without transfer of this bill of lading, then the failure to transfer the bill of lading would not of itself defeat the plaintiff's right of recovery, if he was otherwise entitled to recover."

This was a suit on account to recover the contract price of the goods. It was essential to the seller's right of recovery to affirmatively show that title to the tomatoes had passed into the purchaser, and it was insisted that this burden had not been successfully carried. It was contended that the evidence showed that the seller took the bill of lading in his own name, and that the car of tomatoes was consigned to his own order when the shipment was made to Cincinnati, and afterwards diverted to the defendant in Atlanta by express order given by the shipper to the carrier. The order to divert was complied with by the carrier, who actually delivered the shipment to the defendant in Atlanta. The actual transfer of the bill of lading by the seller to the purchaser, under these facts, was not essential. Notice by the shipper to the carrier to divert the shipment to the purchaser was equivalent to a transfer of the bill of lading.

"A consignor of goods which have been shipped to a designated consignee has a right to direct a change in their destination * * * while the goods remain in the possession of the carrier, and the carrier is bound to obey such direction." *Lewis v. Galena & Chicago U. R. Co.*, 40 Ill. 281.

We reverse the judgment of the court refusing a new trial, because of the error discussed in the first division of this opinion.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 171)

**FARMERS' STATE BANK OF LINCOLN-
TON v. DE SOTO BANKING CO.**
(No. 11603.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 25, 1921.)

Error from City Court of Americus; W. M. Harper, Judge.

Action between the Farmers' State Bank of Lincolnton and the De Soto Banking Company. Judgment for the latter, and the Farmers' State Bank of Lincolnton brings error. Affirmed.

W. A. Dodson, of Americus, and W. H. Burwell, of Sparta, for plaintiff in error.

W. W. Dykes and Jno. A. Fort, both of Americus, for defendant in error.

LUKE, J. The evidence in this case authorized the verdict, which has the approval of the trial judge, and, in view of the note of the trial judge approving the motion for a new trial, there is no error of law that requires a reversal of the judgment overruling the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(181 N. C. 33)

**SHAW COTTON MILLS, Inc., v. ACME HOSE-
RIY MILLS, Inc.** (No. 98.)

(Supreme Court of North Carolina. March 2,
1921.)

1. Appeal and error \S 1050(1)—Admission of invoice to prove price harmless in view of testimony.

The admission of an invoice to prove price paid at particular time, if error, was harmless, where witness had previously testified to the price paid and the invoice was offered in corroboration of such testimony.

2. Appeal and error \S 1026 — Error must be shown to have been prejudicial.

Mere error in the trial of a cause is not sufficient grounds for a new trial, but it should be made to appear that the ruling was material and prejudicial to appellant's rights.

3. Appeal and error \S 1053(3)—Admission of testimony held cured by instruction.

The admission of buyer's testimony as to price of goods at the time of the trial, in action in which buyer claimed damages for non-delivery, to corroborate testimony that the price of the goods had continued to rise from time to time since the execution of the contract, was cured by instruction limiting buyer's damages to the difference between the agreed price and the market price at the time of the breach of the contract.

4. Evidence \S 147, 271(19) — Exclusion of self-serving and negative statements in letter held not reversible error.

Exclusion of statements in letters from seller to buyer that goods rejected by buyer had been shipped to other customers, and that no complaint had been made by other customers tending to show that the goods rejected by buyer had been of a quality called for in the contract, held not reversible error; such declarations being at most self-serving and tending only to prove a negative.

5. Sales \Leftrightarrow 88—Whether seller agreed to deliver specified amount during particular year held for jury.

Whether seller agreed to deliver 12,000 pounds splicing yarn during particular year held for the jury.

Appeal from Superior Court, Halifax County; Devin, Judge.

Action by the Shaw Cotton Mills, Incorporated against the Acme Hosiery Mills, Incorporated in which the defendant interposed a counterclaim. Affirmative judgment for defendant, and plaintiff appeals. No error.

Civil action brought by plaintiff to recover the sum of \$286.94 for certain yarns sold and delivered to the defendant during the years 1915 and 1919. Defendant admitted receipt and nonpayment of said goods, but set up in defense, and by way of counterclaim, two causes of action, each for an alleged breach of contract, as follows:

(1) That during the month of October, 1914, the plaintiff contracted and agreed to sell the defendant sufficient splicing yarn to supply its needs for the year 1915, estimated at 12,000 pounds, at 24 cents per pound; that of said amount plaintiff delivered 11,244 pounds only, leaving 756 pounds due and unfilled on said contract.

(2) That during the month of April, 1919, plaintiff contracted and agreed to sell the defendant 15,000 pounds of splicing yarn at 65 cents per pound for delivery within six months; that of said amount plaintiff only shipped 8,627 pounds, a portion of which was returned and accepted by plaintiff, leaving 8,262 pounds of yarn due and unfilled on said contract.

Upon issues joined, the following verdict was rendered by the jury:

"(1) Is the defendant indebted to the plaintiff, and, if so, in what amount? Answer: \$286.94 with interest from August 10, 1919.

"(2) Did the plaintiff contract to deliver to defendant 12,000 pounds of splicing yarn during the year 1915 as alleged in answer? Answer: Yes.

"(3) If so, did the plaintiff fail to comply with said contract? * * * Answer: Yes.

"(4) What damage is the defendant entitled to recover therefor? * * * Answer: \$74.60.

"(5) Did the plaintiff contract to deliver to the defendant 15,000 pounds of splicing yarn in 1919, as alleged in the answer? Answer: Yes.

"(6) Did the plaintiff wrongfully fail to comply with said contract? Answer: Yes.

"(7) What damage, if any, is the defendant entitled to recover therefor? Answer: \$1,684.80."

Judgment on the verdict in favor of the defendant for the sum of \$1,427.86. Plaintiff excepted and appealed.

Travis & Travis, of Savannah, Ga., W. L. Knight, of Weldon, R. C. Dunn, of Enfield, and Daniel & Daniel, for appellant.

George C. Green, of Weldon, and H. M. Robins and J. A. Spence, both of Ashboro, for appellee.

STACY, J. There are 49 exceptions in the record, 35 of which relate to the admission and exclusion of evidence, one to the submission of the second issue to the jury, two to the court's refusal to give special prayers for instruction, seven to his honor's charge, and the remaining four to the formal rendition of judgment.

Several exceptions, directed to the court's ruling upon questions of evidence, merit our attention and consideration.

[1, 2] The defendant was permitted to offer in evidence, over the plaintiff's objection, an invoice of yarn bought by the defendant from the Magnolia Mills at Charlotte, N. C., October 25, 1919, showing the price paid at that time to be \$1.05. This, standing alone, would be objectionable, but the witness had previously testified that he had paid \$1.05 for yarn to supply the deficiency of plaintiff's shipments. The evidence was offered in corroboration. Viewing it in this light, even if inadmissible, we think its effect was harmless. Mere error in the trial of a cause is not sufficient grounds for a new trial. It should be made to appear that the ruling was material and prejudicial to appellant's rights. *State v. Smith*, 164 N. C. 476, 79 S. E. 979; *Schas v. Assurance Society*, 170 N. C. 420, 87 S. E. 222, Ann. Cas. 1918A, 679, and *Brewer v. Ring & Valk*, 177 N. C. 476, 99 S. E. 358.

[3] Again, defendant was permitted to show, over plaintiff's objection the price of yarn at the time of trial. His honor restricted this to corroborating evidence, testimony having been offered that the price of yarn had continued to rise, from time to time, since the execution of the contract. Furthermore, upon the measure of damages, the court instructed the jury that they should limit their award to the difference between the agreed price and the market price at the time of the breach of the contract. This apparently was sufficient to cure any objection.

[4] A mass of correspondence between the parties was offered in evidence, and his honor instructed the jury not to consider statements contained in the letters of the plaintiff to the effect that the rejected yarn and other yarn had been shipped to different customers, and that no complaint had been made by them. Plaintiff contends this was evidence going to show the yarn to be of the character called for in the contract. These declarations, at most, were self-serving, and tended only to prove a negative. Hence their exclusion could not be held for reversible error. But this position was not insisted on at the time. Plaintiff accepted the yarn as shipped back, without objection, and credited the same on the defendant's account.

We have carefully examined the remain-

ing exceptions, touching questions of evidence, and find them to be untenable.

[5] The plaintiff objected to the submission of the second issue to the jury, and contended that the court should have held, as a matter of law, that the shipment of 11,244 pounds of yarn, during the year 1915, was a substantial compliance with its contract. The original correspondence relative to defendant's requirements, which the plaintiff agreed to fill, used the words, "approximately 1,000 pounds monthly for the year 1915." But at a subsequent date, replying to an inquiry from the plaintiff, as to the amount, the defendant stated:

"We understood we were to have 1,000 pounds of yarn per month for a term of 12 months. Please acknowledge receipt of this letter, and state when we may expect the first shipment to start out."

Plaintiff answered on September 17, 1915, as follows:

"Replying to your favor of the 15th, we will begin shipping again next week."

Later, on December 21, 1915, plaintiff wrote the defendant:

"Some time in September you raised the question about our delivering the balance of your order, and in order to satisfy you that we would live up to our end of the agreement, we shipped you faster than the contract required, and as the order was not for 12,000 pounds, but for your requirements during the year 1915, approximately 1,000 pounds monthly, and under this contract if for the conduct of your business you had required 13,000 pounds we would have furnished same, but as 11,244 pounds, as per your statement, has met your requirements, we are relieved from further shipments under this contract."

Under this correspondence, we think his honor properly submitted the second issue to the jury, and that the answer was justified by the evidence.

No material benefit would be derived from considering all the exceptions and assignments of error in detail. A perusal of the charge given by the learned judge, who presided at the trial of this cause, shows that the case was tried with care and with due regard for the rights of the parties. There was no error in his refusal to give the plaintiff's first prayer for instruction—the second seems to have been given—and we do not think the exceptions to the charge, as given, can be sustained.

Upon the whole record, after a careful and painstaking investigation, we find no material or prejudicial error. The controversy was largely one of fact, tried before a jury of plaintiff's own county and agreeable to its selection. We have found no sufficient reason for disturbing the verdict and judgment.

No error.

(181 N. C. 27)

FOUNTAIN v. JONES. (No. 60.)

(Supreme Court of North Carolina. March 2, 1921.)

1. Sales \S 168½(10)—Buyer under contract for sale and return liable unless he returns within time.

A contract for the purchase of a mare, which gave the buyer the privilege of returning her to the seller within seven days if she was not satisfactory, was a contract for sale and return under which a title passed to buyer subject to the right of return, and if he failed to exercise that right within the time specified, the sale became absolute, and the purchase price could be recovered.

2. Sales \S 181(1)—Burden is on buyer to prove return within time fixed.

Where defendant admitted the execution of a note for the purchase price of a mare which contained a provision authorizing the return of the mare within seven days if not satisfactory, the burden was on him to prove return of the mare within the time fixed to avoid liability on the note, so that it was error to charge that the burden was on plaintiff in such a case to show that defendant was indebted to him.

3. Trial \S 253(10)—Instruction held to ignore evidence of agreement for further trial of mare sold.

In an action on a note for the purchase price of a mare which gave defendant a right to return within seven days if unsatisfactory, where there was evidence that defendant did return the mare, but thereafter agreed to take her for further trial, an instruction to find defendant was not indebted to plaintiff unless they found that he did not return the mare within seven days was erroneous, as ignoring the evidence concerning further trial.

4. Sales \S 168½(8)—Buyer, after waiving right to return, cannot retain indefinitely without liability.

Where a buyer waived his right to return the mare by agreeing to take her for further trial, after returning her within the contract time, and after a second attempt to return, agreed to a further trial, he could not thereafter retain possession of the mare for six months without further offer to return, and then deny liability on the note.

Appeal from Superior Court, Edgecombe County; Cranmer, Judge.

Action by L. E. Fountain against Calvin Jones. Judgment for defendant, and plaintiff appeals. New trial.

This is an action to recover a mare and the balance due on a note. The defendant executed to the plaintiff a note for \$250, which sum represented the purchase price of the mare. The note was dated March 29, 1918, and by its terms the plaintiff retained title to the mare to secure the purchase price. There was also written into the note the provision that the mare "must work O. K., if

not (defendant) can return her in a week's time, seven days from date." The note matured on November 1, 1918. Defendant did not pay the note or any part of the same at maturity. Plaintiff duly demanded payment of the note, and upon defendant's failure to pay instituted this action of claim and delivery, asking that he be declared entitled to the immediate possession of the mare for the purpose of selling her according to law and applying the net proceeds of sale on the note. He also asked for judgment against defendant for balance of note, after crediting on same the net proceeds from the sale.

Defendant admitted the execution of the note, and also admitted that he had not paid same, but claimed that he returned the mare within the 7 days provided for in the note; that plaintiff persuaded him to try her again, and that after a 16 days' trial he again returned the mare, and was again persuaded by plaintiff to try her further; that he again took the horse home and tried her, and found her unsatisfactory, but that he never saw plaintiff again, and was in possession of her when this action was started.

The first issue, addressed to the question as to whether plaintiff was the owner and entitled to the immediate possession of the mare, by virtue of the note retaining title, was answered in plaintiff's favor by consent. The jury returned the following verdict:

"(1) Is the plaintiff the owner of and entitled to the immediate possession of the horse in controversy? Answer: Yes.

"(2) What amount, if any, is the defendant indebted to the plaintiff? Answer: Nothing.

"(3) In what sum, if any, is the plaintiff indebted to the defendant on his counterclaim? Answer: Nothing."

His honor charged the jury on the second issue as follows, to which the plaintiff excepted:

"I charge you that as to the second issue, the burden rests upon the plaintiff to satisfy you by the preponderance, that is the greater weight of the evidence, that he is entitled to have same answered in his favor. Now, if you find by the greater weight of the evidence that the defendant did not return the horse within 7 days from the date of the note, then I charge you that it would be your duty to answer the second issue in such sum as you may find to be due. But if you do not so find, then you should answer the issue nothing."

There was a judgment in favor of the defendant, and plaintiff appealed.

G. M. T. Fountain & Son, of Tarboro, for appellant.

ALLEN, J. [1] The contract, covered by the note offered in evidence, is called in the law books a "contract for sale and return," and under its terms the title to the mare passed to the defendant, subject to the right of return within the time fixed, and to demand the cancellation of the note, and if he failed to exercise this right the sale became absolute, and the purchase price could be recovered.

As said in 35 Cyc. 237, and approved in *Manufacturing Co. v. Lumber Co.*, 159 N. C. 510, 75 S. E. 719:

"Where the contract provides for a return of the goods if not satisfactory, the buyer cannot relieve himself from liability for the price, unless he returns or offers to return them, and the offer to return must be unconditional."

[2] It follows, therefore, as the defendant admitted the execution of the note, and as it was incumbent on him to prove a return of the horse within 7 days in order that he might be relieved from responsibility, it was error to place the burden of proof on the plaintiff on the second issue, and to require him to prove the negative—that the defendant did not return the horse within 7 days—before the issue could be answered in his favor.

[3] It was also erroneous to instruct the jury to answer the issue "nothing," unless they found that the defendant did not return the horse within 7 days, because this ignores the evidence to the effect that, although an offer to return was made, the defendant agreed to give the horse another trial, and again, after 16 days and complaint made, concluded to try the horse further, and thereafter made no further objection and no further effort to return the horse.

[4] If the defendant offered to return the horse within 7 days, and was persuaded to make another trial of the horse, this would be a waiver of the stipulation for the return within 7 days, and if after 16 days he again offered to return the horse, and it was agreed that there should be a further trial, this would prevent the plaintiff from objecting that the second offer of return was not within a reasonable time, but the defendant could not thereafter keep and use the horse for a period of six months without further tender of return, if there was reasonable opportunity to do so, and then avoid liability on the note, under the stipulation in the note, giving the right to return the horse if not satisfactory.

There must be a new trial because of error in the charge.

New trial.

(181 N. C. 42)

**HIGHWAY COMMISSION OF HALIFAX
COUNTY v. VARNER et al.**
(No. 112.)

(Supreme Court of North Carolina. March 2, 1921.)

1. Convicts ⇐8—Commission act held to repeal act for use of convicts on highways.

Pub. Loc. Laws 1919, c. 534, creating the highway commission of a certain county, section 22 of which repealed all special or local laws relating to the highways of that county or any township therein, repealed Pub. Laws 1913 (Ex. Sess.) c. 65, as amended by Pub. Laws 1915, c. 52, requiring the directors of the state prison to furnish convicts and teams for the improvement of a road in a township of that county.

2. Statutes ⇐190—Unambiguous statute not open to construction.

There is no ground for construction when the language of the statute is unambiguous and the intent is plain.

Appeal from Superior Court, Halifax County; Kerr, Judge.

Mandamus by the Highway Commissioner of Halifax County against H. B. Varner and others, Directors of the State Prison. Judgment for the plaintiff, and defendants appeal. Reversed, and action dismissed.

The object of the action is to compel the defendants to comply with the following provisions of Public Laws of 1913 (Ex. Sess.) c. 65, as amended by Public Laws of 1915, c. 52; the amended law being as follows:

"Section 1. That the directors of the state's prison be and they are hereby authorized and directed to repair and construct by use of convicts of the state's prison a public highway in Halifax township, Halifax county, leading from the town of Halifax to Connoconnara Swamp in the direction of the state farm, the same being the public road leading from said town to the state farm.

"Sec. 2. That this work shall be done in accordance with and under the direction of the highway commission of Halifax township: Provided, that the time for the use of the convicts under this act shall be in the discretion of the superintendent of the state's prison, and their use shall not conflict nor interfere with the general work of the state farm."

The following provision was added to section 2 by chapter 52, Public Laws of 1915:

"That this work shall be done in accordance with and under the direction of the highway commission of Halifax township, and said directors of the state's prison shall place on said road not later than August first, nineteen hundred and fifteen, a force of convicts not less than thirty in number, with suitable teams, and so forth, not less than forty mules, with wagons and tools, and keep the same there until said work is completed: Provided, that the directors of the state's prison may not be required

to build a more expensive type of road than the roads built under the bond issue by the highway commission of said township."

By Public Local Laws of 1919, c. 534, the general supervision and authority over public highways and road and bridge construction, improvement, and maintenance, were withdrawn from the townships and given to the county, acting through and by the "highway commission of Halifax county," which body is created by that act. Section 22 of that act provides as follows:

"All special or local laws relating to the construction, improvement or maintenance of public roads or bridges of Halifax county or of any township therein, including special or local laws authorizing the raising of money for said purposes, are hereby repealed. All laws and parts of laws in conflict with this act are also repealed. Nothing in this act, however, shall be held to invalidate any indebtedness incurred under any law hereby repealed, or to invalidate any act done under such a law, or to prevent the collection of any taxes levied under such law."

The court, upon the pleadings and statutes, rendered judgment for the plaintiff, and defendants appealed.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for appellants.
Geo. C. Green, of Weldon, for appellee.

WALKER, J. (after stating the facts as above). [1] The question on which the decision of this case turns is whether the act of 1919 repealed the acts of 1913 and 1915, so as to destroy the plaintiff's cause of action. We are of the opinion that they did plainly and expressly, or at least with sufficient certainty to show that it was the intention of the Legislature to do so. If the Legislature had simply created the "highway commission of Halifax county," without more, the contention of the plaintiff would have some plausibility and would impress us more favorably, but the language of the act of 1919 is so clear, explicit, and comprehensive that we can give it but the one meaning, and therefore it requires no construction. We interpret it as it is written, and as its manifest meaning and intention are disclosed by its words.

[2] It is familiar learning that there is no ground for construction when the language of a statute is unambiguous and the intent is plain. Black on Interpretation of Statutes, pp. 35 and 36; Whitford v. Insurance Co., 163 N. C. 223, 79 S. E. 501, Ann. Cas. 1915B, 270; State v. Barco, 150 N. C. 792, 63 S. E. 673; Pugh v. Grant, 86 N. C. 40; U. S. v. Fisher, 2 Cranch, 353, 2 L. Ed. 304; Dewey v. U. S., 178 U. S. 510, 20 Sup. Ct. 981, 44 L. Ed. 1170; Endlich, Inter. Statutes, § 4. The rule has been clearly stated by the courts in various forms but they all are substantially expressed in this formula, that where the

meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms, which excludes the necessity for construction. *Thornley v. U. S.*, 113 U. S. 310, 5 Sup. Ct. 491, 28 L. Ed. 999; *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *Hamilton v. Rathbone*, 175 U. S. 419, 20 Sup. Ct. 155, 44 L. Ed. 219.

The act of 1913 is not a general law, that is, one having general application, but is "local," and undoubtedly "special" in its nature, and therefore necessarily embraced by the language of the repealing clause of the act of 1919 (section 22). We were not informed of any other general, special, or local act relating to this subject, and the act of 1919 as clearly indicates what law was intended to be repealed as if it had referred to it by the year of its enactment and the chapter of the laws of that year where it would be found. But the other provisions of the act of 1919, especially those of sections 8 and 9, lead us to the same conclusion. The language of those sections is so broad in its scope as to show without any doubt that the Legislature intended to abolish all authority of townships over the construction and maintenance of roads and bridges, as well as their repair and reconstruction, and to vest the entire authority with respect thereto in the county, acting through its own highway commission created by the act of 1919. The language of section 8, upon which plaintiff relies for the position that it was not intended to repeal the act of 1913, as originally framed or as amended, takes away all of the power and jurisdiction (so to speak) of the township highway commission over roads and lodges it, "absolutely and entirely," in the county highway commission. As the act of 1919 repealed altogether, and without any reservation, the law of 1913, it not only completely changed the law as to the control of roads of the township, but relieved the defendants from the duty imposed upon them by the act of 1913, concerning the repair and reconstruction of the particular road mentioned in that act. It follows from these considerations that plaintiff's cause of action, if it had any theretofore, has been lost. There is nothing said in the act of 1919 about repairing the roads of Halifax township, except as that township is embraced by the general terms of the act. It is not named, by itself, in the act.

The other question, as to the right of the plaintiff to bring this action for a mandamus against the defendants as agents or officers of the state need not be discussed, in view of the conclusion we have reached.

After the full discussion given to this question, it will be unnecessary to consider the evident reasons for this change in legislation concerning the repair of this road leading from the town of Halifax to the former state

farm. If the county or township feels that the state in some way should compensate it for damage done to this road, on proper application to the Legislature it may get adequate relief, as the state is presumed always to be just and to perform its moral obligations. It may be moved though to deny relief in this particular case, as plaintiff has been guilty of laches, and conditions and circumstances have recently been so materially changed as to greatly increase the difficulty of doing the work, or some other equity in its favor may exist which would justify its refusal.

The case having been heard upon complaint and answer alone, it will be certified to the court below that there was error. The judgment will be reversed and the action dismissed.

Reversed.

(181 N. C. 476)

ELLIS et al. v. BARNES et al. (No. 58.)
(Supreme Court of North Carolina. March 2, 1921.)

Deeds 676—Undue influence in obtaining deed held for jury.

In a proceeding to partition lands by persons claiming as tenants in common as heirs, whether defendants obtained deeds from ancestor by undue influence held for the jury.

Appeal from Superior Court, Wilson County; Cranmer, Judge.

Action by Morris M. Ellis and others against James Barnes and others. Judgment for plaintiffs, and defendants appeal. No error.

This is a proceeding to sell 100 acres of land for partition, the petitioners claiming that they are tenants in common with the defendants as the heirs of Martha Barnes.

The defendants set up two deeds and a lease from the said Martha Barnes under which they claim to be the owners of 70 acres of said land.

The plaintiffs reply that the said Martha Barnes did not have sufficient mental capacity to execute the deeds and lease, and also that they were procured by fraud and undue influence.

The jury returned the following verdict:

"(1) Are the deeds from Martha Barnes to John R. Barnes and John A. Mayo and wife void for the want of mental capacity on the part of Martha Barnes at the time of the execution thereof? Answer: No.

"(2) Is the lease from Martha Barnes to John A. Mayo void because of the want of mental capacity on the part of Martha Barnes at the time of the execution of such lease? Answer: No.

"(3) Did John A. Mayo and wife, Mattie Mayo, procure the deed from Martha Barnes by

reason of fraud and undue influence over the said Martha Barnes? Answer: Yes.

"(4) Did John R. Barnes procure the deed from Martha Barnes by means of fraud and undue influence over the said Martha Barnes? Answer: Yes."

Judgment was entered upon the verdict in favor of the plaintiffs, and the defendants appealed, reserving the exception that there was no evidence to support the verdict on the third and fourth issues.

Connor, Hill & Little, of Wilson, for appellants.

O. P. Dickinson, of Wilson, for appellees.

PER CURIAM. We have carefully examined the record and are of opinion there were circumstances in evidence fit to be considered by the jury on the issues of undue influence.

The evidence of the petitioners tended to prove that Martha Barnes was old and feeble; that before execution of the deeds she had two strokes of paralysis and that her mind was much impaired; that she had eleven children, and that the deeds purported to pass seven-tenths of her property to a son-in-law and one child, and there was no reason for discriminating between the children; that the deeds and lease were without consideration; that the first deed was to the son-in-law and she was then living with him; that before the execution of this deed the son-in-law had two doctors to examine her for the purpose of seeing if she had sufficient mind to make a deed; that he employed an attorney to prepare the deed and paid his fee; that he went to Elm City to get witnesses for the execution of the deed because, as he said, "he wanted a good element"; that he had four witnesses to the deed "to show that she was in good fix"; that he said nothing to any one about the execution of the deed prior to its execution; and that he then told John R. Barnes, a son, and soon thereafter the other deed was executed under similar circumstances.

These circumstances considered separately would not be sufficient to justify setting aside the deeds, but when considered together ought to have been submitted to the jury.

No error.

(115 S. C. 415)

FREDERICK et al. v. BROWN et al.
(No. 10575.)

(Supreme Court of South Carolina. Feb. 28, 1921.)

Appeal and error \S 954(2)—Discretion in refusing to grant injunction pendente lite not reviewed.

Where appellants failed to satisfy the Supreme Court that a county judge erroneously

exercised his discretion in refusing to grant an injunction pendente lite, the appeal will be dismissed.

Appeal from Common Pleas County Court of Richland County; M. S. Whaley, Judge.

Action by N. J. Frederick and another against T. W. Brown, Grand Chief, and others, as officers of the Independent Order of Good Samaritans and Daughters of Samaria. Judgment for defendants, and plaintiffs appeal. Appeal dismissed.

Butler W. Nance and N. J. Frederick, both of Columbia, for appellants.

Melton & Belser and E. L. Craig, all of Columbia, for respondents.

GARY, C. J. This is an action for the sole purpose of an injunction. The facts are stated in the order of his honor the county judge, who refused the application for a temporary injunction; and the plaintiffs appealed. They have failed to satisfy this court that his honor the county judge erroneously exercised his discretion in refusing to grant the injunction pendente lite.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(115 S. C. 409)

MILLER v. GOODWIN. (No. 10577.)

(Supreme Court of South Carolina. Feb. 10, 1921.)

Appeal and error \S 1194(1)—Judgment properly rendered against appellant failing to comply with conditions of mandate.

Where the Supreme Court on appeal had declared a deed void on condition defendants pay a judgment and costs within 20 days, but otherwise confirmed the sale, defendant could have given notice and taxed all costs, or he could have made his own calculation of costs and tendered the correct amount as provided for in the judgment of the court, but, if he failed to comply with the condition, judgment was properly rendered against him.

Appeal from Common Pleas Circuit Court of Richland County; Edward McIven, Judge.

Action by E. McKay Miller against George Goodwin. From a judgment finding that defendant had failed to comply with the terms of the decision of the Supreme Court on a prior appeal, defendant appeals. Affirmed.

B. B. Evans, of Columbia, for appellant.

Hunter A. Gibbes, of Columbia, for respondent.

WATTS, J. This is the third appeal in this case. 111 S. C. 333, 98 S. E. 129; 113 S. C. 365, 101 S. E. 834. It is from an order of his honor Judge McIver, wherein he finds:

"That the defendant has failed to comply with the terms of the order of the Supreme Court within the time specified."

The time specified by this court in the second appeal, was:

"The judgment of this court is that, if the appellants, within 30 days after remittitur of this court is received in the circuit court, shall pay to the master for Richland county the judgment fixed by the decree of Judge Townsend, in full and all interest thereon, up to the day of payment, as fixed by this judgment, that is, when the remittitur of this court, and all costs due thereon up to the time of sale intended to be made in March 1919, then the deed executed to the respondents be set aside and declared to be null and void, and the order appealed from reversed, otherwise the order appealed from confirmed, however, with no costs of this appeal."

This remittitur was received in circuit court February 5, 1920. Exceptions three in number allege error, and are overruled.

His honor's finding was correct. Defendant could have given notice and taxed all costs. He could have made his own calculation and tendered correct amount, as provided for in the judgment of this court. Having failed to comply with the mandate of this court, his honor was correct in his holding, and judgment is affirmed.

GARY, C. J., and FRASER and COTHRAN, JJ., concur.

(15 S. C. 419)

REAMES v. LAWRENCE. (No. 10572.)

(Supreme Court of South Carolina. Feb. 28, 1921.)

Attachment \S 125—Insufficiency of affidavit waived by reliance on objection that claim not just.

Insufficiency of affidavit for attachment was waived by defendant serving sheriff with notice and affidavit that the amount claimed by the plaintiff was not justly due.

Appeal from Common Pleas Circuit Court of Sumter County; Edward McIver, Judge.

Action by F. A. Reames against T. D. Lawrence. From an order refusing to vacate attachment defendant appeals. Order affirmed.

John H. Clifton, of Sumter, for appellant. Jennings & Harby, of Sumter, for respondent.

FRASER, J. The appellant states his case as follows:

"The above action was commenced by the issuance of a summons and a warrant of attachment. Defendant gave notice of a motion to vacate, upon the ground that the attachment had been irregularly and improvidently issued, in that the affidavit, being upon information and

belief only, did not state the sources of the information nor any circumstances upon which the attachment was issued. This motion was noticed to be heard first before the clerk of court of common pleas for Sumter county, and also was noticed to be heard before his honor, Judge W. H. Townsend. Neither of these two motions was ever heard, but the motion to vacate was taken up before Judge McIver at the fall term, 1919, of the court of common pleas for Sumter county. Before the service of any motion to vacate, the defendant had served a notice and affidavit upon the belief that the amount claimed by the plaintiff was unjustly due. At a hearing before Judge McIver, when the case was called for trial, but before the trial was commenced, the motion to vacate was argued. Counsel for the plaintiff conceded that the affidavit upon which the attachment had been issued was defective, and not sufficient to support the attachment, but contended that, inasmuch as the defendant had served the sheriff with notice and affidavit that the amount claimed by the plaintiff was not justly due, defendant had waived any defect in the attachment papers. The appellant respectfully contends that his honor was in error in refusing to vacate the attachment, because it was admitted upon the argument that the affidavit was defective and insufficient; nor can it be said that the defendant was compelled by any rule of law to move to vacate before filing the notice with the sheriff that the amount claimed was not justly due."

No summons was issued. The crop was seized under a warrant to seize the crop. The motion was refused. The case of Johnstone v. Manigault, 13 S. C. at page 408, fully sustains his honor, and the order appealed from is affirmed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(115 S. C. 407)

STATE v. SWEET. (No. 10571.)

(Supreme Court of South Carolina. Feb. 28, 1921.)

Criminal law \S 1156(3)—Case not reversed in absence of abuse in denying new trial for new cumulative evidence.

In the absence of a showing that the presiding judge erroneously exercised his discretion in refusing to grant a new trial, the case will not be reversed for newly discovered cumulative evidence after conviction for manslaughter.

Appeal from General Sessions Circuit Court of Orangeburg County; I. W. Bowman, Judge.

George Sweet was convicted of manslaughter, and from an order refusing a motion for a new trial, he appeals. Appeal dismissed.

Brantley & Zeigler, of Orangeburg, for appellant.

E. C. Mann, Sol., of Orangeburg, for the State.

GARY, C. J. The defendant was indicted for murder, but the jury found him guilty of manslaughter.

The appeal is from an order refusing a motion for a new trial, on the ground of after-discovered evidence.

The only testimony upon which the motion was made was the affidavit of Thomas F. Brantley, Esq., one of the defendant's attorneys, which was to the following effect:

"That Axon, one of the witnesses in the case of the State v. Sweet, which was tried this 15th day of May, told him after the trial to-day that when he met George Sweet with Mr. Frank De Mars, and after he and Mr. De Mars carried George Sweet back to his home, where the shooting took place, that George Sweet told him in the presence of Mr. Frank De Mars that he had ordered Robert Wallace out of his house and that he had come back with a knife in his hand, and when he came at him with the knife he shot him, and that the [using oath] had reported him for selling whisky; that this deponent is one of the attorneys for the defendant and did not know of this testimony in time to get it out, so as to get the whole truth of Sweet's statement to Mr. Axon."

This testimony was merely cumulative; the defendant and his wife both having testified that the deceased had a knife in his hand at the time he was shot.

Furthermore, the defendant has failed to make it appear that his honor the presiding judge erroneously exercised his discretion in refusing the motion.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(115 S. C. 411)

McQUEEN v. SOVEREIGN CAMP, W. O. W.
(No. 10574.)

(Supreme Court of South Carolina. Feb. 23, 1921.)

Insurance §515—Provision for additional premium on being "enlisted" for military service includes drafted men.

The provision of a life insurance policy reducing the amount of recovery in case of insured's death outside the United States while in military service as an enlisted man, unless insurer was notified of such enlistment and an additional premium paid, means, by the word "enlisted," one enrolling in the service, whether he volunteered or was drafted, and where such a one failed to comply and died in service his beneficiary cannot recover the full amount of the policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Enlist—Enlistment.]

Appeal from Common Pleas Circuit Court of Dillon County; Edward McIver, Judge.

Action by Neill E. McQueen against the Sovereign Camp, Woodmen of the World. Judgment for plaintiff, and the defendant appeals. Reversed.

The provision of the certificate of insurance referred to in the opinion follows:

"(5) In the event the holder of this certificate shall die while serving in any branch of the United States Army or Navy, either as an officer or enlisted man, outside the boundaries of the United States of America, then the amount due under this certificate shall be such proportion of the amount thereof as the period he has lived since becoming a member bears to his expectancy of life at the time of becoming such member, determined by the National Fraternal Congress Table of Mortality. Provided, that should the holder of this certificate so desire, he may within thirty (30) days after entering the service in any branch of the United States Army or Navy, as an officer or enlisted man, notify the sovereign clerk at the home office of the society, Omaha, Nebraska, United States of America, that he has entered such service of the United States of America and pay in advance to the sovereign clerk, for the society, the sum of thirty-seven and 50/100 (\$37.50) dollars, per one thousand dollars insurance per annum in addition to the regular assessment prescribed by section 56 of the Constitution and laws of the Woodmen of the World, and upon so doing at the death of the member or as soon thereafter as possible, the amount prescribed in this certificate shall be paid to his beneficiary or beneficiaries."

Gibson & Muller, of Dillon, for appellant.
Joe P. Lane, of Dillon, for respondent.

FRASER, J. There is only one question in this case. Lonnie McQueen took out a policy of insurance with the Sovereign Camp Woodmen of the World. This policy required the insured to notify the company if he enlisted in the army or navy in time of war, for service outside of the United States, and to pay an additional premium. Mr. McQueen was drafted and died in France. He neither notified the company nor paid the extra premium. Judgment was given for the plaintiff, the beneficiary, on the ground that the deceased was not an enlisted man, but a drafted man, and was not required by the terms of the policy to give the notice or pay the extra premium. The defendant offered to return the premium.

The question is: Was Lonnie McQueen an enlisted man within the terms of the policy? The increased danger of the insured as a soldier is fully recognized by the policy in the requirement of an extra premium. That danger was recognized as increased by service outside of the United States, and this is true, whether his enlistment was voluntary or enforced. The difference is technical and not a matter of substance. The technical objections even cannot be sustained.

Century Dictionary:

"Enlist: 1. To enter, as a name on a list; enroll, register. 2. To engage for public service, especially military or naval service, by enrolling after mutual agreement, as to enlist men for the army."

Webster:

"To enroll; to register; to enter a name on a list. 2. To engage in public service, by entering the name on a register, as an officer enlists men."

Bouvier:

"Enlistment: The act of making a contract to serve the government in a subordinate capacity, either in the army or navy."

It is thus seen that there is high authority for holding that, when a man enters his name on a list of the army or navy, he is an enlisted man, whether he volunteered or was drafted. The service outside of the United States is recognized by the policy as requiring a higher premium. The plain English of the policy makes no distinction and there is none.

The exception that raises this question is sustained, and the judgment is reversed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

COTHRAN, J. I concur upon the additional ground that the provision in the certificate relating to "officers and enlisted men" should be interpreted in the common acceptance of those words as referring to commissioned officers and all soldiers below that rank, whether voluntarily enlisted or enlisted (which necessarily occurs) under the Draft Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 2044a-2044k). This interpretation conforms to Articles of War 1, 2 (U. S. Comp. St. § 2308a); U. S. Army Regulations April, 1917; Draft Act, article or section 1, paragraphs 3, 7, sections 2, 10, 12; Barnes' Federal Code, § 10221 (U. S. Comp. St. 1918; U. S. Comp. St. Ann. Supp. 1919, § 2044a) and has the support of *Hilliard v. Stewartson*, 48 N. H. 280, and *Miller v. Illinois Co.*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378.

(115 S. C. 421)

SCHEPER et al. v. SCHEPER et al.
(No. 10576.)

(Supreme Court of South Carolina. Feb. 28, 1921.)

1. Pleading \Rightarrow 192(5)—Unnecessary averment does not render complaint demurrable.

A part of an executor's complaint for partition and sale of an estate suggesting a possible contest between the daughter and the husband of a deceased heir was entirely proper, but legally gratuitous, and a demurrer thereto should not have been entertained.

2. Pleading \Rightarrow 204(7)—Demurrer will not lie to a part of cause of action.

In view of Code Civ. Proc. 1902, § 166, providing that a demurrer may be taken to the whole complaint or to any alleged cause of action therein, but not providing that a demurrer may be interposed to a part of a cause of action, a demurrer to a part of executor's complaint for partition and sale which suggests a contest between heirs should have been overruled.

3. Pleading \Rightarrow 198—Defendants' demurrer affecting codefendant should be overruled where not served on codefendant.

Where a demurrer to a complaint by one of defendants is interposed to a part involving the rights of a codefendant not shown to have been a party to the demurrer or to have had any knowledge of it, the demurrer should have been overruled.

Appeal from Common Pleas Circuit Court of Beaufort County; T. J. Mauldin, Judge.

Action by F. W. Scheper, individually and as executor of the will of F. W. Scheper, deceased, and others, against Lee Marscher Scheper and others. From an order sustaining a demurrer to a part of the complaint interposed by the defendant W. R. Tindall, the plaintiffs and the defendants other than W. R. Tindall appeal. Order appealed from reversed and cause remanded for trial.

Talbird & Jenkins, of Beaufort, for appellants.

W. J. Thomas, of Beaufort, and Erwin, Erwin & Nix, of Athens, Ga., for respondents.

COTHRAN, J. This is an action instituted in the court of common pleas for Beaufort county in February, 1920, for the partition and sale of the estate of F. W. Scheper, deceased. The appeal is from an order sustaining a demurrer to a part of the complaint, interposed by one of the defendants, W. R. Tindall.

The facts alleged in the complaint, which support the claim of the plaintiffs for partition, are as follows:

F. W. Scheper, Sr., a resident of Beaufort, died there in 1913, possessed of real and personal property; he left a will by which he devised and bequeathed his entire estate to his six children, all of whom survived him; one of his daughters, Minnie S. Tindall, died the same year, leaving as her heirs at law an only child, Edna, now about 20 years of age, and possibly the defendant W. R. Tindall, to whom she had been married; Henry E. Scheper, a son of the testator, died in 1917, leaving a widow and several children, minors.

In addition to these facts establishing the right to partition, which does not appear to be contested, the plaintiffs allege in their complaint certain other facts which are intended to exclude W. R. Tindall from par-

ticipation in the partition as an heir at law of his deceased wife, Minnie S. Tindall. It is either alleged or admitted in the arguments that many years ago Minnie S. Tindall was married to the defendant W. R. Tindall in Beaufort; that they removed to North Carolina and took up their residence there; that in 1910 Mrs. Tindall secured a divorce a mensa et thoro, under the laws of North Carolina, from her husband; that she returned to Beaufort and made her home with her father, where she lived until her death; that W. R. Tindall removed from North Carolina to Georgia and there married another woman while the first Mrs. Tindall was living; that he has deserted her and failed to respond to the decree for alimony rendered when the divorce was granted.

They also allege that after the death of Mrs. Tindall, which occurred on November 14, 1913, there was found an envelope addressed, "For Addie, to be opened right after my death"; that the envelope contained a paper writing signed by Mrs. Tindall dated November 7, 1913, and (quoting from the complaint) that "In that paper she gave all of her property, with the exception of some articles of wearing apparel, to her daughter Edna."

The plaintiffs therefore insisted that the defendant W. R. Tindall should be excluded from participation in the partition as an heir at law of his deceased wife upon the grounds above indicated: (1) That the paper writing referred to constituted a legal transfer of all of her interest in her father's estate to her daughter Edna; (2) that the divorce obtained by Mrs. Tindall in North Carolina excluded him from such participation; and (3) that by his conduct in failing to respond to the decree for alimony, in moving to Georgia, marrying again, and deserting his first wife, he is estopped from claiming any share in her estate.

The defendant W. R. Tindall interposed a demurrer to that part of the complaint which sought to exclude him from such participation for the reasons stated, upon the ground "that the complaint shows upon its face that it does not state a cause of action," in that it shows that he was the husband of Mrs. Tindall and that she died intestate seized of one-sixth interest in her father's estate.

The demurrer was argued before Judge Mauldin, who filed a decree sustaining it, holding that the writing was neither a will nor a deed and that W. R. Tindall was not barred by the North Carolina divorce from claiming an interest in the estate of his deceased wife; he did not pass upon the question of estoppel indicated as (3) above.

From this decree the plaintiffs and the defendants Edna Tindall and W. F. Marscher, executor, have appealed.

[1] The allegations of the complaint, to which W. R. Tindall has demurred, intend-

ed to exclude him from participation, are in no sense essential to the plaintiffs' cause of action for partition, but relate to the subsidiary, administrative question of the distribution of Mrs. Tindall's interest, and simply amount to the suggestion of an issue between W. R. Tindall and his daughter who alone are interested in it. If that issue should arise and the claim be sustained, Edna will receive the entire interest of her mother; if not, W. R. Tindall will receive one-third and she two-thirds. So that in neither event is the executor or the individual plaintiffs interested in the contest thus suggested. It was entirely proper that the executor, desiring a complete determination of the rights of all the parties and a final distribution and settlement of the estate, should suggest this possible contest, particularly as one of the parties interested was the infant daughter of his sister, so closely allied to her in blood, affection, and a common sorrow; but in a legal sense neither he nor the other individual plaintiffs had any concern in the contest.

The demurrer was directed therefore to a part only of the complaint, and to a part which was entirely proper but legally gratuitous, and should not have been entertained.

[2] Even conceding that the allegations of the complaint affecting the interest of W. R. Tindall were essential elements in the plaintiffs' cause of action (the contrary of which we hold), the demurrer should have been overruled.

"Section 166 [195] of the Code provides that the demurrer may be taken to the whole complaint or to any of the alleged causes of action stated therein; but it is nowhere provided that a demurrer may be interposed to a part of a cause of action." *Buist v. Salvo*, 44 S. C. 144, 21 S. E. 615, followed in *Lawson v. Gee*, 57 S. C. 502, 35 S. E. 759; *Sloan v. R. Co.*, 64 S. C. 389, 42 S. E. 197; *Miles v. Light Co.*, 87 S. C. 257, 69 S. E. 292.

[3] Another consideration is controlling: The demurrer is interposed to a part of the complaint by one of the defendants; its determination involves very materially the rights of a codefendant; while the codefendant was a party to the suit, there is nothing to show that she was a party to the demurrer or had any knowledge of it; it does not appear to have been served upon her or her attorneys. If the order sustaining the demurrer should be affirmed by this court, it would be a determination of the contest between these two defendants, affecting to the extent of one-third the interest of one of them, upon a demurrer to the complaint and not to any pleading of such codefendant.

This disposition of the appeal renders it improper for the court to consider the other questions in the case. The effect of the posthumous writing, the effect of the North Carolina divorce, and the alleged estoppel.

The judgment of this court is that the order appealed from be reversed and that the cause be remanded for trial without prejudice to the rights of either W. R. Tindall or Edna Tindall in the issue between them as to the participation by W. R. Tindall in the proposed partition.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(57 W. Va. 722)

MOORE v. HUGHES. (No. 4005.)

(Supreme Court of Appeals of West Virginia.
Feb. 15, 1921.)

(Syllabus by the Court.)

1. Habeas corpus \S 85(1)—Burden of proof resting on mother in father's proceedings to determine custody of child stated.

The mother of a child, having it in her possession by permission of the father to whom its permanent custody had been awarded by the decree of a court of competent jurisdiction which also dissolved the marriage of the parties, in order to make good her defense to a writ of habeas corpus sued out by the father, for vindication of his natural and adjudged right of custody, must either establish a relinquishment of such right in her favor, by agreement, or new and altered conditions of the parties making a change of permanent custody promotive of the interests of the child; and, as to both issues, the burden of proof rests upon her.

2. Habeas corpus \S 113(12)—Finding on conflicting evidence will not be disturbed.

If, upon the first one of such issues, the documentary evidence relied upon by the respondent and the conduct of the parties were inconclusive and the oral evidence directly conflicting and contradictory, the finding of the trial court thereon in favor of the father will not be disturbed by the appellate court.

3. Habeas corpus \S 113(12)—Finding relative to custody of child not disturbed unless contrary to weight of evidence.

Nor will a like finding upon the second one of such issues be so disturbed, unless it is contrary to the weight and preponderance of the evidence as to the material facts in issue, with respect to which the child's interests are to be considered and determined.

4. Habeas corpus \S 113(12)—Findings within court's discretion as to custody of a child between divorced parents will not be disturbed.

The trial court's exercise of its sound and reasonable discretion, within the limitations of law, in the award of the custody of a child, as between its divorced parents, will not be disturbed by the appellate court.

Error to Circuit Court, Cabell County.

Habeas corpus by Earl Moore against Delcie Hughes, to obtain the custody of a female child. Judgment for plaintiff, and defendant brings error. Affirmed.

D. B. Daugherty, of Huntington, for plaintiff in error.

Williams, Lewis & Coffey, of Benton, Ill., for defendant in error.

POFFENBARGER, J. The judgment in habeas corpus, complained of on this writ of error, awarded the custody of a female child to its father. The principal grounds of defense set up by the respondent to the writ, the child's mother, were complete relinquishment to her of the father's right of custody, by agreement, and promotion of the child's interest by the custody of the mother.

By the decree of a court of the state of Illinois, pronounced in May, 1915, the father obtained a divorce from the mother, on the ground of adultery, and right of custody of the child. At that time, he resided in said state, with his mother, who has since died. A widowed sister having children and grandchildren now keeps house for him. There seems to be no doubt of his financial ability to give the child proper care, nor of his personal integrity. At the time of the taking of his testimony, he had an income of \$160 per month from his services. He has several sisters, any one of whom, he says, is willing to keep the child for him. One of his letters to his former wife indicates his possession of some money and ownership of some land in the state of Missouri.

The alleged agreement, if any, by which he parted with the right of custody given him by the decree above referred to was made on or about September 5, 1917. Having been drawn for military service, or intending enlistment therein, he permitted the respondent, who had married her alleged paramour, soon after the decree, to take the child into her care. He claims his relinquishment was only temporary. She claims, on the other hand, that it was absolute and permanent. Their testimony as to the character of the agreement is indirect and in absolute conflict. It was largely effected by correspondence that has not been preserved. Several letters, written by the father to the mother, while he was in military service, and one written after his discharge, have been produced. All of them manifest his deep and sincere interest in the child, but they are indefinite as regards its permanent custody and the character of the agreement under which its custody was changed, in view of the father's intended absence and the dangers he was then about to encounter. Some expressions found in them seem to imply expectation that the child's future would depend upon the mother's care of her; but they were written under circumstances calculated to create a grave doubt as to whether the writer would ever return, and these expressions may well be regarded as being hypothetical. He said he wanted the child educated, and indicated the amount of money

and property that would be available for such purpose, as well as the means of obtaining it. In a letter written about four months after he entered the army, he said he had not felt right to keep the child away from its mother, nor to let the mother have its custody while he was so situated that he could keep it, and that his joining the army had afforded him an excuse to let the mother have it.

The attitudes of the parents toward one another, after the divorce, were not such as precluded all communication. While the child was with the father, the mother visited it several times. He says she had frequently asked for its possession and custody, and that, knowing her desire to have it, he wrote her to come and take charge of it, near the date of his departure for the army, but that he never intended to effect a permanent change of custody. She says he requested her by letter to come and take the child, saying he had enlisted, and that she hurriedly went to the home of his sister and got it. After his discharge in March, 1919, she, at his request, took the child with her on her way to see her mother, and left it for a visit with him, and brought it back on her return, and he repaid her part of the expense of the trip. In the only produced letter of his, written after his discharge, he made no demand for possession of the child, nor did he disclaim right to her possession, in himself. In it he resented something the mother had said about money for the child's support, and expressed his willingness to take her in the event of the mother's tiring of her care. He also declared his intention to do everything in his power for the child's education, at the proper time, which had not yet arrived.

Evidently, he was either undecided as to reassertion of his right of custody or anticipated opposition to such a course, after his discharge, for his conduct was hesitant and equivocal. When the mother took the child to him for a visit, he made no effort to retain it. After that incident, he visited the child at the mother's home, and requested permission to take her home with him for a visit. Later he came again, and endeavored to obtain possession of her. He says he demanded permanent possession of her, and, compliance with his demand having been refused, he obtained permission to take her to Huntington for a short visit. After his arrival at Huntington, he attempted to take her on to his home, but his effort to do so was frustrated by the mother's brother. Then he sued out the writ on which this judgment was rendered.

[1-3] The conflict in the oral evidence as to the character of the agreement under which the mother obtained the child has been passed upon by the trial court. Upon it, as well as the correspondence and circumstances disclosed, there has been a finding in fa-

vor of the father. As to that issue, the mother obviously carried the burden of proof, since the right of custody had previously been vested in the father by a decree of a court of competent jurisdiction. Nothing found in the evidence or facts and circumstances disclosed justifies disturbance of the finding against her. Read in the light of the situation of the parties at the time, and especially that of the husband, the letters produced are not conclusive of the issue, nor strongly probative of complete relinquishment of right of custody. In view of this conclusion, the issue turned mainly on the conflicting oral evidence, and the trial court had the aid and advantage of observation of the parties and their demeanor on the witness stand, which we do not have. The evidence casts no reproach upon the character of the father. The mother imputes no moral delinquency of any kind to him. She charges nothing more than that he had slapped her face, and, for all that appears in the case, he may have been gravely provoked to that act by her misconduct. She has been adjudged guilty of very grave misconduct before the severance of the marriage tie. These circumstances have important bearing upon the credibility of the parties as witnesses, an element lying peculiarly within the province of the trial court.

Failure of the effort to establish relinquishment of the father's natural right of custody, emphasized and reinforced by a judicial award thereof, places the further burden upon the mother to show sufficient cause for a transfer thereof to her, and, so far as we can see, she has shown none. The father's fitness and ability to give the child proper care and attention both stand unimpeached. His moral character is unblemished. Nothing is said against the character of his sister who keeps house for him. He is amply able to provide for the child's support and education. Even though the mother may be equally able to do so, the father has superior right in law. *Hurley v. Hurley*, 71 W. Va. 269, 76 S. E. 438; *Green v. Campbell*, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843. Of course, the legal rule giving the father preference is not an inflexible one. It must yield to the welfare of the child as disclosed by all of the circumstances. *Carlens v. Carlens*, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930. Here, however, nothing appears in the circumstances that can be deemed to be sufficient ground for deviation from the general rule. Through her husband, the mother is able to support the child, but her husband is a contractor, and has no settled place of abode. This is not a controlling circumstance, of course, but it has bearing and weight upon the inquiry. The child needs female care and attention, but she will have that under the father's custody, and, presumptively, her residence will be fixed and permanent. The aunt with whom she

will live is a woman of mature age and the mother of grown children, and nothing has been shown against her character or fitness. As much cannot be said for the mother. All of these considerations must be invoked in aid of the trial court's decision. Besides, the parties were before the judge of that court, and he was in a position to see whether the mother's demeanor was such as to indicate the fitness and stability of character she ought to have as custodian of the child.

[4] In respect of the custody of children, the trial courts have a measure of discretion, the exercise of which will not be disturbed by the appellate court, in the absence of a disclosure of a departure therein from soundness and reason or an abuse of sound discretion. *Gates v. Gates*, 105 S. E. 815, decided at this term; *Williams v. Hicks*, 149 Ga. 333, 100 S. E. 97.

Seeing no error in the judgment complained of, we will affirm it.

(87 W. Va. 650)

GIBBARD v. EVANS. (No. 4194.)

(Supreme Court of Appeals of West Virginia.
Feb. 8, 1921.)

(Syllabus by the Court.)

1. New trial §99—Characteristics of newly discovered evidence warranting new trial enumerated.

To justify granting a new trial for after discovered evidence, the party relying thereon must have been diligent before the verdict, the evidence must be material and not merely cumulative, and such as on a new trial ought to produce the opposite result, and is not proposed simply to discredit or impeach a witness on the opposite side.

2. Witnesses §389—Denial of witness that he had made inconsistent statements may be contradicted.

When a witness has testified to a material fact in issue, and on cross-examination is asked whether he had not on a former occasion and at the time of the occurrence to which his evidence relates, made a contrary statement to a particular person present, and he denies it, the evidence of such person is competent in rebuttal for the purpose of contradicting the witness and destroying the value of his testimony.

3. Evidence §129(3)—Evidence of actions or condition of a person on other occasions admissible.

Where the actions or condition of a person on other occasions are so recently connected in time and circumstance as to likely characterize his actions or condition on the particular occasion involved, evidence thereof may be properly admitted as tending to show what his conduct and condition then were.

4. Damages §96, 127—Recovery for personal injuries not limited by death statute; recovery for personal injuries generally for jury.

In actions for damages for personal injuries sustained, the statute imposes no limitation on the amount recoverable. Generally the amount is for the jury to determine, and the only limitation which the law imposes is that such damages be fairly compensatory, and not such as to show partiality, prejudice or misconduct on the part of the jury.

5. Damages §132(1)—\$12,000 held not excessive for injuries to married woman in automobile accident.

The verdict of twelve thousand dollars in this case, in favor of plaintiff, a married woman forty years of age, who in an automobile accident was badly cut and scarred about the face and head, her ability to masticate her food permanently impaired, and her head and neck permanently drawn over, and was otherwise permanently injured, is not so excessive as to justify the granting of a new trial.

Error to Circuit Court, Cabell County.

Action by Myrtle Gibbard against Dorsey Evans. Judgment for plaintiff, and defendant brings error. Affirmed.

Simms & Staker and Holt, Duncan & Holt, all of Huntington, for plaintiff in error.

Williams, Scott & Lovett and M. P. Wiswell, all of Huntington, for defendant in error.

MILLER, J. We are called upon by defendant to reverse the judgment below in favor of plaintiff for twelve thousand dollars, damages assessed by the jury for personal injuries sustained from the collision, on March 21, 1920, in the city of Huntington, of two automobiles, one owned and being driven by defendant, the other owned by plaintiff and her husband and being driven by the latter.

[1] The questions presented are not many, nor difficult to solve. The first is that defendant should have been granted a new trial on his motion based on newly discovered evidence. The evidence tendered was that of one William Sanson, embodied in his affidavit presented on the motion, the substance of which was that on the occasion of the wreck he was coming along the street and saw defendant Evans going east on Adams Avenue west of Johnson's Lane on the right hand side of the street; saw Gibbard, the driver of the other car, coming west on Adams Avenue just above Johnson's Lane, when he attempted to make a left hand turn going south on Johnson's Lane, and struck Evans; that from what he observed Evans was in no way to blame, and was sober and not drinking to his knowledge. It is conceded that to have warranted favorable action on said motion, such evidence must have been discovered since the trial; that defend-

ant must have been diligent in his search for evidence before verdict; that the evidence was new and material, and not merely cumulative; that it was such that a new trial ought to produce the opposite result; and that its object was not simply to discredit or impeach a witness on the opposite side. Such is the law respecting newly discovered evidence, as recently reaffirmed in *Phoenix Fire Insurance Co. v. Virginia-Western Power Co.*, 81 W. Va. 299, 94 S. E. 372.

Defendant's affidavit offered in connection with that of Sanson is that he discovered this evidence since the former trial, and that before the trial he had been diligent, but does the proposed testimony of Sanson in other respects answer the requirements of the law respecting new trials based thereon? There was no conflict in the evidence that just before the accident defendant was going east, and plaintiff and her husband were going west, the former west, and the latter east of Johnson's Lane. The rest of the proposed testimony related solely to the reaching of Johnson's Lane, and whether just before the impact Gibbard turned suddenly to the left and struck the Evans car midship as he was about to pass, or was in the act of stopping his car when Evans on the wrong side of the street drove his car into the plaintiff's car in a head-on collision doing the damage. A number of witnesses, including plaintiff and her husband, testified to the character of the collision and the place and direction in which the cars were moving and the result to each of the cars, not contradicted. On the question whether Gibbard suddenly turned to the left when near defendant's car, defendant offered his own testimony and that of his wife, and that question was before the jury on the trial. Sanson's evidence would only be cumulative of their evidence, and contradictory of the overwhelming evidence of the other witnesses, including some of those for defendant, and of the physical effects on the two cars, and would not likely have produced a different finding by the jury. So that if Sanson's evidence should be admitted it would be simply cumulative and contradictory, not justifying a new trial based thereon.

[2] The next question in logical order to be considered is whether the court allowed hearsay evidence to go to the jury over defendant's objections. This question involves certain testimony of Dr. C. O. Tate. When recalled by plaintiff in rebuttal, and after answering that he knew the witness O. A. Wilson previously examined by defendant, he was asked whether at the time and place of the accident Wilson had not said to him in substance that "Dorsey was drunk and making a fool of himself; see if you can not get him away from here." He answered that he did. On his examination in chief Wilson was asked as to the condition in which he found

Evans at the time of the accident. He said he found him in a nervous condition; and to the direct question whether he in his opinion was drunk, he answered that he did not think he was. This was material, because the mental and physical condition of Evans at the time was in issue as accounting for his conduct then and just before the accident; and on cross-examination Wilson was asked whether at the time and place of the accident he had not said to Dr. Tate: "Dorsey is drunk and making a fool of himself. See if you can not get him away from here." His answer was: "No, sir. I never made any such statement as that." The foundation was thus laid for impeaching his testimony by that of Dr. Tate, on the question brought out on direct examination, and as to which the jury were entitled to be enlightened. The object of this testimony was not to introduce original hearsay evidence, but was for the purpose of contradicting the witness for defendant on a fact to which defendant's witness had testified. Such testimony was competent, if not on the material fact, for the purpose of weakening or destroying the value of the witness' testimony. *Jaggie v. Davis Colliery Co.*, 75 W. Va. 370, 84 S. E. 941; *State v. Kock*, 75 W. Va. 648, 84 S. E. 510.

Another point of error affects the evidence of plaintiff's witnesses Dr. D. L. Ash, C. F. Zimmerman and Fred L. Blume, which related to the condition of the defendant Evans on the same day, and within from twenty minutes to a half hour before the accident, and also bearing on the question whether he was drunk or sober when the accident occurred. Numerous other witnesses present testified to the fact of his drunkenness at the very time of the accident, and if all the testimony of these witnesses objected to had been eliminated, the jury could not have found otherwise than that Evans was then in a state of intoxication.

[3] The evidence of Dr. Ash is that shortly before the accident he passed Evans about two blocks west of the stone bridge on Four Pole; that Evans had the front end of his car lodged up against a telephone pole; that he was sitting in his car and looking down and out sideways of the car; that coming back and just before reaching the turn in the road below the stone bridge, he met Evans there in the road, and that he seemed to be weaving back and forth, and Wiswell who was driving witness's car on the right hand side of the road had to drive clear off of the road in order to get out of the way of Evans' car. The evidence of the witness Blume corroborates that of Dr. Ash. The testimony of Zimmerman related to defendant's condition or apparent condition at the place of the accident, between 4:30 and 5 o'clock p. m., a few minutes after it occurred, when he had come back to look after his car. The time of the accident was about 4:25

p. m. This witness said: "I would say the man was drunk." The objection to this testimony is that it relates to matters not directly connected with the accident, and not a part of the res geste. In support of this proposition we are cited to *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119, affirming the general rule that where the issue is whether a person did a particular thing or was in a particular state, the fact that he did a similar thing or was in a particular state at some other time, is inadmissible. Like most general rules this one has its exceptions. One recognized and applied by this court is that where other actions and conduct of a person accused of wrongdoing were so recently connected in time and circumstance as to likely characterize his conduct and condition on the particular occasion involved, evidence thereof may be properly admitted for that purpose. *State v. Waldron*, 71 W. Va. 1, 75 S. E. 558; *First Nat. Bank v. Barker*, 75 W. Va. 244, 83 S. E. 898; *State v. Huffman*, 69 W. Va. 770, 73 S. E. 292. Besides, if Evans was in fact intoxicated twenty or thirty minutes before the occurrence in question, may not the court take judicial notice that he would not likely be in a sober and responsible state at the end of that time?

The next proposition urged in support of reversing the judgment is that plaintiff and her husband were guilty of contributory negligence precluding recovery. That question of fact was fully and fairly submitted to the jury, and as they found for plaintiff on the conflicting evidence, we must conclude they found against defendant on this question, and we can not say their finding was not warranted by the evidence.

[4, 5] The last ground for reversal is that the verdict and judgment were excessive and not supported by the facts proven. It is also urged that the size of the verdict imputes to the jury allowance of punitive damages. There is nothing in the record indicating excessiveness in the verdict or that it includes other than compensatory damages. The jury were not asked to give punitive damages; they were not by interrogatories asked to say how much, if anything, they included for punitive damages. In fact our decisions now make it clear that juries are not allowed to include punitive damages unless they find that the compensatory damages awarded do not constitute sufficient punishment for the wrong done. Only in such cases can the jury award smart money. *Hess v. Marinari*, 81 W. Va. 500, 94 S. E. 968. Per-

haps if the verdict were clearly beyond the amount shown by the evidence to be sufficient to fully compensate the injured party, we might say the jury had included something by way of punishment. But no such case is presented here. The plaintiff, a married woman of about forty years of age, with two children, described as good looking, was cut deeply from her ear across her cheek to the corner of her mouth by the glass of the wind-shield of her car, and the muscles of her jaw were so permanently injured that she has practically lost the use of them. Her head was drawn to the side permanently; and she sustained other cuts and bruises of a permanent nature, more or less disfiguring her. She was laid up in a hospital as a result of her injuries for four or five weeks, and suffered and continues to suffer pain and anguish therefrom. Who can say the damages were excessive and more than sufficient to compensate her for her injuries? It was suggested in argument that if she had been killed, her estate would have been limited to a recovery not exceeding ten thousand dollars. But in such cases the damages go to the heirs; in this case they go to the one injured, as to which the statute imposes no limitation. In actions for personal injuries the law fixes no definite rule for measuring compensation. From the very necessity of the case the jury are made the judges of what is proper compensation. *Kennedy v. Glen Alum Coal Co.*, 72 W. Va. 635, 78 S. E. 788. It is true that a married woman having no separate business or estate, employing herself wholly about her husband's household affairs, who sues for personal injuries, can recover damages only for physical pain, mental anguish and impairment of her capacity to enjoy life. *Warth v. County Court*, 71 W. Va. 184, 76 S. E. 420. But based on these elements who can measure the damages to plaintiff when we consider that she must go about among her family and friends all the rest of her days in a scarred and disfigured condition, her head drawn over, and her ability to masticate her food, of the first importance in maintaining good health, greatly impaired. The verdict no doubt appears large to defendant; but if the jury were right on the facts, his wrongdoing was great, and the only way he can be made to compensate the injured plaintiff is to answer to her in damages.

We are of opinion to affirm the judgment of the circuit court.

(97 W. Va. 658)

PERKEY v. PERKEY. (No. 3994.)(Supreme Court of Appeals of West Virginia.
Feb. 8, 1921.)*(Syllabus by the Court.)*

1. Marriage \S 54—Between persons under age of consent voidable, and void only from time so declared by decree.

Section 1 of chapter 64 of the Code renders marriages between persons under the ages of consent not absolutely void, but only voidable, and void only from the time they are so declared by decree of divorce or nullity.

2. Marriage \S 3—Law of place of marriage held to govern as to marriages of those under age.

If one under the age of consent according to section 2 of chapter 64 of the Code goes into another state and marries one residing there, the law of the place of the marriage would govern, not the law of this state, and in such case section 3 of said chapter would have no application justifying annulment of the marriage on grounds therein provided.

3. Marriage \S 60(7)—Facts to annul marriage between persons under age must be alleged and proven.

To justify a decree annulling a marriage because contracted between persons under the ages of consent, the facts giving jurisdiction to grant such relief must not only be alleged but fully proven.

Appeal from Circuit Court, Cabell County.

Suit by Lawrence Perkey against Elsie Perkey for annulment of marriage. Decree for defendant, and plaintiff appeals. Affirmed.

D. B. Daugherty, of Huntington, for appellant.

MILLER, J. Two grounds are alleged for the annulment of the marriage contract consummated between the parties in the state of Kentucky on November 2, 1918: First, that each was under the age of consent, plaintiff under the age of eighteen, and defendant under the age of sixteen, and that they had not cohabited after plaintiff reached the age of eighteen; second, that the defendant had wilfully and without just cause abandoned and deserted plaintiff in April, 1919.

[1] The ground of abandonment justifying divorce from the bonds of matrimony is not made out by the evidence. On the contrary we think the evidence establishes the fact that plaintiff abandoned defendant, and was aided therein by his parents. Besides, after he separated from her he returned and had intercourse with her, according to his own confession, and shortly afterwards brought this suit. He relies really on the fact that both parties were at the time of their marriage under the ages of consent, prescribed by section 2 of chapter 64 of the Code, mak-

ing the age of consent of the female sixteen years, and that of the male eighteen years. Section 1 of said chapter, among other things, makes marriages between persons under the ages of consent not absolutely void from the beginning, but from the time they were so declared by a decree of divorce or nullity.

[2] The bill alleges that plaintiff was for more than a year next before suit brought an actual bona fide resident of this state; that he and defendant were married in Kentucky, November 2, 1918; and that from the date of their marriage they lived and cohabited in Cabell County, West Virginia, until the latter part of April, 1919, at which time they separated. The residence of defendant prior to the marriage is not alleged; nor does the bill allege, as was the case in *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120, 1 Ann. Cas. 612, and as section 3 of said chapter contemplates, that being residents of this state, and in order to evade the laws of this state, and with the intent of returning to reside in this state, they went into the state of Kentucky and there intermarried contrary to the provisions of section 1 of said chapter. Even if we regard the bill good on demurrer overruled, a question of law which we need not determine, nevertheless there is no proof that defendant was a resident of this state, and that she and plaintiff being such residents went to the state of Kentucky, there to intermarry and evade the laws of this state. If she was a resident of the state of Kentucky, and plaintiff went there and entered into a marriage contract with her, neither his act nor hers could be brought within the purview of our statute. As the court impliedly overruled the demurrer, we might, if the proof showed the fact, allow the bill to be amended so as to conform to the evidence, but the material facts appear neither by pleading nor proof.

[3] Moreover, we think the decree below right for failure of proof on the part of the plaintiff that he was under the age of consent at the time the marriage contract was consummated. He and his mother swear that he was under eighteen years of age at that time, but when taken in hand by the court, the mother swore that plaintiff was born July 18, 1900. The marriage occurred November 2, 1918. If born July 18, 1900, he was then over the age of eighteen years and capable of entering into a lawful contract under the laws of this state. Our statute does not render contracts of marriage by parties under the age of consent absolutely void, but void only from the date of the decree declaring them so; and section 4 of said chapter says that upon the hearing the court shall render a decree affirming or annulling the marriage according to the right of the case. And this section also says it shall be presumed that the marriage is valid unless the contrary be clearly proven. Defendant who was about to

become the mother of a child begotten by plaintiff, and who at the time of the decree lacked but a few days of having reached the age of consent, answered the bill opposing annulment of the marriage.

At common law the age of consent of the female was twelve years, that of the male fourteen years, but marriages under those ages and over seven were not regarded void, but voidable only at the will of either of the parties on arriving at the age of consent. Statutes like ours were not intended to do more than raise the ages of consent, leaving the rules of common law in all other respects unimpaired and in full force. *State v. Lowell*, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 76 Am. St. Rep. 358, and cases cited. And so our statute provides that marriage contracts made under the ages of consent shall be void only from the time they are so declared by decree of divorce or nullity, and as provided by section 4 of the statute, according to the rights of the case.

For the foregoing reasons we are of opinion to affirm the decree.

(88 W. Va. 61)

SUN LUMBER CO. v. NELSON FUEL CO.
et al. (No. 4220.)

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(Syllabus by the Court.)

1. Logs and logging ⚡4—Mines and minerals ⚡55(6)—Deed held to vest title to minerals with irrevocable license to use timber for mining and removing minerals.

A deed granting all of the minerals in and under a tract of land, with all such rights of way and such of the timber upon said land as may be necessary for the mining and removing of such minerals vests in the grantee the title to such minerals and an irrevocable license to use so much of the timber as may be necessary for the mining and removing of such minerals.

2. Licenses ⚡58(2)—License coupled with interest for valuable consideration not revocable.

A license coupled with an interest acquired for a valuable consideration is not revocable, but may be enjoyed by the licensee so long as his interest in the subject-matter continues.

3. Logs and logging ⚡4—License to use timber necessary for removing minerals held not to confer right to use for buildings for employes of mining company.

A right to use so much of the timber on a tract of land as may be necessary for mining and removing the minerals therefrom will confer the right to use only so much timber as is reasonably necessary to be used in direct connection with such mining operations, and at such times as the same may be required for such uses. It will not confer the right to use the timber upon such land for the purpose of

building miners' houses, storehouses, churches, schools, and houses of entertainment for the prospective employes of the mining company.

4. Logs and logging ⚡3(11)—Tender of sum to continue right to remove timber held effectual notwithstanding conveyance of land by unrecorded deed.

The grant of the timber upon a tract of land with a provision that the same be removed therefrom within 10 years, or in case of failure to so remove it within such time that the grantee may extend the time for removal by paying to the owner of the reversion a certain sum per year, and in case of his failure to pay the same he will be treated as having abandoned the said timber, and the title thereto shall revert to the owner of the land, is not defeated where, prior to the expiration of said 10 years, such grantee pays to his grantor the stipulated amount provided to continue the said right of removal for another year, and upon discovering that such grantor was not at said time the owner of the reversion tendered to the owner of the reversion, as shown by the records in the office of the county clerk, said sum of money, which tender was refused, even though it turns out that said land had been theretofore conveyed away by the party to whom such tender was made by a deed which was not placed on record until after the expiration of said 10-year term.

5. Logs and logging ⚡3(11)—Conveyance of timber of certain size held to include only timber of that size at execution of conveyance.

A conveyance of all the timber upon a tract of land which measures 12 or more inches in diameter, to be cut and removed within a certain stipulated time, includes only the timber of that dimension when the conveyance was executed and delivered.

Appeal from Circuit Court, Greenbrier County.

Action by the Sun Lumber Company against the Nelson Fuel Company and others. Judgment for defendants, and plaintiff appeals. Affirmed in part, reversed in part, and rendered.

Haymond & Fox, of Sutton, for appellant.
Osenton & Lee, of Fayetteville, and Brown, Jackson & Knight, of Charleston, for appellees Nelson Fuel Co. and others.

Henry Glimmer, of Lewisburg, for appellees J. C. and L. E. McClung.

RITZ, P. The appellant complains upon this appeal of a decree of the circuit court of Greenbrier county dissolving a temporary injunction awarded to it inhibiting the defendant from cutting the timber upon a large tract of land which is held by said defendant under a mining lease, the timber on which plaintiff claims belongs to it.

In the year 1890 one Charles L. McClung was the owner of a large tract of land, or rather of a number of contiguous tracts, sit-

uate in Greenbrier county, and on the 5th day of February of that year he conveyed to M. Erskine Miller and others, trustees, all of the minerals of every kind upon and under a part of his land said to contain 4,046 acres. This deed by its terms grants and conveys "all of the minerals of every kind in and upon and under that certain tract or parcel of land," which is then described by particular metes and bounds, "together with all necessary and convenient rights of way of ingress and egress in, over, and through said land for the purpose of removing said mineral, or minerals, upon other adjacent lands, and also so much of the timber on said lands as may be required for mining said minerals and removing them from said lands." By another deed dated the 19th of August, 1892, said McClung conveyed to said trustees the mineral under another tract of land, which deed contains the same provision as to rights of way and timber as is contained in the deed of February 5, 1890. In 1896 said McClung conveyed to said trustees the minerals under still another tract of land, in which deed the same provisions are again made as to the rights of way and timber; and on the same day said trustees conveyed to said McClung a tract of land, which is described in said deed, from which conveyance, however, there is excepted and reserved all the coal and other minerals, and other substances on, in, and underlying said lands, and timber for mining purposes. The trustees who thus obtained the title to the minerals underlying the four tracts of land referred to in these deeds held the same for the Gauley Coal Land Company, which at that time was a voluntary association, but which subsequently became a corporation, and took the title to the lands in its own name. In addition to these McClung lands, this company owns very extensive mineral lands lying not only in Greenbrier county, but in some of the adjoining counties. On the 23d of October, 1918, the Gauley Coal Land Company executed to John B. Laing a lease of certain of its lands for mining purposes, the lands acquired by said lessee containing about 2,800 acres, about 2,000 acres of which is included within the lands conveyed by the four deeds above referred to, part of said 2,000 acres being within the lands conveyed by each of said deeds, but not covering all of the lands conveyed by any of said deeds. This lease permitted Laing to enjoy in the mining of the coal the timber rights which the Gauley Coal Land Company had upon the land. Laing subsequently transferred all of his right under said lease to the defendant Nelson Fuel Company, which at the time of the institution of this suit was the holder of the same.

Subsequent to the conveyance of these minerals by C. L. McClung, as above mentioned, to wit, on the 10th of November, 1909,

he made a deed to J. O. and L. E. McClung, by which he conveyed to them all of the timber upon his lands, which included the lands, the minerals under which had been theretofore conveyed, 12 inches in diameter and up, and on the same day J. O. and L. E. McClung conveyed this timber to E. G. Rider and F. D. Stalnaker. In this deed to Stalnaker and Rider there was excepted and reserved such timber as had been theretofore conveyed to or reserved by the Gauley Coal Land Company for mining purposes. Stalnaker and Rider, on the 18th day of November, 1909, conveyed the timber to Amos Bright and J. H. Brewster, who were acting for and on behalf of the plaintiff Sun Lumber Company, and who by deed of October 4, 1911, conveyed the same to that company, and it is under this deed that the plaintiff claims to be the owner of all the timber upon the land 12 inches in diameter and up.

By two deeds dated respectively the 13th of February, 1919, and the 7th of March, 1919, C. L. McClung conveyed to John B. Laing all of his remaining interest in these lands, with some inconsiderable exceptions. Laing transferred the right so acquired by him to the Nelson Fuel Company, which in turn transferred it to the Gauley Coal Land Company, so that the Gauley Coal Land Company thus became the full owner of the McClung lands, with the exception of such rights as may be vested in the Sun Lumber Company under the timber deeds above referred to, unless C. L. McClung had parted with his interest in it prior to his conveyances to Laing of February 13, 1919, and March 7, 1919, by a paper which he executed on the 8th of November, 1897, to Amanda Shawver, and which will be more particularly hereafter adverted to.

In the deed from C. L. McClung to J. O. and L. E. McClung conveying the timber upon this tract of land there is a provision in regard to the time within which said timber is to be removed, and which provision is as follows:

"First, parties of the second part are to have ten years from the date hereof for the removal of the timber from the land and if not removed within the said ten years they are to pay to the parties of the first part the sum of \$200 thereafter for each year the timber may remain on the lands for the privilege of continuing the removal, or should the parties of the second part abandon the timber or its removal it is to revert to the parties of the first part, but the payment of the \$200 is to preclude the abandonment."

This same provision in effect is contained in the deeds from J. O. and L. E. McClung to Rider and Stalnaker, and from Rider and Stalnaker to Bright and Brewster, and from Bright and Brewster to the plaintiff.

The interest of the several parties in this

land being as above indicated, the Nelson Fuel Company, on the 2d day of October, 1919, notified the plaintiff that it was preparing to begin mining operations upon its lease, under the terms of which it was entitled to use all timber on the leasehold premises necessary for the mining and removal of the coal, and that in accordance with this right it would proceed at once to cut any timber which it found necessary for mine ties, mine props, tipples, railroad siding, cross-ties for switches approaching its mine, storehouse, enginehouse, and for necessary houses for the miners who would be engaged in mining the coal. Upon receiving this notice the plaintiff filed its bill setting up its title to the timber as above stated, and claiming to be the owner of all of the timber on said tracts of land 12 inches in diameter and up, and averring that it was the intention of the defendant Nelson Fuel Company to cut the plaintiff's timber for the purposes specified in the notice above referred to, and asked that it be enjoined from doing so. A temporary injunction was granted. To this bill the defendant Nelson Fuel Company filed its answer by which it contended that under the three deeds conveying the minerals to the Gauley Coal Land Company's trustees, and the one deed in which the minerals were reserved, because of the provisions in said deeds in regard to the timber, it was the owner of said timber, and had the right to cut the same to the extent that it was necessary for the purpose of mining said coal and removing the same, and that it would require all of the timber upon said land for its mining purposes. It claimed that the deeds to the Gauley Coal Land Company's trustees, above referred to, were effective to divest C. L. McClung of the title to the timber upon this tract of land, and that his subsequent deed conveying the timber 12 inches and up to J. O. and L. E. McClung passed no title, for the reason that there was not at that time any title remaining in said C. L. McClung to the said timber. It claims further that, even though the deed from C. L. McClung to J. O. and L. E. McClung did convey the timber upon said tracts of land, the right to remove the same was limited to 10 years, and that the said plaintiff, claiming under said deed, had not commenced or completed the removal thereof within said 10 years, and had not complied with the condition requiring the payment of \$200 a year for continuing such privilege, wherefore, under the language of said deed, the title to said timber reverted to and became vested in the Gauley Coal Land Company, the present owner of the reversion. It further claims that the deed from C. L. McClung to J. O. and L. E. McClung, above referred to, was ineffectual to pass any title to the timber upon said tract of land, for the reason that the said C. L. McClung had by a deed made long before

he made the timber deed, to wit, on the 8th day of November, 1897, conveyed all of the interest then remaining in him in said tract of land to Amanda Shawver, and certain of his children and grandchildren mentioned in said paper. In its answer, which it asks to be taken as a cross-bill, it asks that the paper last above referred to be construed by the court, and the status of the parties thereunder determined. It asks the court also to hold that the mineral deeds above referred to vested in the Gauley Coal Land Company the title to all of the timber upon said land, and that it was entitled to use all thereof as lessee of said company, and to hold that the plaintiff by virtue of the several timber deeds referred to acquired no title or interest in the timber on said land, or if, perchance, it had acquired any such title or interest that the same had reverted to the Gauley Coal Land Company, the owner of the reversion, under the last conveyances from McClung to Laing above referred to. Some testimony was taken by the parties, but little of it is of any materiality in the determination of the questions involved. The defendant Nelson Fuel Company proved by witnesses introduced by it that in order to carry on mining operations upon said tract of land it would require for mine props, mine ties, timber for the construction of its tipples, houses, stores, and other buildings useful in connection with said mining operations considerably more than all the timber remaining upon the tract of land, and the plaintiff did not undertake to controvert this testimony.

The court below held that the paper writing dated the 8th day of November, 1897, purporting to be a deed from C. L. McClung to Amanda Shawver, now Amanda McClung, is an executory contract to convey a life estate to said Amanda Shawver, and does not convey or contract to convey any other right or interest in the land, and that the reversion thereof, after the life estate so contracted to be conveyed, remained after the execution of said paper in the said C. L. McClung; that the mineral deeds above referred to vested in the Gauley Coal Land Company the title to so much of the timber as was necessary for its mining purposes, and, it being shown that all of such timber was necessary for such purpose, the injunction was dissolved, and the plaintiff's bill dismissed.

The decision of this case involves the determination of the following questions: What interest in the timber upon these lands was acquired by the Gauley Coal Land Company under the deeds to its trustees? And if it should be held that these deeds were effective to grant to it all of the timber upon the lands under the showing made, then, of course, the subsequent deed made by C. L. McClung by which he attempted to convey certain timber to J. O. and L. E. McClung passed nothing. If, however, it be deter-

mined that the Gauley Coal Land Company did not acquire the timber upon these lands by the mineral deeds above referred to, then it is necessary to inquire whether the plaintiff has any interest therein holding under the deed made by C. L. McClung to J. O. McClung and L. E. McClung purporting to convey all of the timber upon the lands 12 inches in diameter and up, and this involves a consideration of the effect of the paper executed by C. L. McClung to Amanda Shawver above referred to. If it should be held that this paper was effective to convey all of the interest that C. L. McClung had remaining in these lands to the said Amanda Shawver and the other parties mentioned in said paper, then, of course, his subsequent deed to J. O. and L. E. McClung purporting to convey the timber passed nothing, for there would be nothing remaining in him to convey. And, should it be held that this paper was not effective to pass the title of C. L. McClung, then it becomes necessary to inquire whether or not any interest which the plaintiff acquired in said timber has reverted to the Gauley Coal Land Company for its failure to remove the same within the 10 years specified in the deed, or to pay the annual consideration provided therein for an extension of the time.

[1] Was the circuit court right in its holding that the mineral deeds to which reference has been heretofore made granted the timber upon these lands to the Gauley Coal Land Company's trustees, or did these deeds confer only a license to use so much of the timber as was necessary for mining and removing the coal? It cannot be doubted that the purpose of these conveyances was to grant the minerals in these lands. That is what the grantees bought and paid for. The use of timber and the rights of way over the lands referred to in the deeds were only incidents to the grant of the minerals, to be used in connection with the enjoyment of the estate conveyed by the deed. We do not think it can be said that these deeds vested in the grantees therein any estate whatever in the timber. It only conferred upon them a license to use so much of the timber in connection with their mining operations as might be necessary therefor, and might be available when the time for its use in connection with such operations arrived. In the case of *Godfrey v. Coal Co.*, 82 W. Va. 665, 97 S. E. 186, we had under consideration a very similar provision. That was a suit for damages brought by the owner of the land against a coal company operating thereon, for destruction of the timber, and the defense was made that, inasmuch as the coal company had been granted the use of so much timber as was necessary for mining purposes, and that all of the timber upon the land would be necessary therefor, the plaintiff could not claim any damages for the destruction there-

of. We held, however, that no title to the timber was vested in the grantee under the mineral deed, but that the same remained the property of the grantor until the grantee exercised his right to cut and appropriate it to the use contemplated, in effect holding that this right was a mere license incident to the grant of the minerals. A similar holding was made in the case of *Paxton Lumber Co. v. Panther Coal Co.*, 83 W. Va. 341, 98 S. E. 563. The plaintiff contends that, if the defendant Nelson Fuel Company took any rights in the timber under the deed, it was a license to cut the same as its needs might require, and that the same was revocable by the grantor at any time, and was revoked by the subsequent conveyance of the timber. It is quite true that a mere license ordinarily may be revoked, and the licensee deprived of any right to act thereunder, but this rule is not without its limitations.

[2] Where the license is coupled with an interest granted upon a valid consideration, such license may not be revoked, but will confer upon the licensee the power to exercise the rights conferred so long as the interest to which the license is incident continues. 17 R. C. L. title "Licenses," § 91; *Gausson v. Morton*, 10 B. & C. 731, 109 Eng. Reprint, 622; *Winter v. Brockwell*, 8 East, 308, 103 Eng. Reprint, 359; *Doe v. Wood*, 2 B. & Ald. 724, 106 Eng. Reprint, 529; *Wood v. Manley*, 11 Ad. & E. 34, 113 Eng. Reprint, 325; *Miller v. State*, 39 Ind. 267; *Russell v. Hubbard*, 59 Ill. 335; *Thompson v. McElarney*, 82 Pa. 174; *United States v. Railroad Co.*, 1 Hughes, 138, Fed. Cas. No. 14,510; *Boults v. Mitchell*, 15 Pa. 371; *Ricker v. Kelly*, 1 Greenl. (Me.) 117, 10 Am. Dec. 38, and note at page 41; *Chicago & Ind. Coal R. Co. v. Hall*, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231; *Western Union Telegraph Co. v. Pennsylvania Co.*, 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968; *Ackroyd v. Smith*, 10 Eng. Rul. Cas. 1, and note at page 11. These authorities very clearly establish the doctrine that, where a license is coupled with an interest, it may be exercised as an incident to that interest, and may not be revoked so long as the interest to which it is incident is vested in the licensee. We are of opinion in this case that the right of the defendant to the use of timber for its mining purposes is a license coupled with its ownership of the minerals in the land, and that so long as it owns these minerals this license to use the timber may be exercised by it. It confers upon the defendant the right to take so much of the timber as may reasonably be required for the mining and removal of the coal, and as the same may be required for that purpose, and the plaintiff took the title to the timber subject to this right of the defendant.

[3] The defendant contends that it has a right to use this timber for the construction

of houses, store buildings, churches, and places of amusement for the men whom it will employ in its mining operations, as well as for the erection of tipples, railroad sidings, mine tracks, and for props in the mines, and that, even though it may only have an irrevocable license, it has the right to use all of this timber for the purposes aforesaid. As before stated, the license does not confer upon the licensee any title or interest in the property. It has a right to use it, and of course this right of user exists only when the occasion therefor arises. The defendant under its mineral deeds did not acquire any interest in any of the timber on this land, but only a right to use so much of the timber as its mining operations might require, as the same were carried on. The title to the timber remained in McClung, and passed to his grantees in the timber deeds. If in the conduct of its mining operations the defendant uses all of the timber on the land for the purposes contemplated by the parties, then nothing will remain for the plaintiff. If, on the other hand, plaintiff removes the timber conveyed to it in advance of the use of it by the defendant for its mining purposes, the defendant, for those purposes, will have to be content with exercising its right upon such timber as may remain when the same is required for mining. The mining operations upon this 2,000 acres of land will doubtless continue for many years, and the timber now upon the land which is at this time of insufficient size for mine props or mine ties in all probability will be sufficient for that purpose when the time for its use arrives. Can the defendant's contention that it is entitled to use this timber under this license for the purpose of building miners' houses, storehouses, churches, theaters, schoolhouses, and buildings of this character that it may be desirable or advisable to provide for the use and entertainment of its employes be sustained? The right given by the deed is limited to such timber as may be necessary for mining and removing the coal. Did the parties contemplate the building of a mining village from timber cut from this land under this license? We do not think so. We think the timber which the defendant is entitled to use under the license must be such as is necessary for the operations directly connected with mining and removing the coal, such as the props used in its mines, ties used for its mine railroads, timbers for its tipples and entries, and for cross-ties for sidings constructed to its tipples. It is argued that it is just as necessary for the miners to have houses to live in, and for the company to have a store building where the miners may secure provisions and supplies as it is to have railroads and mine openings. This is entirely true, and it may be that the defendant, for the more effective and convenient operation of its business, may provide

these things, but can it be said that they are necessary for mining and removing the coal? They are an incident to the business, but not so directly connected with it as that it can be said that they are necessary thereto within the meaning of the license granted. There is some discussion of what is included in the terms "mining rights" and "mining purposes" in the cases of *Denver & Rio Grande Ry. Co. v. United States* (C. C.) 34 Fed. 838, *United States v. Chaplin* (C. C.) 31 Fed. 890, *United States v. Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 14 Sup. Ct. 11, 37 L. Ed. 975, *United States v. Richmond Mining Co.* (C. C.) 40 Fed. 415, *United States v. United Verde Copper Co.*, 8 Ariz. 186, 71 Pac. 954, and *Duncan v. American Standard Asphalt Co.* (Ky.) 83 S. W. 124, from which it may be gathered that the rights to which the licensee is entitled under such licenses must be directly connected with the work of mining. None of these cases fully define the extent to which one may go in the use of timber under such a license as the one involved here, but all of the uses permitted in those cases consisted of a direct application of the timber to the contemplated purpose. We do not think this license can be extended to include any use of timber except the direct application of it to mining and removing the coal, and that the attempt to use it in the construction of houses, store buildings, churches, or theaters is beyond the licensee's right.

[4] The defendant insists, however, that the plaintiff cannot maintain this suit for the reason that it did not remove the timber within the 10 years provided within its deed, nor pay the \$200 provided therein to be paid to prevent the title to said timber from reverting to the owner of the land. There is no merit in this contention. It appears that before the expiration of the 10 years plaintiff did pay to C. L. McClung \$200 with a view of extending its right for another year, but, finding before the expiration of the 10 years that C. L. McClung was not then the owner of the reversion, it tendered \$200 to the defendant Nelson Fuel Company, believing that it was at that time the owner of the land under the deeds made by McClung to Laing, and by Laing to it, above referred to. This tender was refused, and it turned out that the Nelson Fuel Company had before that time conveyed the land to the Gauley Coal Land Company, but this deed was not put on record until some time afterward, so that at the time this tender was made, so far as the records in the county clerk's office were concerned, the Nelson Fuel Company was the owner of the reversion, and the tender of the money to it was sufficient to prevent plaintiff's title from becoming forfeited. In addition to this, upon the refusal of the defendant to accept this \$200, the same was paid

into court for the purpose of preventing any forfeiture.

In its pleading defendant also sets up as a bar to plaintiff's right to maintain this suit the paper executed by C. L. McClung to Amanda Shawver on the 8th of November, 1897, prior to the execution of the timber deed by said McClung to J. O. and L. E. McClung, and asserted that, if this paper was effective to convey C. L. McClung's interest in this land to Amanda Shawver and the other parties mentioned therein, then the timber deed passed no title to J. O. and L. E. McClung, and this would be true. The court below, having all of the interested parties before it, construed this paper to be only an executory contract for the conveyance of a life estate to the said Amanda Shawver, leaving the reversion in C. L. McClung. No complaint is made of this construction by any of the interested parties, and no reason is urged against it. We see no reason for disturbing the lower court's decree in this regard.

[5] The plaintiff in its pleadings insists that it has a right under its deed to cut all of the timber upon this tract of land which may be 12 inches in diameter, or in excess thereof, at the time it actually cuts it, regardless of the size of such timber at the date of the timber deed; while the Nelson Fuel Company insists that, if any timber was granted to the plaintiff at all, it was only such timber as was 12 inches in diameter and up at the date of the conveyance of the timber by C. L. McClung in 1909. There is proof in the record that the poplar timber that was 12 inches in diameter at the date of the deed would in the intervening time have increased in diameter about 2 inches, and that such timber which was say 10 inches in diameter at the date of the making of the deed would in the intervening time have grown to be 12 inches in diameter. The harder woods, it is shown, would not grow so rapidly as the poplar. As to the extent of their growth there is no evidence. It will thus be seen that there may be upon this tract of land considerable timber which was not 12 inches in diameter at the date of the deed, but which the plaintiff would be entitled to cut under its contention, if the same should be sustained. The deed conveys "the timber 12 inches in diameter at the stump 2 feet above the ground and upwards and situate on the lands." There is nothing to indicate an intention that the deed should pass the title to any timber that was not at that time included within that description. Of course, the parties fixed a limit of 10 years within which to remove the timber, and it is undoubtedly true that it would be more convenient, in executing this contract, to apply its terms to the timber at the time it is actually cut; but this is not what the parties provided in their contract. As before

stated, such a construction might include even within the 10 years a large amount of timber which did not answer the description of the timber sold at the time the deed was made and delivered; and not only that, but there is a provision in this contract which permits the purchaser to extend it from year to year after the expiration of the 10 years by the payment of \$200 per year. As to how long this timber may be allowed to stand uncut no one can tell, and if a sufficient length of time is allowed to elapse before the same is cut it may very well be that there will be as much timber 12 inches in diameter and up at the date of the cutting, which was not of that diameter at the date of the deed, as there would be of timber that was of such dimensions at the time of the delivery of the deed.

This same question has been before the courts of other states, and with practical uniformity it has been held that where a deed conveys timber of certain sizes, or for certain purposes, and the time for determining whether or not the timber falls within the description is not specified, it must fall within the definition contained in the contract at the time of its execution and delivery, and that only such timber as does come within the terms of the contract at that time will pass by the deed. In the case of *Bryant v. Bates* (Ky.) 39 S. W. 428, where there was a contract for the sale of trees thirty inches in diameter and up at the stump, with the provision that the same should be removed within three years, the holding was that the measurement should be made as the same were cut, and not as of the date of the deed. But the same court subsequently, in the case of *Evans v. Dobbs* (Ky.) 112 S. W. 667, held exactly the contrary. In that case it was held that, where a contract was made for the sale of all the white oak timber suitable for the manufacture of staves upon the land described, the purchaser was only entitled to such timber as was suitable for such purpose at the date of the deed. In North Carolina it is uniformly held that only such timber passes as answers the description in the deed at its date, unless there is some other time mentioned at which the measurements shall be made. *Robinson v. Gee*, 26 N. C. 186; *Whitted v. Smith*, 47 N. C. 36; *Warren v. Short*, 119 N. C. 39, 25 S. E. 704; *Lumber Co. v. Hines*, 126 N. C. 254, 35 S. E. 458; *Hardison v. Lumber Co.*, 136 N. C. 173, 48 S. E. 588; *Lumber Co. v. Corey*, 140 N. C. 462, 53 S. E. 300, 6 L. R. A. (N. S.) 468; *Isler v. Lumber Co.*, 146 N. C. 556, 40 S. E. 508. Like holdings have been made by the Supreme Court of South Carolina in *Crawford v. Lumber Co.*, 79 S. C. 166, 60 S. E. 445, and *Wilson Lumber Co. v. Alderman*, 80 S. C. 106, 61 S. E. 217, 123 Am. St. Rep. 865. The holdings of the Supreme Court of Georgia also accord with this view. *McRae v. Stilwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R.

A. 513; Goette v. Lane, 111 Ga. 400, 36 S. E. 758; Allison v. Wall, 121 Ga. 822, 49 S. E. 831. In Pennsylvania the same doctrine is declared. Boults v. Mitchell, 15 Pa. 364; Shiffer v. Broadhead, 126 Pa. 260, 17 Atl. 592; Irwin v. Patchen, 164 Pa. 51, 30 Atl. 436. The case of Putnam v. Tuttle, 10 Gray (Mass.) 48, is also in point.

In view of the fact that the deed grants the timber 12 inches in diameter and up, and does not indicate that the size of the timber granted shall be determined at any other time than the date of the delivery of the deed, and of the further fact that the authorities, so far as we have been able to find, uniformly hold that in such case only such timber as is included in the terms of the grant at the time it was made will pass thereby, we are constrained to hold that the plaintiff is only entitled to remove from this land such timber as was 12 inches in diameter and up at the time of the grant by McClung in 1909. The evidence is not sufficiently certain for us to determine what would be the present size of such trees as were 12 inches in diameter at the time of the grant, nor is it at all necessary to fix at this time the limit of plaintiff's rights, for that will not become a practical question until it proceeds to remove the timber. When this happens, if the parties cannot agree, then some appropriate remedy will have to be applied to determine the limits of the plaintiff's rights.

J. O. and L. E. McClung appeared upon the hearing of this case in this court and asked that the decree of the lower court be modified, so as to show that it was without prejudice to any rights they might have against their vendees to collect the unpaid purchase money for the timber conveyed by them to Rider and Stalnaker. The pleadings in this case did not involve in any way their right to collect purchase money. In fact, that was foreign to the subject-matter of this litigation and it could not have been litigated in this suit, even if the parties had attempted it. No decree entered here can in any way affect any interest or right they may have to enforce the collection of any unpaid purchase money.

Our conclusion, therefore, is to reverse the decree of the circuit court of Greenbrier county, except to the extent that it construes the paper writing made by C. L. McClung to Amanda Shawver as being only an executory contract for the conveyance of a life estate, in which respect said decree will be affirmed; and we will enter a decree here adjudging that the plaintiff has the title to the timber on said lands 12 inches in diameter and up, and that the defendant the Nelson Fuel Company, however, has an irrevocable license to cut and use so much of the timber upon said lands as may be necessary for the purposes of mining and removing the minerals, as here-

inbefore defined. The injunction will be reinstated and perpetuated to the extent that the defendant is enjoined from cutting or using any of such timber for the construction of miners' houses, schoolhouses, storehouses, churches, theaters, or any other use not directly connected with the mining and removal of the coal.

(87 W. Va. 738)

STATE v. BOGGS. (No. 4273.)

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(Syllabus by the Court.)

1. Arrest \S 68—Officer not justified in shooting suspected misdemeanor on refusal to stop when ordered.

An officer seeking to arrest a misdemeanor is not justified in shooting or wounding a traveler on the highway whom he has reason to believe is the misdemeanor, and whom he has ordered to halt for the purpose of ascertaining if he is the person for whom he is seeking, where the traveler simply refuses to obey the command, and pursues his journey hurriedly and in such manner as would lead the officer to believe he is the misdemeanor, indicating an escape.

2. Criminal law \S 1169(1), 1170(1)—Error in ruling on evidence not ground for reversal where verdict would not have been changed.

Error in the admission or rejection of evidence will not be sufficient ground for reversal when it appears upon the whole case, including the admissions of the defendant, that the verdict would not have been changed, and ought to be affirmed.

3. Criminal law \S 870—Statute authorizing special verdicts inapplicable to jury trials in criminal cases.

Sec. 5, c. 181, of the Code (sec. 4909), authorizing the circuit court to submit interrogatories to the jury upon the trial of any issue for the purpose of having it render separate verdicts upon any one or more of the issues, does not apply to jury trials in criminal cases.

Error to Circuit Court, Harrison County.

J. E. Boggs was convicted of assault with intent to kill, and he brings error. Affirmed.

Law & McCue, of Clarksburg, for plaintiff in error.

E. T. England, Atty. Gen., R. A. Blessing, Asst. Atty. Gen., and Steptoe & Johnson, of Clarksburg, for the State.

LIVELY, J. This writ of error brings up for review the judgment of the criminal court of Harrison county rendered on the 18th of November, 1920, which sentenced J. E. Boggs to confinement in the penitentiary for two years on a verdict finding him guilty of an unlawful assault with intent to maim,

disfigure, disable, and kill Clyde Coffindaffer.

A justice of the peace had issued a warrant for the apprehension of Joe Costa for a violation of the prohibition law, and had appointed John Siers as a special constable to make the arrest. Siers had obtained information that Costa was expected to arrive at Clarksburg in the nighttime in an automobile with a load of spirituous liquors, and that he would come from Shinnston by the Maulsby bridge across the West Fork river. He had received information that Costa was a "bad" man, and would likely resist arrest, and that there would be danger in making the arrest. He secured the assistance of Boggs, the defendant, and George Darnell, both of whom were members of the department of public safety, and stationed at that time in the vicinity of Clarksburg, where there was an industrial disturbance, informing them of the character of the person to be arrested and the possible danger attending the arrest. This special constable and these two members of the department of public safety went in an automobile to the Maulsby bridge, arriving there about 9 o'clock on the evening of October 5, 1920, and stationed themselves at the end of the bridge nearest to Clarksburg for the purpose of apprehending Costa should he pass that way. The bridge was a covered bridge, and about 20 feet wide, and the record does not disclose its length. They had detained, temporarily, several persons until about the hour of 10:30 p. m., when an automobile coming from the direction of Shinnston entered the bridge. In this automobile were Dr. Clyde Coffindaffer, F. Byrl Wyer and wife, and John Ashcraft, who was driving the car. Clyde Coffindaffer was a physician, well known in that community, practicing his profession at Clarksburg, and was then taking Mrs. Wyer, who was suffering from peritonitis, to a hospital at Clarksburg. She was sitting on the rear seat with her husband on her left side. The doctor was sitting in the right front seat by the side of Ashcraft, and had his back toward the right door of the car, and was assisting in steadying Mrs. Wyer with his left hand. This car was a four-seated Chandler chummy roadster, and was somewhat similar to the car which Costa was supposed to be using. It appears that Siers, the special constable, was standing on the left-hand side of the bridge, a short distance inside thereof, and to the left of this car as it approached. He had an electric flashlight in one hand, which he waved at the approaching car, and two of the witnesses in the car stated that he had a pistol in the other hand. Siers denied that he had a pistol. Boggs was on the right-hand side of the car as it approached, and inside of the covered bridge a short distance, and just in front of another car which was standing there, which had been detained, and which

belonged to a Mr. Raikes. Darnell was also standing on the same side of the bridge, and a short distance from the other end of the last-named car. As the doctor's car approached these men it slowed down, but as Siers and Boggs approached it, seemingly in a threatening manner, and without giving information of their design, the chauffeur quickly "put on more gas" and the speed of the car was quickly accelerated. Shooting then began, and there is considerable conflict as to whether the first shot was fired from the left-hand side of the car or from the other side. Siers states that Boggs was on the same side of the bridge with himself. Boggs stated that he was on the opposite side, and all of the other witnesses place him on the opposite side, from Siers. All of the occupants of the car state that the first shot penetrated the rear left-hand tire of the car, releasing the air therefrom, and almost immediately after the first shot the man standing on the opposite side of the car and four or five feet from the car presented his pistol at Dr. Coffindaffer, and shot him in the back, the doctor exclaiming, "Oh, I am shot." The car was in rapid motion, and after it left the bridge some more shots were fired. The wounded man was immediately taken to the hospital at Clarksburg, where he received medical attention. The testimony of Boggs does not coincide with that of the occupants of the car respecting the actual shooting. He corroborates the state's evidence as to the place he was standing, but testified that after he approached the car when it slowed down, and after it had started to go faster, he commanded them to halt, and that the car had passed him and had almost reached Darnell, who was standing several feet from him, when Darnell also called on the car to halt, and he (Boggs) then began shooting, not at the occupants of the car, but at the tires, and for the sole purpose of stopping the car. He did not know that any one was shot that night, and had no idea that any one had been wounded until the next morning, when he heard from Siers, or saw it in the newspapers, that Dr. Coffindaffer had been severely wounded. He stated both before and on the trial that all of the shots which were fired that night were fired by him with a 45 Colt's Army revolver. Immediately upon learning that Dr. Coffindaffer had been wounded, he came to Clarksburg, admitted the shooting to the sheriff and others, and went to the doctor's sick room, where he admitted the shooting, but stated that he had no intention whatever of hurting any one, and that his shots were in good faith at the tires of the automobile, and for the purpose of stopping it in order to make the arrest of Costa.

Boggs, Siers and Darnell were indicted for malicious wounding and Boggs elected to be tried separately. On the evidence, a summary only of which is above given, the jury

found the defendant not guilty of malicious wounding, but of unlawful wounding with the intent to maim, disfigure, etc. Five instructions were offered by the state, all of which were objected to by the defense, but all were given except instruction No. 3. Instruction No. 1 was to the effect that an officer had no right to kill, or attempt to kill, in endeavoring to make an arrest for a misdemeanor, and unless the jury believed from the evidence that these officers were attempting to arrest Coffindaffer for the committing of the felony, or in the act of committing a felony, that the defendant was not authorized to shoot with intent to kill for the purpose of arresting Coffindaffer. This instruction simply lays down the law of arrest, and it is to the effect that defendant was not justified in shooting Coffindaffer with intent to maim, etc., unless the jury believe that Coffindaffer was doing an act which would justify such shooting. We can see no good objection to this instruction. It is apparent that defendant and the other officers were attempting to make the arrest of Joe Costa, the person for whom they had the warrant, and when the car began to go faster at the command to halt they erroneously concluded that Dr. Coffindaffer was the person for whom they had the warrant or that he was in that car; and the instruction simply propounded the law applicable to that situation, to the effect that an officer is not justified in shooting with intent to kill the person for whom he has a warrant unless that person has committed, or is in the act of committing, a felony; and in no case is an officer justified in shooting with like intent in making an arrest for a misdemeanor. The instruction is further objected to because there was no evidence of any attempt to kill any one on that occasion; that the shooting was accidental. But the evidence of all the witnesses who were in the car was positive that the pistol which did the wounding was fired at Dr. Coffindaffer's back when only a few feet from him. The question whether it was accidental or intentional is one for the jury. A man is presumed to intend that which he does or which is the immediate or necessary consequence of his act. If the jury believed beyond a reasonable doubt that the shot was fired with the intent to kill or wound the doctor, then there was no justification unless they further believed that the doctor was committing, or attempting to commit, a felony.

[1] These officers were evidently attempting to make an arrest, or, at least, to stop the occupants of the car for the purpose of ascertaining if Costa was therein in order to make the arrest. Neither purpose alone would justify the shooting of the occupants unless with the qualification set out in the instruction. It is argued that the doctor should have stopped and permitted these

men to make examination of the car and search for Costa. But even if this be true, and he did not stop or permit search, that alone would not justify the defendant in shooting him, or in such reckless shooting as would be likely to kill or wound any of the occupants of the car.

Objection is made to instruction No. 2, which was given for the state, because it is more or less abstract in laying down the law of arrest, in that an officer acts at his own peril in making such arrests; that it is unlawful in making the arrest of a person without at the time having a warrant for him unless he is at the time committing a felony, or in the act of committing a felony, or has committed some offense less than a felony in the presence or view of such officer. While this instruction is somewhat abstract, we cannot see that it might have or did mislead the jury. *Reed's Case*, 98 Va. 817, 36 S. E. 390.

Instructions numbered 4 and 5, given for the state, while objected to at the trial, are not insisted upon as error here. We can see no error in them. They correctly state the law on reasonable doubt as to the guilt of the prisoner.

Five instructions were asked for by the defendant, and all given except No. 3, which was refused, and error is assigned for that reason. This instruction was to the effect that the defendant, then assisting officers who had a warrant for Costa and awaiting him on the bridge, had the lawful right to temporarily detain Dr. Coffindaffer long enough to ascertain if he was Costa or some other person, and to use such reasonable force as was necessary to cause the doctor to pause for that purpose, if he refused such request.

The evidence did not disclose that Dr. Coffindaffer or any other person in the car knew that these men had a warrant for Costa or for any other person. He knew Siers, but it must be remembered that Siers was a special constable for his arrest only. Their mission was not known to him, nor did he know that they were officers; and the command of "Halt!" was not very communicative of their authority or design. Besides, if they had any right to detain him temporarily, the force used was not reasonable. We cannot accede to the proposition that an officer with a misdemeanor warrant may station himself on the highway and command innocent persons to halt, and if they, not knowing the intention or design, refuse to do so, that the officer is then justified in shooting those refusing, or in shooting so recklessly that fatalities or serious injuries may occur. It is well settled that where an arrest for a misdemeanor has been made, and the prisoner breaks away, the officer is not justified in shooting him. *Voorhees on Arrest*, § 197. Many authorities say it is murder if death results. The officer must not use unnecessary force in making the arrest, and if he

does so it is at his peril. These well-settled principles would apply with much greater reason where an innocent traveler on the highway is not even sought to be arrested, but to be detained for examination. This instruction would tend to lead the jury to understand that the law would justify the defendant in using force necessary to cause Dr. Coffindaffer to pause for the purpose of being investigated. The force used was the firing of the shots, one of which almost caused death. Even this force was not sufficient to cause him to pause; on the contrary, it caused him to flee for his life. The instruction would, if given, have tended to justify the offense charged. Under this evidence the instruction was misleading and properly refused. It is argued that if an officer can break a door to enter a dwelling house in order to search for a criminal supposed to have taken refuge therein, then like force can be used to stop and enter an automobile and make search. But before an officer can break the doors and enter a dwelling house to make an arrest, he must first make due demand as an officer armed with authority, and a refusal would not justify the taking of life. The controlling feature on this question in this case is not what might have been done, but what was actually done.

Shooting with firearms by officers in pursuit of fugitives charged with minor crimes, as a ruse to prevent further flight, is illegal as a reckless use of firearms, and was disapproved in *State v. Cunningham*, 107 Miss. 140, 65 South. 115, where the court said: "An officer must not intentionally shoot a misdemeanor who is a fugitive, nor must he discharge a firearm while in pursuit, in such manner as to cause such fugitive injury."

Exception is made to the ruling of the court in not allowing the witness John Siers to detail information he had received from A. L. Lohm, a federal officer, to the effect that Costa was a dangerous character, and would likely resist arrest, and would attempt to run over the officers with his automobile; and also that Costa was expected to come through the bridge that night; and that he (Siers) had informed the defendant of what had been told him in that regard by Lohm; also that the court refused to allow the warrant to be put in evidence which witness had as a special officer for Costa for violation of the prohibition law. The record discloses that practically all of this evidence went to the jury in another form. The defendant testified that he was requested by Siers to help him make an arrest of a man who was coming in with liquor. "He [Siers] said he [Costa] was a bad man, and he did not feel like going after him alone; he wanted some assistance, and I felt it was my duty to do so, and I did." Question: "Was that man Joe Costa?" Answer: "Joe Costa." Question: "At the time you went down to

the bridge did you know, or had you learned, that this fellow, Joe Costa, was a bad man, and would likely resist arrest?" Answer: "I did." Siers also testified that he had a warrant for Joe Costa at the time he went to the bridge, and requested the defendant and Mr. Darnell to accompany him to assist in making the arrest, and that they were all at the bridge for that purpose. The information which Siers had received from Lohm went to the jury, and the prisoner received the benefit of it. The fact that Siers had a warrant for Costa went to the jury, and it is not perceived how the warrant itself, if introduced to the jury, would have strengthened that fact. Moreover, it is apparent that the jury gave the defendant the benefit of this evidence. It did not find him guilty of malicious shooting. The object of that evidence was to repel the presumption of malice in the use of the deadly weapon, and the reason why the defendant was at the bridge. Malice was successfully eliminated. The verdict was for unlawful wounding.

[2] The error, if any, in refusing to allow Siers to give this evidence (which in fact went to the jury in another form), was harmless, in view of the verdict. *State v. Miller*, 102 S. E. 303. Had Costa been in Dr. Coffindaffer's place, the jury would have been justified in finding a verdict for unlawful wounding. There is conflict in the evidence as to the actual shooting. All of the occupants of the car, four in number, testify that the shot which wounded the doctor was fired by a man standing immediately to the right of the car, and within four or five feet of the doctor, and that he pointed his pistol directly at, and in line with, the doctor's shoulder. The doctor felt the burn on his neck. The ball entered the posterior part of his right shoulder, close to the upper portion of the shoulder blade, or scapula, and came out just beneath the collar bone, which it broke, and lodged in his clothing. There was evidence that a pistol ball had penetrated the rear tire on the left side of the car, entering from the left side of the tire near the rim, and, glancing upward, came out of the opposite side of the tire, making a ragged hole. All of the occupants of the car testified that the first shot came from the left side, the side where Siers stood, and they heard the air go out of the tire, and immediately afterwards the shot which wounded the doctor was fired from the right by a man standing very close to the car, and in front of the other car standing on that side of the bridge. This was about the position which the defendant testified he occupied at the time of the shooting. The defendant very frankly and promptly stated that he had done all the shooting that was done there that night, and the other defendants make the same statement. As heretofore stated, the main

conflict in the evidence concerning the immediate shooting arises between the statement of the witnesses that the shot was fired directly into the back of the doctor from a man on the right and the statement of Boggs that the shots were not fired until after the car had passed him. The physical fact that the doctor was shot in the right shoulder, and the range of the bullet directly through his body, corroborates the testimony of the state's witnesses. These questions of fact were passed upon by the jury and adversely to the defendant. It was within the province of the jury under this testimony to say that the defendant either did the act maliciously or unlawfully. The jury was instructed by defendant's instruction No. 1 on the question of malice. That instruction reads as follows:

"The court instructs the jury that the defense of accidental injury to Dr. Coffindaffer goes to the very gist of the charge, and denies all criminal intent, and throws the burden of proving the intent, as charged in the indictment, beyond a reasonable doubt, upon the state. Therefore, although you may believe that the defendant Boggs did shoot and wound Dr. Coffindaffer, yet unless you believe beyond all reasonable doubt that such shooting was done with intent to maim, disfigure, disable, and kill him, you must find the defendant not guilty of the malicious and unlawful shooting."

This instruction put before the jury the full theory of the defense, and it may be that the result was the best for the defendant that he could expect under the circumstances. At least the jury so disposed of the case, and it is not within the province of this court to gainsay it.

Exception was made to the ruling of the court in refusing to permit Dr. Coffindaffer to state on cross-examination a conversation between himself and two men who passed him on Gipsy hill, a place about a mile from the bridge and between Shinnston and the bridge. The doctor had stated on cross-examination that he had passed two men at that point who asked him if he had any whisky, and, if so, "you had better not go ahead." To which he replied, "'We haven't got any whisky; we have got a very sick woman,' and I said—I don't know whether I said, 'We are in a hurry,' or not, and they began to say something more, and I thought the fellows were drinking, and we just drove on." The defense then asked, "Now, Doctor, I want you to state what these parties said to you when they came to you, or when they drove past you, on the road before you reached the bridge." This question was objected to, and the court sustained the objection because the witness had practically answered the question, and because the court said it was not pertinent to the issue. There was another ground upon which this question was not proper. This was a cross-examination of the doctor, and he had not testified to this mat-

ter on direct examination. As to this conversation between these witnesses the defense was making the doctor their own witness. He could have been recalled for that purpose when the defense put in its evidence. *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

Interrogatories were prepared by the defense and submitted to the jury touching the questions of malice and the intention of the defendant in firing the shots, and were carried by the jury to their room, and afterwards, and before they returned their verdict, on motion of the state, these interrogatories were withdrawn from the jury over the objection and exception of the defense, and this action of the court is insisted upon here as error.

[3] The statute allowing interrogatories is found in chapter 120 of the Acts of 1882, and is section 5 of chapter 131 of the Code (sec. 4900), which chapter relates to trials in civil cases. There is no reference to propounding such interrogatories in chapter 159 of the Code (secs. 5577-5601), which relates to the trial of criminal cases. The statute is as follows:

"A circuit court may in any case before it, other than a chancery case, have an issue tried, or an inquiry of damages made by a jury, and determine all questions concerning the legality of evidence and other matters of law which may arise. Upon the trial of any issue or issues by a jury, whether under this section or not, the court may on motion of any party, direct the jury, in addition to rendering a general verdict, to render separate verdicts upon any one or more of the issues, or to find in writing upon particular questions of fact to be stated in writing. The action of the court upon such motion shall be subject to review as in other cases. Where any such separate verdict or special findings shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

It is at once apparent from the context that these interrogatories were intended to be used only in the trial of civil cases. On this question Judge Cooley says:

"How far the jury are to judge of the law as well as of the facts is a question a discussion of which we do not propose to enter upon. If it be their choice to do so, they may return specially what facts they find established by the evidence, and allow the court to apply the law to those facts, and thereby to determine whether the party is guilty or not. But they are not obliged in any case to find a special verdict; they have a right to apply for themselves the law to the facts, and to express their own opinion, upon the whole evidence, of the defendant's guilt." *Cooley's Const. Lim.* (7th Ed.) p. 461.

"Statutes permitting findings to be required in response to interrogatories are held not to apply to criminal cases, for the reason that to so apply them would be to impair the right of trial by jury secured by the Constitution. It is one of the most essential features of the right of trial by jury that no jury should be

compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit.

"But though the jury cannot be compelled to answer specially, it is undoubtedly at liberty to include special findings in its verdict." *Clementson on Special Verdicts*, p. 49.

See, also, *People v. Roat*, 117 Mich. 578, 76 N. W. 91; *People v. Marion*, 29 Mich. 31; *Maiden v. Commonwealth*, 82 Ky. 133; *Smith v. State of Ohio*, 59 Ohio St. 350, 52 N. E. 826; *State v. Fooks*, 65 Iowa, 196, 452, 21 N. W. 561, 773.

This law has been on our statute books for 38 years, and it has never been considered as applying to criminal cases by either the bench or the bar. This fact could be considered in the interpretation of the application of this statute if it were necessary. "A construction of a statute that has been acted upon by the bench and bar for nearly half a century should not be disturbed. The common consent and opinion of the legal profession on a question of the construction and practical operation of a statute were held to be of persuasive force." *Lewis' Sutherland Statutory Construction* (2d Ed.) vol. 2, p. 887.

As above intimated, we are of the opinion that special interrogatories cannot be propounded to the jury in criminal cases, and we see no error in the action of the trial court in withdrawing these interrogatories from the jury. In the first place, they should not have been submitted to the jury.

This is a most unfortunate case, both for the defendant and for Dr. Coffindaffer. The defendant is only 26 years of age, and for nearly two years he was with the American Expeditionary Forces in Europe, and his services were acknowledged by decorations for gallantry on the battlefield. Possibly his military training impelled him to act over hastily when the occupants of the car refused to heed the command of "Halt!" Possibly the influence of army life and the incidents of the battlefield made it more difficult for him to heed the civil requirements in making arrests. While his punishment may be severe, under all the circumstances this court, perceiving no error in his trial, can give him no relief.

The judgment of the lower court is affirmed.

Affirmed.

(87 W. Va. 763)

BRAUDE & McDONNELL, Inc., v. ISADORE COHEN CO. (No. 4152.)

(Supreme Court of Appeals of West Virginia. Feb. 22, 1921.)

(Syllabus by the Court.)

1. Evidence §442(1)—Parol evidence admissible only when contract incomplete on face.

Generally a written contract must appear on its face to be incomplete in order to permit

parol evidence of additional terms not embodied therein.

2. Evidence §397(2)—Written contract presumed to contain the whole agreement.

Though no written contract, which does not in terms state that it contains the whole agreement, precludes the possible supposition of additional parol clauses not inconsistent therewith, yet if, upon inspection and study of the writing, it appears to contain the full engagement of the parties, and to define the object and measure the extent of such engagement, the presumption is that it contains the whole of the agreement, and this presumption generally is conclusive.

3. Sales §29—Acceptance by buyer of bill of sale binds without signature.

Acceptance by the buyer of an invoice or bill of sale of goods from the seller, which admittedly purports to be a contract between them, indicates his assent to its terms, despite the absence of the buyer's signature.

4. Evidence §442(2)—Parol evidence to show return privilege held inadmissible.

An invoice or bill of sale, complete on its face, which recites an absolute sale of goods without condition or restriction, defines the terms thereof, some of which are inserted at the buyer's suggestion, and is accepted by the latter with full knowledge of its provisions, is within the rule prohibiting modification of a written agreement by parol evidence, and the purchaser, in defense of an action by the seller for the price of the goods, will not be permitted to show an alleged contemporaneous oral agreement between the parties by which the buyer was accorded the privilege of returning such of the goods as he was unable to sell.

5. Trial §156(2), 412—Demurrer to evidence not waiver of inadmissibility of evidence; inadmissible evidence to be ignored in passing on demurrer to evidence.

A demurrer to the evidence does not have the effect of waiving the demurrant's objections to evidence which the demurree was permitted to introduce over his protest; and in passing upon such demurrer the court should ignore and exclude from consideration so much of the challenged testimony as is legally inadmissible.

Error to Circuit Court, Mercer County.

Action by Braude & McDonnell, Incorporated, against the Isadore Cohen Company. Judgment for defendant after plaintiff's demurrer to the evidence was overruled, and plaintiff brings error. Judgment reversed, demurrer to evidence sustained, and judgment for plaintiff entered.

Arthur F. Kingdon, of Bluefield, for plaintiff in error.

Sanders & Crockett and A. G. Fox, all of Bluefield, for defendant in error.

LYNCH, J. This writ requires the review of a judgment for defendant upon a motion for judgment by plaintiff, based upon a sale and delivery of diamonds by it to defendant September 5, 1919. The transaction began and terminated on the same day, ending with

the actual transfer by the seller of the possession of the property sold. After the parties had introduced their proof, plaintiff demurred to defendant's evidence, and, having considered the questions arising upon the demurrer, the court overruled it, and entered the judgment complained of. In order better to comprehend the real gist of the controversy, it is necessary to set out the original itemized invoice or bill of sale of the goods sold and delivered, and the terms of the sale and delivery evidenced by it, as they appear upon the face of the instrument sued on, the identity and validity of which counsel concede by a stipulation to that effect. The invoice follows:

"All claims must be made immediately after receipt of goods.

"Braude & McDonnell, Inc., Manufacturing Jewelers.

"High Grade Diamond Mountings, Gold and Diamond Jewelry. No. 3840.

"65 Nassau Street, New York. Sept. 5, 1919.

"Sold to Isadore Cohen Co., Bluefield, W. Va.

"Terms: Net, Jan. 1st.

"Salesman, F. H. Mounts.

"[Then follows itemized description of goods sold and prices, aggregating, net, \$1,849.60.]

"Terms Net. Settlement to be made Jan. 1, 1920—all or part cash—balance to be divided into eight equal notes—thirty days apart—first note to be due Feb. 5th.

"F. H. Mounts."

There is no question as to the complete sufficiency of the proof to establish every item of the account and the consideration agreed to be paid. The character of the transaction alone is questioned; that is, whether it was an actual sale accompanied by an unconditional transfer of the title concomitant with the delivery of the goods sold, according to the contention of the plaintiff, or a sale of the goods to defendant, coupled with an authority on his part to return to plaintiff such items of the property as he failed or was unable to sell within a reasonable time after the date of the delivery, technically an agreement of "sale or return" (Williston on Sales, §§ 270 et seq.; 24 R. C. L., Sales, §§ 720 et seq.), as defendant contends. It was upon the latter theory that defendant undertook to reship the goods by express to plaintiff soon after January 5, 1920, a shipment which plaintiff refused to accept and did not accept.

As the demurrer challenges the sufficiency of the proof to entitle defendant to the judgment in its favor, considered in the light of all the facts and circumstances proved by plaintiff, and not inconsistent with those likewise established by the latter, it is permissible and advisable to let Isadore Cohen, the defendant's president, general manager, and also its "buying and financing and selling" agent, for which purpose he devoted all his "working time to the management of

the store and selling goods in it," repeat in his own language his interpretation of what occurred between him and Mounts, the agent and representative of the plaintiff, at the time of the sale.

Cohen says:

"Mr. Mounts came in the store on the day that this invoice was made out and offered—came in and asked me if he could display his goods, and I told him he could, and he opened up his goods there on the case, and after I looked at them I wasn't very anxious to buy; and he was a very good salesman, and he talked about his goods, and said that I bought from him when he was with the other concern, and that he was representing a good concern, and he thought it would be to our advantage to buy his goods, and he was very anxious to sell them to me; and I told him that I didn't need them so badly, but I would try it. As a matter of fact, he has two books that he carries with him; one is the straight invoices, and one is memorandum, consignment; and he offered at first to leave the goods on consignment if I wanted it, but I didn't want him to leave them on consignment for the reason that, in case the goods was sold, they could make their own terms; so I told him if he would leave the goods I will take them, and if I sell any of them I shall settle for it the way he has outlined on his contract here, and if I can't sell it I can return it.' We had them in the safe during the months of October, November, and December, kept them all in the safe, and when a customer came in that wanted to see the diamonds we took the diamonds out of the safe—and we haven't succeeded in selling a great many, so about the first of the year we have returned all except the one, for which we inclosed the check in payment of the one we have sold, and asked them to give us credit for the difference."

For the reasons stated in the above excerpt defendant refused to accept the rings on consignment, but took them on invoice, with provision for deferred payment, and, as he testifies, with an oral understanding permitting return of the goods to plaintiff under the conditions heretofore stated. The only question for consideration is whether testimony relating to the alleged oral understanding is admissible to vary the terms of the invoice, which purports on its face to represent an unequivocal sale without conditions or qualifications of any kind or character.

Considered in the light of all the facts and circumstances surrounding the transaction, including the language used and terms prescribed, and the immediate transfer of the possession of the property, the invoice has all the distinguishing features of a written contract of sale except the signature of the purchaser. Immediately preceding the specification of the property are the words, "Sold to Isadore Cohen, Bluefield, W. Va. Terms: Net, Jan. 1st. Salesman, F. H. Mounts;" and following it are the words, "Terms Net. Settlement to be made Jan. 1, 1920—all or part cash—balance to be divided

into eight equal notes—thirty days apart—first note to be due Feb. 5th." That the provision as to the terms of payment was incorporated in the invoice at defendant's suggestion, for the purpose of having written evidence of the agreement in the form of a contract, is admitted by him. In response to the question, "Did you write this memorandum down there at the time he gave it to you?" he replied:

"We agreed upon it, but he wrote it. * * * The reason this memorandum is put in there is because we agreed upon—if we cannot sell it, we can return it, and if we sell some of the goods, we will have the right to settle it in this way. * * * I made him put on the invoice the terms, if I didn't sell any of the goods, I can return them; if I did sell it, I can have these terms, which I can take advantage of."

The agent Mounts denies that the privilege of return was accorded defendant under any circumstances, and testifies that the sale was unequivocal and unrestricted by conditions, and that he had no authority to agree to such an arrangement with customers to whom he sold goods. It is unnecessary to enter into any discussion concerning Mount's authority to consent to a return of the goods, except to say that, even though he was expressly forbidden to do such a thing, yet his implied authority may have been such as to bind his principal in case he had undertaken to do so. *George De Witt Shoe Co. v. Adkins*, 83 W. Va. 267, 98 S. E. 209.

[3] According to the testimony of defendant himself, the parties prepared the invoice so as to express the terms agreed upon between them, and defendant accepted it with that understanding. He was fully aware of all that it contained. Nor was his signature necessary in order to bind him. The acceptance of the invoice was sufficient, and doubly so as it contained the terms which he had insisted upon. "The acceptance of a paper which purports to be a contract sufficiently indicates an assent to its terms, whatever they may be." 1 Williston on Contracts, § 90a. So one may, under certain circumstances, be bound by the terms and conditions contained on telegraph blanks, bills of lading, tickets, or warehouse receipts, by printed notices on letter heads, and by notices on merchandise. 1 Williston on Contracts, §§ 90b-90c. See, also, *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696.

[1] Since defendant, in effect, admits the validity of the contract between the parties as to the terms of payment therein expressed, can he now insist, and by parol testimony attempt to prove, that the invoice did not state all that was agreed upon between Mounts and him, but that there was a contemporaneous oral agreement completely altering and changing the apparent finality of the sale? The parol evidence rule does not apply to every contract of which there is written evidence, but only to such as appear on

their face to be complete and to embody in one instrument all the essential terms of the agreement. If the parties expressly state, in terms, that the writing shall be but a partial integration of the agreement, or if the contract on its face purports to omit some important feature, then parol evidence may be admitted to explain the omission and show what the full agreement was. Generally, however, a contract must appear on its face to be incomplete in order to permit parol evidence of such additional terms. 2 Williston on Contracts, § 633; *Griffin v. Runnion*, 74 W. Va. 641, 82 S. E. 686; *Petty v. United Fuel Gas Co.*, 76 W. Va. 268, 85 S. E. 523; *Manufacturing Co. v. Smith*, 79 W. Va. 736, 91 S. E. 817.

[2] But defendant contends that from a reading of the invoice or bill of sale it is not a necessary inference either that it is a statement of the entire agreement or that it is not, and therefore that parol evidence is admissible to show which is the fact. In response to such contention, Prof. Williston says (2 Williston on Contracts, § 633):

"The difficulty with such a principle lies in its application. No written contract which does not in terms state that it contains the whole agreement (and few do so provide, though it would generally be a wise provision) precludes the possible supposition of additional parol clauses, not inconsistent with the writing. The matter has been well summed up by Finch, J., in *Eighmie v. Taylor*, 98 N. Y. 288, 294: 'If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract.'"

Of course, the doctrine that an absolute written transfer may be proved by parol to be a mortgage is an exception to the above stated rule, well recognized by courts and depending upon considerations generally different from those affecting ordinary agreements. 2 Williston on Contracts, § 635.

The case of *R. M. Davis Photo Stock Co. v. Photo Jewelry Mfg. Co.*, 47 Colo. 68, 104 Pac. 389, 19 Ann. Cas. 540, is applicable to the facts before us. Plaintiff, having sold certain goods to defendant, sent an invoice or bill of sale in the following terms: "Photo Jewelry Mfg. Co. (Incorporated) * * * Chicago, 5-27-05. Sold R. M. Davis Ph.

(106 S.E.)

Stock Co., Denver, Colo. Order No. 10839. Terms, net 30 da. Shipped by A. T. & S. Fe. Net Cash. Book * * * Chicago or New York Exchange. 1639 Champa," followed by a description of the goods, with their prices. The defendant buyer sought to introduce parol testimony to show that it had purchased the goods with the express understanding that, if it should be unable to sell or dispose of them, it might return them to plaintiff to be exchanged for other goods. But the court refused to permit this to be done, because the bill on its face showed a complete legal obligation. See, also, monographic note following report of this case in 19 Ann. Cas. 541.

[4] The invoice or bill of sale with which we are dealing is complete in every aspect, and purports to embody or represent a sale without condition or restriction. If defendant desired to incorporate a stipulation securing to it the right of return, it could and should have done so at the time the provision was added relating to terms of payment. Indeed, it is difficult to understand how defendant, who exercised such care with regard to the one, could have overlooked the other. Parol testimony, flatly contradicted by plaintiff cannot be admitted to add to or modify in this manner the invoice contract accepted by the defendant. "In so far as a bill of sale partakes of the nature of a receipt, or is simply declaratory of a fact, it may be explained, or perhaps contradicted; but to the extent that it expresses the contract of the parties, and defines their rights and liabilities, it is subject to the same rule as other written contracts, and precludes the admission of parol or extrinsic evidence." 22 C. J. (Evidence) § 1451.

[5] As under these authorities the defendant's evidence was incompetent in that its effect was to vary the explicit terms of the invoice or contract of sale, the court should have sustained plaintiff's motion, timely made, to exclude it from consideration by the jury, and ignored it as establishing no fact material upon the issues between the parties. Its incompetency nullifies and deprives it of all force as proof, especially when an effort was made to eliminate it from the record. As the court, and not the jury, passed upon the merits of the controversy, the court properly could and should have disregarded it in dealing with the demurrer. This it may have done for aught we know to the contrary. But, if it did, the court erred in adjudging the law to be in favor of the defendant. And if it did not ignore and disregard the incompetent proof, this court will do so, because the demurrer does not have the effect of waiving or operating as a waiver of the objection and exception to the incompetency of the evidence. *Dishazer v. Maltland*, 12 Leigh (Va.) 524; *Muhleman v. Na-*

tional Ins. Co., 6 W. Va., 508, 514; *N. & W. R. Co. v. Warden*, 117 Va. 801, 804, 86 S. E. 103; *Gillett v. Burlington Ins. Co.*, 53 Kan. 108, 36 Pac. 52.

For these reasons our order will reverse the judgment, sustain the demurrer to the evidence, and enter judgment here for \$1,849.60 in favor of the plaintiff, with interest thereon from January 1, 1920.

(87 W. Va. 781)

**WEST VIRGINIA PULP & PAPER CO. et al.
v. COOPER. (No. 4114.)**

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(*Syllabus by the Court.*)

1. Vendor and purchaser \S 54, 213(2)—Land subject to attachment, although owner has given unsigned, though recorded, option thereon.

A proposition or option in writing to sell and convey a specific tract of land, at a certain price per acre, and within the time stipulated therein, not signed by the optionee or his agent, nor binding on him, though recorded, leaves the title to the land in the optionor, subject to attachment at the suit of his creditor, but subject to whatever rights the optionee thereby acquired in the land.

2. Vendor and purchaser \S 214(2) — Unaccepted option vests no title in the optionee or his assignee.

Such option contract before acceptance vests no title, legal or equitable, in the optionee, and the assignment thereof by the optionee vests no title to the land, legal or equitable, in his assignee.

3. Vendor and purchaser \S 213(2) — Land subject to attachment, although unaccepted, but recorded, option thereon given.

Though such option contract, when recorded pursuant to section 4 of chapter 74 of the Code (sec. 3834), protects the optionee or his assignee in any rights acquired under the contract, they are not complete purchasers of the land, and the land remains subject to attachment at the suit of a creditor of the optionor.

4. Lis pendens \S 25(1)—Purchaser under unaccepted option pending attachment held a pendente lite purchaser.

When pending a suit by a creditor, and upon attachment levied to sell the land, in the lower court or here upon appeal, such optionor undertakes to sell and convey the land attached to such optionee or his assignee, the purchaser or purchasers are pendente lite purchasers and will be bound by any decree made in the cause affecting the rights of the vendor or his attaching creditor.

5. Lis pendens \S 11(2) — Purchaser of land pending appeal in attachment suit a pendente lite purchaser.

And if one purchases such land pending a rehearing awarded here on appeal by the op-

tionor, from the decree below against him, and the decree subsequently entered here reverses the decree below, dismisses plaintiff's bill and quashes his attachment, nevertheless, if upon a bill of review filed in time by the plaintiff for newly discovered evidence, the decree of this court be set aside or reversed, and upon such original bill and bill of review the decree be in favor of plaintiff for his debt, and upon the attachment originally levied, that the land attached be sold to satisfy the same, such purchaser will be bound by such decree as a pendente lite purchaser.

6. Lis pendens \Leftrightarrow 11(2)—Decree upon bill of review held binding upon pendente lite purchaser.

While the filing of a bill of review constitutes a new suit for some purposes, as does also the suing out of appellate process, and to the extent of protecting purchasers under the judgment or decree sought to be reversed, nevertheless, for the purposes of protecting plaintiff's or appellant's rights and preserving jurisdiction of the subject matter of the suit, they constitute a continuation of the old suit, and as against all pendente lite purchasers of the property involved, the property proceeded against remains subject to the jurisdiction of the court, and any decree pronounced upon such bill of review or appeal, binds such pendente lite purchaser as well as the parties to the suit.

7. Equity \Leftrightarrow 443 — Bill lies to review decree for after-discovered evidence after determination on appeal.

That a bill of review lies to review for after-discovered evidence a decree below after affirmance or reversal here on appeal is settled law in this state.

(Additional Syllabus by Editorial Staff.)

8. Vendor and purchaser \Leftrightarrow 18(1/2)—"Option contract" defined.

A contract by which one binds himself to sell and convey to another certain property at a stipulated price within a specified or reasonable time, leaving it in the discretion of the other party to take and pay for the property, is termed in law an "option contract."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Option.]

9. Lis pendens \Leftrightarrow 1—Doctrine stated.

The common-law doctrine of lis pendens is that one who purchases from a party pending suit a part or the whole of the subject-matter involved in the litigation takes it subject to the final disposition of the cause and is bound by the decision that may be entered against the party from whom he derived title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lis Pendens.]

Appeal from Circuit Court, Upshur County.

Suit by the West Virginia Pulp & Paper Company and another against John T. Co-

oper. Decree for defendant, and plaintiffs appeal. Modified and affirmed.

E. A. Bowers and Talbott & Hoover, all of Elkins, and Young & McWhorter, of Buckhannon, for appellants.

W. E. R. Byrne, of Charleston, for appellee.

MILLER, J. Plaintiffs, the West Virginia Pulp & Paper Company and the Upper Elk Coal Company, on May 23, 1918, filed their bill in the Circuit Court of Upshur County against the defendant, John T. Cooper, among other things alleging that they were the owners and were in possession of a tract of land called the Upton Tract of 10,012 acres, lying in Webster, Randolph and Pocahontas Counties, and that the same land had been decreed to be sold to satisfy a debt of \$12,404.00 with interest and costs in a suit upon a bill of review pending in said court, in which said Cooper was plaintiff and Carolyn Upton and others were defendants, by a decree entered therein on June 8, 1917, to enforce the lien of certain attachments levied upon said land in the original suit of Cooper against E. M. Upton, then in life, now deceased; and further charging that said attachments for the reason alleged were void and unenforceable by a sale of said land, and that said decree of sale constituted a threatened cloud upon their title thereto, and a menace and prejudice to plaintiffs, affecting the market value thereof; and further charging that they were not liable for said debt, and were not advised whether the defendants in said suit intended to satisfy the debt so decreed to Cooper, but believed they did not so intend, and that they were advised and believed that the special commissioner appointed to sell the land would proceed to enforce said decree unless prevented by process of law. And upon said bill, on the day of the filing thereof, plaintiffs obtained an injunction restraining and inhibiting Cooper from proceeding in any way whatsoever to enforce his decree of sale of June 8, 1917, against said tract of 10,012 acres and every part thereof, until the further order of the court.

To this bill Cooper appeared and demurred, assigning as grounds: First, that the facts alleged therein do not justify the granting of the relief prayed for; second, that plaintiffs have an adequate remedy, if entitled to any relief, by proceeding pursuant to section 23 of chapter 106 of the Code (sec. 4477).

The final decree which appellants would have us reverse, pronounced on March 23, 1920, adjudicated that defendant's demurrer be sustained as to the first ground, but overruled as to the second, and plaintiffs declining to amend, it was adjudged that their bill be dismissed and that the injunction theretofore awarded thereon be and the same was wholly

dissolved, and that defendant recover his costs.

The bill with the accompanying exhibits disclose the fact that none of the appellants were parties to the original suit of Cooper against Upton, nor were they impleaded upon the bill of review.

Three principal propositions are advanced by appellants for reversal of the decree: First, that the circuit court in its final decree upon Cooper's bill of review for after discovered evidence erroneously adjudged that the attachments sued out by him upon his original bill and levied upon said Upton tract of 10,012 acres, upon the filing of said bill of review within one year after final decree, continued to constitute liens on said land and enforceable thereby, regardless of the prior decision of this court upon appeal by Upton reversing the decree below against him in favor of Cooper, quashing said attachments and dismissing his bill, first pronounced November 27, 1906, 60 W. Va. 648, 64 S. E. 523, and finally determined in the same way on rehearing by decree and mandate entered here, and certified to the circuit court on March 30, 1909, 65 W. Va. 401, 64 S. E. 527; second, that the court below erroneously held that the original notices of his pendens of Cooper's original suit so finally dismissed by this court upon appeal constituted sufficient notices of his lis pendens on bill of review; third, that the circuit court by its decree on bill of review erroneously held that the contract of sale in writing, purporting to have been made by one J. K. Moore, as agent for Upton, dated April 8, 1902, and recorded in Randolph County April 28, 1902, in Pocahontas County May 1, 1902, and in Webster County May 8, 1902, under which appellants claim title to said 10,012 acres, did not constitute an equitable sale of said land, with notice to Cooper, a creditor, precluding him from asserting a lien thereon by attachment sued out on the date of his original suit, May 28, 1903, and levied in Webster and Randolph Counties respectively May 28 and May 30, 1903.

We are disposed to respond to these propositions in the inverse order of their statement by counsel. The alleged contract by Moore as agent for Upton, of April 8, 1902, relied on to defeat the lien of Cooper's attachment is as follows:

"April 8, 1902.

"As agent for E. M. Upton, of Rochester, N. Y., and others, owners of what is known as the Porter tract of land consisting of ten thousand and twelve (10,012) acres, situated in the counties of Pocahontas, Randolph and Webster, West Virginia, and on the Leatherwood and Bergo Creeks which empty into the Elk River, I sell the above tract to Arthur Lee, Trustee, in fee, at thirteen dollars (\$13.00) per acre, to be paid for in cash upon delivery of a general warranty deed with good and sufficient title free from incumbrances.

"I hereby acknowledge receipt of a check for five thousand dollars (\$5,000.00) in favor of E.

M. Upton, on the Mercantile Trust & Deposit Company of Baltimore signed by H. G. Davis, as payment on account of the purchase money upon above Porter tract.

"My authority for signing this agreement of sale is letters, and a telegram from E. M. Upton, dated Rochester, N. Y. April 7, 1902, addressed to me, and which reads as follows: 'Close deal at thirteen dollars net to us, if five thousand dollars is deposited in some bank as Trustee.' J. K. Moore, Agent."

"Signed in duplicate.

This paper purports to have been acknowledged before a notary public in Washington, D. C., April 24, 1902, and to have been recorded in Webster and Randolph Counties on April 28, 1902, and May 1, 1902, respectively. The record shows, however, that while the legal title to the land stood in the name of Upton others were beneficially interested with him and that subsequently, on May 16, 1902, at a meeting of the owners in New York, a paper was signed by them but not then acknowledged. On June 23, 1903, it was acknowledged by Baldwin, Upton and McGraw before a notary public of Taylor County, West Virginia, and proven by the oaths of Upton and Baldwin as to Warner, Beckley and Rumsey before the clerk of the County Court of Randolph County on June 24, 1903, and on the same day admitted to record in that county by him, as follows:

"Memorandum of agreement made and entered into this sixteenth day of May, 1902, by the parties hereto.

"Whereas Eli M. Upton holds the legal title to what is known as the Elk lands, comprising ten thousand and twelve (10,012) acres on the waters of Elk River in the state of West Virginia, and better known as the Porter land; and

"Whereas the said Eli M. Upton, with the concurrence and consent of all the owners of said land with the exception of John T. McGraw did sell the said Arthur Lee, Trustee, for Henry G. Davis, at and for the sum of thirteen dollars (\$13) per acre net to the owners thereof; and

"Whereas at a meeting of all of the owners of said land this day held at the Waldorf-Astoria Hotel, in the city of New York, all of the parties owning said lands have concurred in said sale and desire to ratify and confirm the act of the said Eli M. Upton in so selling said land to said Lee, Trustee for said Davis, at said price of thirteen dollars (\$13) per acre; and

"Whereas the said McGraw declining to concur in the sale of said land and at said meeting of the owners thereof this day held the said McGraw, for reasons which are sufficient and satisfactory to him, did concur in said sale, this making the sale of the whole of said land comprising said ten thousand and twelve (10,012) acres to said Lee, Trustee for said Davis, full and complete:

"Now therefore this agreement witnesseth: That the said parties, the owners of said lands, do concur in, ratify and confirm the act of the said Upton in selling the said land to said Lee,

Trustee for said Davis, thus making the title of the said land full and complete in the purchaser thereof under the sale so made by the said Upton, Trustee.

"Witness the following signatures and seals:

"E. M. Upton.
 "A. T. Baldwin.
 "C. M. Warner.
 "L. N. Beckley.
 "Jno. T. McGraw.
 "William Rumsey."

It will be observed that neither Arthur Lee, Trustee, nor Henry G. Davis were subscribing parties to either of these papers; and the bill shows that no attempt was made to put them into execution by deed until July 9, 1903, on which day a deed purporting to have been made by Eli M. Upton and Fannie M., his wife, parties of the first part, and Arthur Lee and Grace D. Lee, of the second part, and Henry G. Davis of the third part, was acknowledged by said first parties in Monroe County, New York, on July 14, 1903, and by the second parties in Randolph County, West Virginia, on July 24, 1903, and together with a decree of the Circuit Court of the United States for the Northern District of West Virginia, referred to in said deed, was admitted to record in Randolph County, which deed recites the source of title of said Upton, that he had contracted to sell said land to Arthur Lee, Trustee, at the price of thirteen dollars per acre, and that at the time of said sale there was pending undetermined in the said Circuit Court of the United States for the Northern District of West Virginia a suit in equity in which said Upton was plaintiff and James Woodzell and others were defendants, in which the title and boundary of said land was in controversy, and in which suit by decree pronounced June 12, 1903, the right and title of so much of said 10,012 acres as laid in Randolph County, estimated at 7,800 acres, was confirmed, and reciting also under a "whereas" that said Davis had elected to take at said price of thirteen dollars per acre all of the boundary of said land lying in the County of Randolph, estimated to be 7,378 acres, and all thereof lying in Pocahontas County, estimated at 150 acres, and aggregating 7,528 acres, and to pay for the same at the rate of thirteen dollars per acre, as part performance by said Upton of his contract, and which election was accepted and concurred in by said parties of the first part, and which deed further witnessed that for and in consideration of thirteen dollars per acre, aggregating \$97,864.00, paid to the said Eli M. Upton by the said Henry G. Davis, the receipt whereof was thereby acknowledged, the said parties of the first and second parts thereto purport to grant and convey by metes and bounds unto said Davis those portions of said land lying in the counties of Randolph and Pocahontas, aggregating 7,528 acres. And said deed also provided that the title to the remaining parts of said 10,012 acres lying in the county of

Webster was to remain in said Upton for the present, subject to the said contract of sale to Arthur Lee, Trustee. This deed was admitted to record in Randolph County July 24, 1903. If ever admitted to record in Pocahontas County, the record does not show it.

Said contracts and so much of said deed to Henry G. Davis are recited herein for the purpose of showing the nature of the contracts and deed, and the status of the title to said land, and the record thereof as affecting the right of Cooper depending on his attachments sued out and levied thereon on May 28, and following, in 1903. As already shown, these attachments antedated the recordation of the alleged contract of May 16, 1902, not recorded until May 23, 1903, but were subsequent in date to the alleged contract of April 8, 1902, recorded April 24, 1902. The present bill with its exhibits shows that the authority of Moore to make this unilateral contract was put in issue in the original suit of Cooper against Upton; and it appears from the record of that suit, exhibited with the bill in this suit, that the contract was not ratified by the owners until the contract of May 16, 1902, not recorded until June, 1903. But assuming authority of Moore to make the contract, what was its effect on the rights of Cooper as an attaching creditor of Upton, in his original suit and the attachments then levied on said land? Clearly, neither of these contracts or papers amounted to more than propositions or options to sell the land to Lee, Trustee for Davis, not accepted by Davis or Lee until the deed for the Randolph and Pocahontas lands was executed and delivered on July 9, 1903, for in that deed it is recited, as already shown, that Davis thereby elected to take not all, but only the portions of said tract lying in Randolph and Pocahontas counties; and it is pertinent to again refer to the facts recited in the deed that the election was not made until after the date of the decree in Upton versus Woodzell, settling Upton's title to the Randolph part of the land, had been entered. Another pertinent fact appearing upon the face of the bill and exhibits is that by the deed of June 9, 1903, Upton thereby acknowledges payment of the entire amount of the purchase money for the acreage Davis so elected to take. It does not appear that the check for \$5,000.00, not cash, receipted for in the option contract of April 8, 1902, was ever collected, or that any other thing of value was parted with by Davis or Lee at that time.

Appellants took title under Davis, and unless the proposition affirmed and relied on by counsel be well founded in law, namely, that the making and recordation of the contract of April 8, 1902, precluded Cooper from acquiring by his subsequent attachments any rights upon the land contracted for, Davis when he elected in July, 1903, to take the land and procured the deed of that date from

Upton and the Lees, was a pendente lite purchaser with notice of the attachments and the lis pendens recorded.

The proposition of counsel depends on the character of Upton's title or right after the record of the option contract, and whether the land standing in his name was attachable at the suit of Cooper. The position of appellants' counsel is that Cooper's only remedy, in view of the recorded contract, was to summon Davis, or Lee, Trustee, as garnishees, and thereby acquire a lien on the money in their hands due Upton on the contract. But only Upton, not Lee or Davis, was bound by these unilateral agreements. Davis did not elect to take the land until after Upton's title had been adjudicated by the Federal Court, in June, 1903. In this status of the title and the rights of the parties, was not the land of Upton attachable? If the land was attachable, then Cooper by his attachments as decreed by the lower court, acquired a lien thereon, and process of garnishment was not his remedy. At this time neither Davis nor Lee, Trustee, owed Upton anything, and no doubt this would have been their defense on garnishment.

[1, 2, 3] A contract by which one binds himself to sell and convey to another certain property at a stipulated price within a specified or reasonable time, leaving it in the discretion of the other party to take and pay for the property, is termed in law an option contract. Such a contract transfers to the optionee no title to the property. His right is not in rem, but in personam. The right thus acquired is to call for specific execution within the time limited. 21 Am. & Eng. Enc. Law, pp. 924, 925. And we have held, in accordance with the principle laid down in the authority cited, that such an option contract does not vest in the person to whom the offer of sale is made any title to the land, either legal or equitable, and that his assignment under the contract passes no title to the assignee. *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150. So that, according to the authorities, neither Davis nor Lee acquired any title to the land of Upton invalidating Cooper's attachments.

But counsel for appellants say they are fully protected in their rights by section 4 of chapter 74 of the Code (sec. 3834), providing:

"Any contract in writing, made in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract."

[3] Undoubtedly this statute protected Davis and Lee in whatever interest they acquired by the contract. But it amounted

simply to an unaccepted option at the time of Cooper's attachments; neither got anything thereby except the right at his election to buy, and then subject to whatever rights may have intervened in favor of others against the land. In case judgment had been recovered against Upton and recorded against the land, the optionee, when he came to exercise his right of purchase subsequently, would have been bound to take notice, and before paying the purchase money would have had the obligation thrust upon him of seeing the lien discharged out of the purchase money. And the same obligation would rest on the purchaser exercising his rights under the option, to look after liens acquired on the land by attachments properly levied. The cases of *Conaway & Smith v. Sweeney*, 24 W. Va. 643, *Thorn v. Phares*, 35 W. Va. 771, 14 S. E. 399, and *Withers v. Carter*, 4 Grat. (Va.) 407, 50 Am. Dec. 78, involved cases where actual sales of land by contracts recorded were involved, and of course the rights of the purchasers were protected by the statute. But here we have only the option contracts, with right of election to take or not to take the land, not exercised until after the rights of Cooper under his attachment became effective.

The proposition advanced by counsel for appellants that land thus sold or optioned but not yet conveyed is not subject to attachment is negatived by the authorities. They hold that the interest of the vendor in the land is attachable. 6 *Corpus Juris*, p. 207, § 378. In *Sheehy v. Scott*, 128 Iowa, 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365, the direct question here presented was involved. It was there held that, when the contract though executory is completed, the vendor holds the legal title in trust, and his interest in the land is not attachable; but when the contract, as in the case here, is not purely executory and in no way binds the optionee to complete the purchase, the contract does not vest in him any interest in the land, and that the land is attachable as the land of the vendor. And in *Coggshall v. Marine Bank Co.*, 63 Ohio St. 88, 57 N. E. 1086, it was decided that the interest of a vendor in such a case is not that of a mere naked trustee for the vendee, but a beneficial estate in the lands to the extent of the unpaid purchase money. The rule must apply with greater force, where as here the contract was unilateral, not binding on the purchaser, without acceptance of the option, converting the contract into one binding him also. See, also, as bearing on this proposition, *Brett v. Thompson*, 46 Me. 480, and *French v. Sturdivant*, 8 Me. (8 Greenl.) 246.

Upon these authorities we conclude that the interest of a vendor in an option contract, unilateral in character, not binding on the vendee, but with right of election in him to purchase, is an interest in land subject to

attachment at the suit of a creditor of the vendor, and binding the interest of the vendor therein.

[4, 5] The next question, covering the first and second propositions advanced, is, were the rights of Cooper as attaching creditor of Upton terminated by the final decree of this court upon appeal by Upton from the decree in favor of Cooper in his original suit, pronounced here November 30, 1909? The appellants claim title under Davis and McGraw, and their purchases were all prior to the date of the final decree of this court. The case was pending in this court upon rehearing granted Cooper when the Upper Elk Coal Company acquired its title, and continued pending, either in the court below or here, from the time it was instituted until the final decree of March 30, 1909. So that Davis and his successors in title were all pendente lite purchasers as to Cooper's suit and bound by notice thereof unless relieved by the final decree here, and were unaffected by Cooper's bill of review filed in the circuit court for after discovered evidence on October 19, 1909, only a little more than six months after the date of said final decree.

[6] The statute gave Cooper a year after said decree in which to present his bill of review. But it is contended that the bill of review constituted a new suit in so far as Cooper sought thereby to review his rights as attaching creditor under his original bill without suing out new attachments and recording anew notice of lis pendens, and that his efforts in that respect were abortive and the decree appealed from in his favor therein is erroneous and ought to be reversed. It is undoubtedly true that bills of review, like writs of error and appeal, are for some purposes in the nature of new suits. They are so for the purpose of protecting purchasers under decrees sought to be reviewed for error, between the date of such decree and the filing of a bill of review or suing out of appellate process. We have so decided in the several cases cited and relied on by appellants' counsel, notably the cases of *Dunfee v. Childs*, 59 W. Va. 225, 239, 53 S. E. 209; *Wingfield v. Neall*, 60 W. Va. 106, 54 S. E. 47, 10 L. R. A. (N. S.) 443, 118 Am. St. Rep. 882, 9 Ann. Cas. 982; and *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913. If appellants had become purchasers of the lands between the date of said final decree and the date of the filing of Cooper's bill of review, they would undoubtedly be protected by the principles of those cases and others; but they did not. They purchased when Cooper's suit was still pending, either in the circuit court or in this court, and they were not purchasers under decrees entered in that suit.

[7] That a bill of review lies to review a decree, for after discovered evidence, even after affirmance here on appeal, is settled law in this state. *Davis Sewing Machine Co. v.*

Dunbar, 32 W. Va. 335, 9 S. E. 237; *Dunfee v. Childs*, supra; *McLanahan v. Mills*, 73 W. Va. 246, 80 S. E. 351. Such a decree can not be reheard after affirmance here for mere matters of law or fact apparent, but only for after discovered evidence. As to those errors of law or fact appearing on the former decree, affirmed here, they are res adjudicata and can not be again reviewed by bill of review, or otherwise impeached, except for fraud or upon some other ground of equitable jurisdiction.

Such being the settled law relating to bills of review, how shall it be applied to the case at bar? It is said that the decree appealed from operated to set aside the decree of this court reversing the decree of the lower court and dismissing Cooper's bill, which it is argued is without precedent. But if Cooper was entitled to his bill of review for evidence discovered after the decree, how could he have the benefits thereof without such result to our decree? No matter that a bill of review, as is also an appeal is a new suit for some purposes, already alluded to it is not so to the extent that it has no connection with nor effect upon the original suit or the decree therein. The purpose of both proceedings is the same, namely, the correction of errors in a decree or judgment already entered, and it would be a strange doctrine that such purpose could be frustrated by the fiction that such proceedings on error constituted new suits. *State v. Moore*, 77 W. Va. 325, 328, 87 S. E. 867. Certainly reversal of a decree on bill of review or appeal would restore plaintiff to his rights and remedies as against the parties to the suit; and if as to them, why not also as to pendente lite purchasers? In this case, as we hold, appellants stand in the shoes of Upton, except as to any rights in which they are protected by the option contracts pleaded and relied on, which we have already attempted to define.

[8] There are some decisions to the contrary, it seems, but the great weight of authority is that a purchaser after judgment or decree, but while the decree is subject to review or further proceedings thereunder, takes subject thereto. 25 Cyc. 1472, note 2, citing among other cases, *Farmers' Bank of Frankfort v. First National Bank*, 30 Ind. App. 520, 66 N. E. 503. Such is the law applicable to bills of review or appeals except in the instances observed in our cases of *Dunfee v. Childs*, and other cases cited. 25 Cyc. 1473. As already observed, appellants do not come within the protection of those cases. As recently decided here, the common-law doctrine of lis pendens is that one who purchases from a party pending suit a part or the whole of the subject matter involved in the litigation, takes it subject to the final disposition of the cause and is bound by the decision that may be entered against the par-

ty from whom he derived title. *Rardin v. Rardin*, 102 S. E. 295. An amendment to the bill, or complaint, after the purchase or the acquisition of other rights pendente lite which does not alter the cause of action, does not affect the lis pendens, since it relates back to the filing of the original bill. So the law is stated in 25 Cyc. 1743, and the cases cited in the note thereto.

A bill of review for after discovered evidence does not change the cause of action; it only seeks to open up the cause to let in the evidence of the facts well pleaded in the original bill. If a new cause of action was pleaded and relied on, the original bill perhaps would not be notice thereof nor bind a pendente lite purchaser.

One question is presented on appeal which we can not overlook. Manifestly the attention of the circuit court was not called to the fact that pending the suit 540.5 acres of the land levied on by Cooper was adjudged to belong to Christian Seybolt and not to Upton. Appellants did not purchase the land from Upton, but subsequently to the judgment in favor of Seybolt, it was purchased by them or one of them from Seybolt; otherwise they would not now be injuriously affected by the error in the decree sustaining Cooper's demurrer. Their bill on its face presented good ground for relief as to that portion of the land attached and decreed to be sold; and doubtless if the court's attention had been particularly directed to the fact, the demurrer would have been overruled as to that matter and Cooper ruled to answer, as he ought to have been. However, as the record shows ample property to satisfy Cooper's judgment without the tract of 540.5 acres, it will not likely be necessary for him to pursue it further in the prosecution of this suit.

For the foregoing reasons, we are of opinion to modify the decree so as to overrule Cooper's demurrer to so much of the bill as sought relief against the sale of the 540.5 acres, and in all other respects to affirm the same.

As Cooper substantially prevails here, he will recover his costs in this court.

(88 W. Va. 22)

MCCULLOUGH v. CLARK. (No. 4117).*

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1002—Verdict on conflicting evidence not set aside unless indicating passion or prejudice.

The verdict of a jury, based upon conflicting evidence, will not be set aside, unless the

evidence so strongly preponderates against the verdict as to indicate that the jury was moved by passion, prejudice, or some other improper influence.

2. Appeal and error \S 930(1), 1004(1)—Verdict presumed based on evidence; verdict for damages will not be disturbed if within estimates in testimony.

There is a presumption that the verdict of a jury is based upon a fair consideration of all matters presented to it, and if in an action for damages for breach of a contract the evidence does not certainly fix the amount of such damages, but depends upon varying amounts fixed by different witnesses, the verdict will not be disturbed if the amount found is within the estimates given in the testimony.

3. Appeal and error \S 932(1)—Jury will not be considered to have included items not supported by evidence.

In an action for damages for breach of contract it will not be held that the jury included an item not supported by the evidence and rejected in toto another finding support in the evidence, upon the sole ground that to include such improper item with others found by the jury will make the exact amount of the verdict, while to exclude such item and include the whole of the item finding support in the evidence would make an amount in excess of the verdict.

4. Sales \S 418(2)—Measure of damages for breach of contract to deliver personal property at definite time stated.

Where, in an action for breach of a contract, it appears that the plaintiff was entitled to receive certain personal property at a definite time, his measure of damages is the value of such property at the time and place it should have been delivered to him, less any amount remaining unpaid upon the purchase money, with interest thereon to the date of the verdict.

5. Trial \S 237(4)—Instruction defining "preponderance of evidence" held not improper.

An instruction properly defining the term "preponderance of the evidence" is not improper in a case where the jury has been instructed that certain elements must be proven by a preponderance of the evidence, even though there are other elements which the jury have been instructed must be proved by evidence clear, full and convincing.

6. Appeal and error \S 207—Improper argument not considered in absence of request for instruction.

This court will not consider errors predicated upon the abuse of counsel of the privilege of argument, unless it appears that the complaining party asked for and was refused an instruction to the jury to disregard the improper remarks, and duly excepted to such refusal.

Error to Circuit Court, Upshur County.

Action by John W. McCullough against H. E. Clark. Judgment for plaintiff, and defendant brings error. Affirmed.

\S —For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied April 5, 1921.

Young & McWhorter and J. M. N. Downes, all of Buckhannon, for plaintiff in error.

Samuel T. Spears and Talbott & Hoover, all of Elkins, for defendant in error.

RITZ, P. The defendant by this writ of error seeks reversal of a judgment against him for the sum of \$203,907.28, for damages for the breach of an alleged contract for the sale of certain corporate stock.

Plaintiff and defendant for many years had been business associates, and in the spring of 1915 were jointly interested in lumber operations in the state of West Virginia, carried on in the name of Virginia Lumber Company, and in like operations in Virginia, Tennessee, and North Carolina, conducted in the name of Damascus Lumber Company. In addition to these companies, in which they had a common interest, there were some other concerns in which they were likewise jointly interested, but which are only incidentally involved in this litigation. In addition to the interest which the defendant had in common with the plaintiff, he was largely interested in many other concerns with which the plaintiff had no connection. For a few months prior to April, 1915, the Virginia Lumber Company and the Damascus Lumber Company, owned and controlled by the parties to this suit, were having trouble in carrying on their affairs. The plants had, to a large extent at least, closed down, and the parties were having difficulty in securing sufficient funds to meet the outstanding obligations. Many conferences were had between McCullough and Clark with a view to devising means to put these concerns on a sound financial basis. In addition to needing money for the purpose of taking care of these companies, Clark also needed considerable sums of money to take care of his other interests. It sufficiently appears that both of the parties had plenty of assets to take care of their liabilities, their difficulties being in providing liquid assets as the same were needed. McCullough claims that after a conference lasting over several days Clark proposed to him that he would sell his interest in the Virginia Lumber Company for the sum of \$325,000, and in the Damascus Lumber Company for the amount that he had invested in that company, less such amounts as had been withdrawn therefrom by him, with interest compounded every four months; or that he would buy McCullough's interests in these companies on the same basis, the proposition being indivisible, contemplating the purchase or sale of both properties at the same time; that he considered this proposition and came to the conclusion that he and his associates could handle the same, and on the 24th of April, 1915, in the city of Philadelphia, accepted Clark's proposition to sell on the above terms; that this was late on Saturday evening, and for that reason the matter of pre-

paring the formal contracts was deferred until the next Monday; that he communicated with Mr. Bowers, who was interested with him in the Virginia Lumber Company proposition, and procured his attendance at Philadelphia on Monday with a view to having him render financial assistance in making the purchase; that he and the defendant Clark spent a large part of the next day, Sunday, the 25th of April, at the Manufacturers' Club, and talked over to a considerable extent the transaction which had been concluded on the day before; that on Monday morning Mr. Bowers arrived, and he explained to Bowers what he had done, and Bowers agreed to take some further interest in the Virginia Lumber Company upon the basis of the purchase made by McCullough; that they then went to Clark's office for the purpose of putting their agreements in writing; that Clark was informed that Bowers would be jointly interested with McCullough in the Virginia Lumber Company proposition, but would not take any interest in the Damascus purchase, for which reason it would be necessary to make separate contracts covering the sale of his interest in each of these companies; that this was satisfactory to Clark, and they began the preparation of a contract in writing, which is introduced into the record, evidencing the sale of Clark's interest in the Virginia Lumber Company to McCullough and Bowers.

It appears that the parties were engaged in the preparation of this contract practically the whole of the day; Bowers and McCullough being of the opinion that it was about 5 o'clock when the same was completed and executed by the parties, and Clark stating that in his opinion it was even later than that. After this contract was concluded, McCullough claims that he then called upon Clark to prepare the contract showing the sale of his interest in the Damascus Lumber Company to him, and that Clark replied that it was then late, and that he had some important mail requiring attention, and asked him and Bowers to go to the hotel, and when he had attended to his pressing affairs he would come down and join them at supper. In this he is corroborated by Bowers. He and Bowers did leave Clark's office and went to the Walton Hotel, where they awaited Clark's appearance. Some time later Clark, in accordance with his promise, did appear, and the three had supper together. McCullough says that while they were at the hotel, and during the course of the meal, he took up with Clark again the matter of the preparation of a formal written contract evidencing his purchase of Clark's interest in the Damascus Lumber Company, and that Clark then advised him that it would be impossible to prepare this contract until they had had an audit made of the Damascus Lumber Company's accounts, and

the amount coming to him thus determined; that he (McCullough) insisted that this was not necessary; that in the written contract the consideration could be specified in a general way, and could thereafter be determined by an audit made of the company's business; that Clark protested against preparing the contract in this way, and that some heated conversation followed; and that instead of preparing the Damascus Lumber Company contract the next morning as McCullough insisted should be done Clark left the city. As to what happened at the hotel on this occasion, McCullough is corroborated by Bowers, who was present and heard the conversation. Clark contends that McCullough never mentioned to him the matter of preparing any contract for the sale of his interest in the Damascus property at his office after the contract evidencing the sale of the Virginia Lumber Company interests had been concluded, but he admits that McCullough did insist on the preparation of this contract at the Walton Hotel, but contends that he then and there repudiated the idea that he had made any sale of his interest, and told McCullough that when they had an audit made and found how they stood he would then be willing to consider a proposition for the sale of his interest. McCullough and Bowers interested some other parties with them in the Virginia Lumber Company purchase, and for the next few months the parties seem to have been pretty closely engaged in concluding the transfer of these interests from Clark to McCullough and his associates. This transaction was finally consummated with a slight modification on account of a vendor's lien on some of the property, which it was agreed should be taken care of by the purchaser instead of by Clark as had been originally designed.

McCullough contends that at various times after the April transaction he demanded of Clark that he perform his contract by turning over to him his interest in the Damascus Company, and that Clark never at any time denied that he had made the contract, but always insisted that he could not finally consummate it until an audit of the company's affairs was made, and the amount to be paid to him determined, while Clark contends that McCullough never on any of these occasions made any contention that he had purchased his Damascus Lumber Company interest, but did make various propositions for a purchase of his interest in that company, or for a sale to Clark of his (McCullough's) interest, and that Clark always advised him that, as soon as the audit was made and the status of affairs determined, he would consider a proposition along that line. It seems that the Thayer Company was indebted to the Damascus Lumber Company in a considerable sum of money, the exact amount of which depended upon a

settlement with that company. In the fall of the year 1915, McCullough wrote this company advising it, among other things, that he had bought Clark's interest in the Damascus Company, and was then the sole owner of it, and that he desired a settlement of the outstanding balance. A copy of this letter he forwarded to Clark. Clark, upon receipt of it, responded repudiating the statement that McCullough had acquired his interest in the Damascus Lumber Company, and McCullough contends that this is the first time that Clark ever did deny to him that he had not sold his interest upon the terms above indicated.

A representative of the Thayer Company did meet Clark and McCullough in Philadelphia in the early part of December, 1915, and a settlement was made of the accounts between the two concerns, and that company paid the balance which it owed amounting to about \$45,000. McCullough says at this time he again insisted on Clark having an audit made, and that Clark then promised him that he would send at once for the bookkeeper of the Damascus Lumber Company, who was stationed at Damascus, Va., and have him bring all of his books and records to Philadelphia, and together with his secretary, Mr. Van Every, an audit would be made, and just as soon as the amount to be paid him under the terms of the contract was thus ascertained he would conclude the transaction. This was on the 2d day of December, 1915. Clark admits that he did agree to send for Mr. Midlam, the company's bookkeeper at Damascus, for the purpose of having an audit made of all the affairs of the Damascus Company, with a view of ascertaining how each of the parties stood, so that he could either make McCullough a proposition to purchase his interest, or else McCullough make him one to acquire Clark's interest in that company, and insists that this was the only purpose in having an audit made. McCullough, it appears, went to the Damascus Lumber Company's operation at Damascus, Va., immediately after this meeting, and while there inquired of Mr. Midlam, the bookkeeper, whether he had been requested by Mr. Clark to bring his books and records to Philadelphia for the purpose of making this audit with Mr. Van Every, and upon being advised that he had not received any such directions McCullough wrote to Clark advising him that Midlam had not yet received directions to come to Philadelphia to proceed with the audit, and insisted upon Clark giving instructions at once. Subsequently Clark did write to Midlam and directed him to come to Philadelphia with all of the records of the Damascus Lumber Company to make the audit desired, working in conjunction with Mr. Van Every, Mr. Clark's private secretary, who had charge of Mr. Clark's books. Pursuant to these in-

structions, Midlam did come to Philadelphia and bring with him all of the Damascus Lumber Company's books. This was about the middle of March, 1916. Upon his arrival he and Mr. Van Every entered upon the work of making an audit under the supervision and direction of Mr. Clark and Mr. McCullough. They completed the work which they were directed to undertake some time in the early part of May, 1916. This audit made by Midlam and Van Every was a complete exposition of the dealings that Clark had with the Damascus Lumber Company, and nothing more. It undertook to show all of the money paid into this company by Clark for the purchase of timber, the payment of taxes, and all other purposes, as well as all of the money withdrawn therefrom by him, and to ascertain the amount which Clark would be entitled to receive from the company as of the first day of May, 1915, compounding the interest on his balance each four months. No attempt was made by these auditors to ascertain the status of McCullough's affairs with the company.

It will be observed that, by this audit the amount which Clark was entitled to receive for his interest in the Damascus Lumber Company, in accordance with the contract claimed by McCullough, was ascertained, and this was the only thing that was ascertained. This amount was fixed as of the 1st day of May, 1915, the time at which McCullough says Clark was to turn over his interest. The amount was ascertained by compounding the interest on the amounts advanced by Clark to the company from the very beginning at four months intervals, which McCullough says was the method agreed upon in the contract between him and Clark for the determination of the amount Clark was to receive for his interest, and it is also further significant that the auditors engaged upon this work went no further than to ascertain the amount that Clark was entitled to as of the 1st day of May, 1915. McCullough says that a few days before the auditors completed their work he called Clark's attention to the fact that the work was about done, and he wanted him to be prepared to execute his contract for the sale of his interest when the work was completed and the exact amount ascertained; that Clark at that time told him that when the audit was completed he would consider any proposition that he had to make, but repudiated any arrangement theretofore made; that he insisted upon Clark carrying out the contract he had made, but that Clark told him he was not going to do so unless he had to; that when the audit was completed he again called upon Clark to carry out his part of the contract, and Clark refused to do so, repudiated the same, and to escape from McCullough's importunities left the city of Philadelphia,

but kept in communication with his office over the telephone, and did not return until he found that McCullough had also left for his home. Shortly thereafter this suit was instituted to recover damages for the failure upon the part of Clark to deliver his stock in the Damascus Lumber Company, in accordance with the contract of purchase claimed by McCullough.

McCullough is supported in his contention as to the contract between him and Clark by the testimony of several other witnesses who heard conversations between the parties, in which Clark in effect admitted making the contract, and his purpose to carry it out when the audit was completed. On the other hand, Clark contends that there never was any contract between him and McCullough for the purchase of his interest in the Damascus Lumber Company; that he and McCullough were contemplating a general settlement of all the affairs between them, and that the audit made by Midlam and Van Every above referred to, was only made for the purpose of such a general settlement, and not with any view of fulfilling the contract of sale. There were some settlements made between the 26th of April and the time this audit was completed, but it appears that in these settlements there was no compounding of interest every four months, as in the audit made by Midlam and Van Every. Clark also introduced a number of witnesses who claimed to have had conversations with McCullough, or overheard conversations between McCullough and Clark indicating that negotiations were pending for the settlement of their interests in the Damascus Lumber Company, but that they did not come to any conclusion in regard thereto. The oral evidence upon the question of the existence of such a contract as is declared upon by the plaintiff is highly conflicting. Perhaps the strongest circumstance in support of McCullough's contention is the audit made by Van Every and Midlam. The manner in which this audit was made, the fact that it ascertained nothing but the amount that Clark would be entitled to receive because of his advancements to the company, with interest compounded every four months as of the 1st of May, 1915, is consistent only with the contention made by McCullough. This information would be entirely useless to Clark or McCullough in a general settlement of their affairs. It would not afford them any basis for a settlement of these affairs unless they also had the amounts advanced by McCullough and the amount that he would be entitled to receive upon the same basis. This was not ascertained, nor undertaken to be ascertained, and according to the auditors they acted under the direction of the parties to this suit. Clark does not undertake to explain why the auditors ascertained just the one thing which was

necessary to complete the contract which McCullough claims he had with him.

[1] The jury found in answer to a special interrogatory submitted that the contract sued on by McCullough was actually made, and we are asked to overthrow this verdict upon the ground that the evidence does not warrant it. If this finding depended alone upon the oral testimony of McCullough, supported as it is by other witnesses who were present at various times when he and Clark negotiated in regard to the contract, contradicted as such oral evidence was, the jury might have had great difficulty in arriving at a correct solution of the controversy. A careful review of the record, however, convinces us that the audit of Clark's accounts with the Damascus Lumber Company made by Midlam and Van Every, as above stated, was a pillar of light guiding the jury in its deliberations to the only conclusion which could have been reasonably reached. This circumstance in the case was one which could not be changed by either of the parties to suit his subsequent convenience or interest. It indicated in no uncertain terms that McCullough's contention was correct, and that Clark was seeking to avoid the effect of his contract. It is consistent with no other theory except the one relied upon by McCullough for recovery. It would have been entirely useless for the purpose for which Clark says that it was made. It would have furnished no basis for a settlement between Clark and McCullough of their interests in the Damascus Lumber Company. It was made to speak as of the very day upon which McCullough says the interest was to be turned over to him, to wit, the 1st of May, 1915, and it gave the information, and only the information, which was necessary for the parties to have in order to fully consummate the contract relied upon by McCullough. It would be strange, indeed, that these parties, business men of large experience, would have their bookkeepers engage for more than six weeks in this work unless the result of their labors was to be of some utility in the conduct of their affairs. Of course, this finding of the jury, even if it were based solely upon conflicting oral evidence, about which the court might be in doubt, would not be disturbed; but, when the finding of the jury is supported by the circumstances above adverted to, it is clearly justified by the evidence.

Defendant contends, however, that even assuming that the contract was sufficiently proven to justify the jury's verdict, the plaintiff is entitled to no such measure of recovery as was applied by the jury. It appears that Clark was the owner of 76 per cent. of the stock of the Damascus Lumber Company, which was a Delaware corporation. This corporation was organized in the fall of 1907. McCullough contends that prior to

its organization he and Clark acquired considerable timber lands lying in Virginia, North Carolina, and Tennessee, and that at the time of the acquisition of this land it was agreed between them that they would form a corporation for the purpose of cutting the timber thereon, and to hold their respective interests; that the title to the land was taken in the name of Clark to be held by him in trust for himself and McCullough. Clark agrees that the title taken by him was taken in this way; that is to say, that McCullough had a one-fifth interest in all of this land, and he a four-fifths interest. When he and Clark determined that they would cut the timber and market it, a mill was purchased from the Thayer Company, and this purchase was made in the name of Clark. A corporation was then organized, and subsequent to its organization some other tracts of timber were acquired, and the legal title was taken in the name of Clark. McCullough contends that Clark was to convey all of this land to the corporation, but that this was never done, and at the time this suit was instituted the legal title thereto was still vested in Clark. Clark insists that because of this fact it was error to allow the jury to consider the land and the standing timber thereon as an asset of the Damascus Lumber Company for the purpose of fixing the value of his stock therein, and in a former trial of this case his contention that this timber and land could not be included as such an asset was sustained by the lower court, and a verdict directed in his favor, which upon a writ of error to this court was reversed; this court holding that under the evidence introduced by McCullough it would be a question for the jury to determine whether or not this land and timber was in fact an asset of the Damascus Lumber Company. *McCullough v. Clark*, 81 W. Va. 743, 95 S. E. 787. Clark's insistence now is that the finding of the jury upon the evidence introduced upon this question should be set aside as contrary to the great preponderance of the testimony.

On behalf of McCullough's contention, it appears that at the time he and Clark entered into the arrangement to acquire the Damascus Lumber Company's lands, they agreed to the formation of a corporation. This contention is sustained by the people employed by Clark and McCullough to make the purchases and otherwise represent them, several of them testifying that they were informed by both Clark and McCullough that when the lands were acquired the corporation would be formed, and the interests turned over to it. McCullough insists that pursuant to this arrangement, while the legal title was not conveyed to the corporation when it was formed, the land was in fact turned over to the corporation; that it took possession thereof; that it paid all of the

remaining unpaid purchase money, and even reimbursed Clark for the purchase money he paid on this land to practically the full extent that he had made such payments. Clark, on the other hand, insists that when the corporation was organized a resolution was passed by the stockholders and the board of directors acquiring the right to cut the timber upon the lands held by him upon the basis of paying therefor certain prices per thousand feet for the different kinds of timber, the price being \$8 per thousand and for the larger part thereof, and that the stock of this company by a like resolution was directed to be issued to him in payment for the mill purchased by him from the Thayer Company, and which had not yet been completed, as well as for the benefits arising from a contract entered into by him with the Thayer Company for the sawing of that company's timber at this mill, and the transportation of the Damascus Lumber Company's logs over that company's railroad. In this way he contends that he acquired all of the stock of the Damascus Lumber Company, and that the only interests which that company owned at the time of the institution of this suit was the mill and the right to cut the timber upon the lands owned by him at the prices mentioned in the resolution above referred to, and whatever advantages might be derived from the Thayer contract, which will be hereafter adverted to. If his contention is sustained, then there is no basis in the evidence for any substantial recovery upon the part of the plaintiff, even though the contract set up by him has been fully proven.

It is insisted that, while we held on the former writ of error that the question arising as to the ownership of these assets was one for the jury, at that time only the evidence introduced on behalf of the plaintiff was before the court, and that with the introduction of the defendant's evidence the plaintiff's showing has been so overwhelmed that the jury could not find a verdict for the plaintiff consistent with all of the evidence. It very clearly appears that at the time of the purchase of this timber and these lands immediately before the organization of the Damascus Lumber Company, it was contemplated by the parties that a corporation would be formed for the purpose of holding their interests in that neighborhood. Not only McCullough testifies to this, but, as before stated, several other parties who were employed by Clark and McCullough in acquiring the timber likewise testify, and some of these other parties were to be allowed to take stock in this corporation, Clark agreeing to let them have some of the stock to which he would be entitled as representing his four-fifths interest in the properties. When the corporation was formed it did take possession of the mill, which had been there-

fore acquired in an incomplete state, and complete the same, and did enter upon the land and cut the timber thereon and market the lumber derived therefrom through Clark as its selling agent, Clark receiving for all of the lumber thus sold by him 5 per cent. for his services. From 1907 until 1915 it does not appear that any payments were ever made by the company to Clark on account of the timber cut by it, nor does it appear that Clark ever demanded any payments upon this account. It appears that on his books he charged to the company the taxes paid by him upon the land, the money paid by him for the mill before the organization of the company, and the moneys paid by him on account of the purchase of the land, both before and after the organization of the company, and credited the company with all moneys received by him from the sales of lumber, less the 5 per cent. commissions. It is true that the minutes of the organization meeting of the Damascus Lumber Company show that a resolution was passed by its stockholders and its board of directors purchasing from Clark the Thayer contract, including the mill acquired by him from the Thayer people, for all of the capital stock of the corporation fully paid and non-assessable. It is likewise true that the minutes show that Clark made a proposition to the company to sell it the timber upon the tracts of land standing in his name at certain stumpage prices, and it is testified by several witnesses that these resolutions were actually passed at those meetings. McCullough, who was present at the directors' meeting, says that all of the work at that meeting was cut out beforehand, and was passed in a few minutes, and that he does not know anything about such resolutions as these; his contention being that the minutes are fraudulent. But whether they are or not, he insists that no such contract was ever carried out by the company, but that the contract which was carried out was the one existing between him and Clark, the only parties interested in the property, at the time of the formation of the company, to wit, that the corporation should take over the properties, and the interests of Clark and McCullough should be evidenced by the issuance to them of the company's stock in the proportions that they were interested in the property.

It is significant that while Clark contends he was entitled to receive all of the company's stock for the mill and the Thayer contract, one-fifth of this stock was issued to McCullough in strict accordance with his contention as to what the arrangement was; that is, that their respective interests should be evidenced by the issuance of stock in the corporation. Clark now contends that McCullough owes him for this stock, but he does not undertake to explain how it ever

happened to be issued to McCullough originally. The other 80 per cent. of the stock was put at Clark's disposal. Seventy-six per cent. of it is now held by him, and 4 per cent. was acquired by another party from him, which 4 per cent. has since been acquired by McCullough. McCullough says that it is true that there was talk between him and Clark about cutting the timber on these tracts of land upon a stumpage basis. He says that Clark advised him that he (Clark) had agreed to let some of the employees take stock in the corporation out of the four-fifths of the stock assigned to him, but that he did not want these employees to have the benefit of the timber purchases, and that he wanted to make an arrangement for the corporation to cut the timber upon a stumpage basis; that this arrangement would make no difference as between himself and McCullough, for the reason that McCullough had the same interest in the timber held in Clark's name that he would have in the corporation, the only effect of it being that Clark would be enabled to prevent the parties to whom he had agreed to sell stock from getting into the company upon what is termed the "ground floor." McCullough says that Clark insisted that inasmuch as this arrangement would not affect McCullough's interest one way or the other, he should allow him to carry it out because of the effect it would have upon the arrangements he had theretofore made with some of the employees in regard to selling them stock; that when this arrangement was explained to these employees who had agreed to take stock, they all refused to take it, and that upon such refusal Clark agreed with him to abandon the arrangement and carry the whole proposition as they had originally intended, and that this was done. Clark contends, on the other hand, that the only interest which the Damascus Lumber Company has in the timber is the contract as shown by the minutes, that is, the right to cut it on the payment of certain stumpage prices. The oral evidence upon this proposition is conflicting. In order to support his contention Clark introduced in evidence certain books kept by him, or under his direction, in Philadelphia, by which he attempted to show that there was kept during all of the time an account with the Damascus Lumber Company showing the amounts of lumber cut of the various kinds, and the amount due by it to him upon the basis of the stumpage contract.

From the evidence in the record we are justified in saying that this stumpage account is fictitious, and was fabricated after the institution of this suit. It was before the jury in the court below, and it is shown by the testimony of witnesses asked in regard to it that the various items are inserted in most instances at the foot of the pages, and that while this account purports to have

been commenced in 1907, where it is indexed in the various books of Clark, it is below the index of other accounts commenced long afterward, except in a few instances where some other accounts are made to appear below this Damascus Lumber Company stumpage account in the books, but on reference to the book it appears from the testimony that these entries in the index below the Damascus Lumber Company stumpage account are purely fictitious, there being no such accounts in the books. While these books were introduced in evidence on the trial of the case before the jury, they are not brought to this court as part of the record. It appears that notice was given Clark's counsel some time before the hearing here to produce these books upon this hearing, and the only reply that was made to this notice at the bar of the court was that the books had been taken to Philadelphia, for which reason they could not be produced for our examination. We do not think their production would show any more, perhaps, than the oral evidence in regard to them does show, and that is that this stumpage account was a fabrication from beginning to end, and was made up for the purpose of this case.

[2] There is another significant thing in this connection, and that is that when the audit above referred to was made for the purpose of ascertaining Clark's standing with the Damascus Lumber Company, he charged that company with every cent paid out by him for the purchase of the mill, for the purchase of timber, for taxes paid upon timber, and for all expenses incurred by him in connection therewith. It is a little hard for us to comprehend why the Damascus Lumber Company should be treated as owing him for the money advanced for the purchase of this timber, and for the money advanced by him for the purchase of the mill if, as he says, he still owns the timber and the lumber company never had any interest therein, and he received all of the capital stock of the company as the purchase price of the mill. The effect of this is that the Damascus Lumber Company in this audit is made to pay every cent that was paid for the mill and Clark gets all of its capital stock for nothing. It is likewise made to pay every cent paid out by him for the purchase of timber which he claims he still owns. But he says in explanation of this that this audit was made up only for the purpose of a settlement between him and McCullough, and that inasmuch as their interests in the corporation were the same as their interests in the timber and the land, it was not necessary to separate the two transactions and make a settlement showing how he stood in relation to the standing timber, and what his standing was with the Damascus Lumber Company. This explanation would be plausible were it not for the fact that Clark's interest

in the Damascus Lumber Company is not the same as he claims it to be in the timber and land. He claims in the timber and land to own a four-fifths interest, and McCullough the other one-fifth, while in the Damascus Lumber Company he owns 76 per cent., and McCullough 24 per cent. It will thus be seen that the explanation made by him for including all of the money paid out by him for the purchase of land, and for the purchase of the mill, as a charge against the Damascus Lumber Company in this account, has no real basis to stand upon. There is much evidence taken upon this question, and after a careful review of it we are of opinion that the jury was entirely justified in holding that this timber and land was an asset of the Damascus Lumber Company at the time of the alleged sale of Clark's stock therein to the plaintiff.

Clark further contends that even though it be conceded that he made the contract sued upon, and that the timber and lands were assets of the Damascus Lumber Company, yet the verdict is grossly excessive, for the reason that the jury evidently included items as assets which were concededly not assets of the Damascus Lumber Company, and failed to give him credits to which he was entitled. The jury, under the instructions of the court, in arriving at the damages to which plaintiff was entitled, has ascertained the net assets of the Damascus Lumber Company. These assets consisted of a large amount of timber remaining uncut upon the land, of the land itself, of the mill, of the amount due from the Thayer Company above referred to, of the value of the contract under which the Damascus Lumber Company was cutting the Thayer timber at its mill, if this contract was of any value, and of various other items of property. Some of the items allowed by the jury were fixed by an answer to interrogatories propounded. As to other items we are unable to say from the record what allowance was made therefor by the jury, except that some allowance was evidently made, because the amount of the verdict necessarily includes something for these other items. The jury were asked in an interrogatory if they allowed anything because of the 30,000,000 feet of standing timber on one tract of land, 10,000,000 feet on another tract, 4,000 cords of bark, and the real estate, and in answer to this interrogatory stated that for the 30,000,000 feet of timber they allowed \$180,000, for the 10,000,000 feet of timber, \$20,000, for the 4,000 cords of bark, \$20,000, and for the real estate, \$20,000. There is some contention that these figures are excessive. That there was 30,000,000 feet of timber standing on one tract of land which was particularly fine timber, Clark concedes, but he says that this timber was not worth \$6 a thousand on the stump in 1915, at the time of the alleged sale. He swears, however, in his testimony that

when the alleged stumpage contract was made in the fall of 1907, the price of \$6 per thousand feet for such timber as this was a fair price, and it appears from the record that prices were worse depressed in the fall of 1907 than they ever have been since that date, so that we may fairly conclude that even on Clark's own statement the jury would have been justified in fixing the value of this timber at \$180,000. A number of other witnesses, who have gone over this timber very carefully, testify that it is worth the price found by the jury. As to the 10,000,000 feet of timber standing on the other lands, it was not so valuable because of the character of the timber itself and the difficulty in getting it to market. Clark admits that \$2 per thousand feet for this was a fair price, but he denies that there was as much as 10,000,000 feet of it. The evidence, however, shows that the operations of this company have been carried on since the 1st of May, 1915, and that there has been cut of this timber more than 10,000,000 feet. He disputes the item of 4,000 cords of bark, contending that this was included in the price of the timber. It is true one witness does include this in the estimate given by him of the timber, but when he does this he makes the estimate somewhat higher than the other witnesses. The other witnesses do not include it in their estimates of the timber, but estimate for it separately, and the jury were entirely justified in finding the amount they did on that account. The item of \$20,000 for the real estate Clark admits to be very much less than the actual value of it. In addition to these items of assets upon which there was a specific finding by the jury in answer to interrogatories, there was a large quantity of sawed lumber on hand. There is not much dispute as to the value of this lumber. It is placed by a number of the witnesses at from \$35,000 to \$36,000. As to what the jury allowed for it we cannot say, but certainly upon the undisputed evidence somewhere near these figures. It is put in plaintiff's account filed with his declaration at \$36,686.83, and this is based upon an inventory taken from the books of the company. We think it may well be assumed that the jury figured it at this amount. There is some dispute as to the value of the mill, of the railroad, and various equipment, amounting to several thousand dollars. We are not able to determine from the general verdict what amount was allowed for these items.

[3] There is an item included in the bill of particulars of \$45,000, being the amount received from the Thayer Company upon a settlement made in December, 1915, which it is contended the jury must have allowed in toto, when in fact and in truth a part of this item accrued after May 1, 1915. It is admitted in the record by the plaintiff that only about \$32,000 of this item was an asset of the Damascus Lumber Company on May

1, 1915, and we are not justified in assuming that the jury allowed more than that amount in arriving at its verdict. The defendant insists that the jury did allow more than this amount, for the reason that its finding is for the very amount which would be arrived at by including this item as \$45,000, and excluding another item claimed by the plaintiff for the value of the contract to saw the Thayer lumber as an asset. The fact that these amounts correspond does not justify the assumption that the jury arrived at its verdict by including the items confessedly not an asset, and by excluding an item upon which proof had been introduced, which would entitle them to consider it as an asset of the company. This claim that the jury included this \$13,000 of the Thayer settlement which accrued after the 1st of May, 1915, as an asset as of that date, is based solely and only upon the assumption that because the verdict it found was the same in amount as would be reached by including it and excluding the other item, that they did so include it and exclude the other item. As to how the jury reached its verdict we cannot inquire so long as there is evidence in the case to justify the amount found.

The defendant insists that the court erred in permitting evidence to go to the jury for the purpose of establishing that the contract with the Thayer Company for the cutting of its timber at the Damascus Lumber Company's mill was an asset, for the reason that the value of this contract was too speculative and uncertain to permit the jury to find that it was in fact worth anything to the Damascus Lumber Company on the 1st day of May, 1915. The contract provides that the Damascus Lumber Company should cut at its mill for the Thayer Company that company's timber at a certain price per thousand feet, and should have in addition to this price what is denominated the "offal," consisting of the slabs and other waste from the logs, which was by the Damascus Company cut into building lath and sold by it. A number of witnesses testify that this contract constituted a valuable asset of the Damascus Lumber Company; that the Thayer Company had remaining to be cut on the 1st of May, 1915, under this contract at least 60,000,000 feet of lumber; and that the profit that would be derived to the Damascus Lumber Company from the cutting this 60,000,000 feet under the terms of the contract would be at least \$1 per thousand feet, or \$60,000 in all. On the other hand, Clark attempts to show that instead of this contract being an asset it was a liability; that because it must extend over a considerable period of time, and the cost of performing it, by the Damascus Lumber Company, be uncertain, there could not be fixed any basis upon which to determine that it was of any value whatever. It must be borne in mind that any allowance of profits for the failure to perform a contract is

more or less uncertain. What the future will bring forth no one can tell. Undoubtedly when parties enter into a contract each expects to derive some benefit therefrom, and when it is shown by those familiar with the situation that under existing conditions, and such changes as may reasonably be contemplated, a substantial benefit would accrue by reason of the terms of the contract, the plaintiff is justified in submitting to the jury the question of the quantum of damages for a breach thereof. 8 R. C. L. tit. "Damages," § 62 et seq. We do not think there was any error in this case in the court submitting to the jury the evidence upon the value of this contract to the Damascus Lumber Company. Of course, it would be for the jury to determine from the evidence what, if any value, it had. In this case it is clear that the jury did not allow all that the plaintiff claimed upon account of it, but it cannot be said, as contended for by the defendant in his argument on the allowance of the \$13,000 of the Thayer settlement, that the jury did not make some allowance on account of this item.

There is complaint that the jury included as assets of Damascus Lumber Company an item of \$2,500 for a one-half interest in Hemlock Extract Company. We do not know from the general verdict whether this item was considered by the jury or not, but assuming that it was, it appears that the evidence would justify such action. The Damascus Lumber Company furnished to this extract company \$15,000 worth of bark for which it was to have a one-half interest in the plant. This the plaintiff estimated at \$2,500 at the time he filed his suit, but since that time the extract company has been wound up and there was realized \$8,000, according to the evidence, after the payment of all debts, which would make this interest worth \$4,000 instead of \$2,500. Clark says the amount has not been paid, and, if such is the case, no doubt it can be obtained by application to the proper party.

Clark also claims that he advanced more money than the audit shows, and calls attention to certain items which he claims are not correct. This audit was made by Clark's private secretary and the Damascus Company's bookkeeper, and was the result of six weeks of labor. They had before them not only the Damascus Company's books and papers, but also Clark's books, records, and papers. For this reason it will be presumed to be prima facie correct, and if Clark would impeach it he must do so by evidence that satisfies that it is not correct. As an example of his effort along this line he attempts to say that he is not given credit for as much as he paid for insurance on the company's property, and he bases his contention simply upon an entry in his own books, while it appears that this amount was ascertained by the auditors from the party

to whom the money was paid. Clark introduced this party as a witness, but did not attempt to show by him that he had paid more for insurance than the audit gave him credit for. The other attempts he makes to impeach the audit are no better supported, and we think the jury was warranted in making the answer it did to an interrogatory that the audit was correct.

Another complaint which the defendant makes is that there was certain purchase money remaining unpaid for some of the timber which the jury did not consider. There is nothing to warrant such a conclusion. Of course, if Clark was a trustee holding this land and timber for Damascus Lumber Company, then any unpaid purchase money was a liability to be considered in determining the company's net assets. In the statement filed by the plaintiff he placed the liabilities of the company at \$20,000. Aside from this unpaid purchase money these debts actually amounted to only eight or nine thousand dollars, so that there was a sufficient balance of this estimated indebtedness to take care of the unpaid purchase money. These items are proven, and we are not warranted in believing that the jury did not, in arriving at the net assets of the company, deduct the same from the gross assets as found by it.

[4] The court instructed the jury that in arriving at the plaintiff's measure of recovery, if they found that he was entitled to recover, they should ascertain the value of the defendant's stock in the Damascus Lumber Company as of the 1st day of May, 1915, the time at which it was to have been delivered under the contract sued upon, and after deducting therefrom the amount which the plaintiff was to pay the defendant therefor, add interest on the remainder to the date of the verdict. The defendant insists that it was erroneous to permit the jury to include in their verdict anything in the nature of interest, inasmuch as the claim was for unliquidated damages. This instruction is simply a direction to the jury as to the method to be used by it in liquidating these damages. The amount to which the plaintiff is entitled had to be ascertained by the jury as of the time they rendered their verdict. Manifestly to give him what the stock was worth, less the amount he was to pay therefor, three or four years before the date of the verdict, would not be compensation. That would permit the defendant to have the full use of the property during all of the intervening time without making any compensation therefor. This question, however, is hardly an open one in this state. In the case of *Cresap v. Brown*, 82 W. Va. 468, 96 S. E. 66, we held that in ascertaining the damages to which one was entitled for the wrongful removal of timber, it was proper to find the value of the timber at the date of the removal and add interest thereon to the date of the judg-

ment or decree as fixing the amount of damages to which the complaining party was entitled at that time. Likewise in *Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co.*, 84 W. Va. 448, 100 S. E. 296, 7 A. L. R. 901, we held that where one was entitled to compensation for oil taken from his land, the measure of that compensation would be the value of the oil taken at the time it was so wrongfully taken, with interest on such amount to the date of the judgment or decree. These holdings are fully supported by the authorities. 4 *Sutherland on Damages*, §§ 1118-1132; 8 R. C. L. tit. "Damages," § 89, and authorities there cited; *Mullen v. Cook*, 69 W. Va. 456, 71 S. E. 566.

[5] The action of the court in giving to the jury plaintiff's instruction No. 3 is also insisted upon as ground for reversal of this judgment. That instruction defines to the jury what is meant by the term preponderance of the evidence. It is as follows:

"The court instructs the jury that the requirement that the plaintiff must prove his case by a preponderance of the evidence has to do with the weight of evidence, and if after the jury considers all the evidence in the case, both the evidence for the plaintiff and the evidence for the defendant, including all circumstances as well as direct testimony, and from all this the jury believe that the evidence in favor of the plaintiff outweighs that of the defendant, even in the slightest degree, then this requirement as to the burden of proof on the plaintiff is fully met."

The defendant does not contend that this instruction does not correctly define the term preponderance of the evidence, but his insistence is that it misled the jury, inasmuch as some elements of the case were required to be proved by more than a preponderance of the evidence. He insists that the evidence to establish that he was holding the legal title to the lands and timber as trustee for Damascus Lumber Company, the equitable owner thereof, must be full, clear, and free from doubt, and the court so instructed the jury. This instruction does not purport to do more than to define to the jury what is meant by a preponderance of the evidence. This term was used by the court in instructing the jury in a number of instances, and we can see no objection to the court defining it, if it was thought necessary to tell the jury what he meant by the use of that term. It could not mislead the jury, for the definition was carefully limited in its application, and extends no further than to the instances in which the thing required to be proved could be proved by a preponderance of the evidence. It is not a binding instruction as claimed by the defendant. It does not require the jury to find for the plaintiff if he has proved the elements of his case by a preponderance of the evidence. It only tells the jury that the term "preponderance of the evidence" as used by the court in instructing it means what it is defined to mean in this instruction.

The action of the court in giving to the jury plaintiff's instruction No. 6 is also insisted upon as error. This instruction is as follows:

"The court instructs the jury that if from the evidence in this case they find for the plaintiff, then in determining the assets of the Damascus Lumber Company they must consider all property owned by said company, whether it had the legal title thereto or not; and in determining whether or not said company owned the property, or any part thereof, standing in the name of the defendant, the jury must consider all the facts and circumstances in the case applicable thereto, and must take into consideration the manner in which said property was treated and handled by the parties, and by the way in which the accounts were kept in relation thereto, and the official position held by defendant in said company, as well as the way, if any, said property was treated by the defendant in the making of the audit of his accounts, as well as all other facts and circumstances, and from all the evidence determine if said defendant held the legal title to said property for the use and benefit of said company, and thus determine if said company had the equitable right to said property, and the value of said equitable rights on May 1, 1915."

The criticism made of this instruction is that it gives undue emphasis to a few facts, and calls special attention to the fact that Clark was an officer of the company without also calling attention to the fact that McCullough was likewise such officer. It will be noted from reading the instruction that the purpose of it was to aid the jury in determining the question of whether or not the property, the legal title to which was in Clark's name, was in fact the property of the Damascus Lumber Company, and should be treated as an asset of that company. This instruction invites the jury's attention, as it will be observed, to a number of circumstances, among them the manner in which the property was treated and handled by the parties, and the fact that Clark was an officer of the corporation by which it was so treated and handled. It tells the jury to consider all of the facts and circumstances in evidence upon this question. The fact that McCullough was also an officer of the corporation could have made very little difference in determining this question, for the property was not in his name, but was in the name of Clark, while the fact that Clark was an officer of the corporation which treated this property as its own would be material as indicating that he considered it as belonging to the company. McCullough's action as an officer of the company might not be, or would not be, effective to bind Clark unless had with Clark's knowledge and consent. We think the instruction fairly presented this phase of the case to the jury, and is not subject to the criticism made of it.

The action of the court in refusing to give to the jury defendant's instruction No. 11 is also assigned as error. This instruction

would have told the jury that if they believed from the evidence that the minutes of the organization meetings of the Damascus Lumber Company, as read in evidence, are the minutes referred to in a subsequent minute by which the charter of the company was amended, which were offered in evidence by the plaintiff, then the plaintiff is estopped to deny the regularity or validity of such minutes and meetings, and cannot be heard to contradict the same. This instruction was not comprehensive enough even assuming that the propositions of law contained in it are correct. It eliminates entirely from consideration the theory of McCullough that the contract attempted to be made by these minutes was never in fact carried out by the parties, but was entirely abandoned. There can be no doubt but that by mutual agreement of the parties, even though we consider that the minutes constitute a contract, the same could be abandoned and the parties carry on their operations upon an entirely different basis, and this was the real question which the jury had to determine. The giving of this instruction could have served no other purpose than to have misled the jury into the belief that, if the minutes that were made at the Pittsburg meeting constituted a contract, not even the parties themselves could change it.

The refusal to give to the jury defendant's instruction No. 9 as presented, and in modifying it and giving it to the jury as modified, is also assigned as error. This instruction would have told the jury that in ascertaining the assets of the Damascus Lumber Company, if they believed from the evidence that the T. W. Thayer contract was a source of loss to the company instead of profit, they should deduct such loss from the assets. The court modified this instruction so as to tell the jury that if they found this contract to be a source of loss as of the 1st day of May, 1915, the date of the alleged contract, then they should deduct such loss from the assets. Clearly this modification was right. The jury in fixing the damages to which the plaintiff was entitled were compelled, so far as they could, to put themselves in the position of the parties on the 1st day of May, 1915, and if upon that day this Thayer contract was a liability rather than an asset, of course they should have so treated it. The instruction without this modification was indefinite in that it did not give to the jury a certain time at which they were to fix the effect of this contract upon the Damascus Lumber Company.

[6] Another assignment of error is based upon an alleged abuse by counsel for the plaintiff of the privileges of argument in his closing address to the jury. We cannot even consider under the showing in this record the alleged abuse of privilege relied upon. It appears from the bill of exceptions that counsel for the plaintiff when making his argument to the jury was interrupted by defendant's counsel with the request that certain

remarks be taken down, to which demand or request plaintiff's counsel acceded. Whether the remarks were taken down at the time or not does not appear, nor does it appear that the defendant or his counsel made any objection at the time to the court that the remarks complained of were improper, or asked the court to make any ruling in regard thereto, but after the jury had returned its verdict assigned as one of the reasons for setting it aside the alleged improper remarks. We have repeatedly held that this court will not consider errors predicated upon the abuse of counsel of the privilege of argument unless it appears that the complaining party asked for and was refused an instruction to the jury to the effect that such remarks were improper and should be disregarded. *State v. Statler*, 86 W. Va. 425, 103 S. E. 345, and authorities there cited. In order to take advantage of a matter of this kind the complaining party must ask the court for a ruling thereon at a time at which the trial court could correct the alleged error, and not wait until after the jury has returned a verdict and the court is without the opportunity to correct any error, if error there be.

Other errors assigned are to the action of the court in admitting certain evidence offered by the plaintiff over the defendant's objection, and in rejecting certain evidence offered by the defendant. Counsel for the defendant, while in their brief insisting that they rely upon these errors, do not advance any reason for disturbing the verdict because thereof. Evidently in the preparation of their brief they considered them of such an inconsequential character as to be unworthy of serious presentation by way of argument. We have carefully examined them, and we quite agree with this conclusion.

We find no error in the judgment complained of, and the same is affirmed.

(88 W. Va. 1)

WHITE v. MOSS et al. (No. 4126.)

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(Syllabus by the Court.)

1. Judgment \S 801—Pleading in suit to enforce lien setting up fraud in procurement of judgment held insufficient.

A pleading filed in a suit in equity brought to enforce the lien of a judgment, which, assailing the validity of the judgment involved, on the ground of fraud in the procurement thereof, charges no more than that defense to the action in which it was rendered was prevented by a representation made by the creditor to two of the four debtors, that he was suing on the note, in order to hold one of the endorsers and him alone, that they need not be uneasy, and that they could just let it go, is insufficient.

2. Pleading \S 8(15)—Facts stated in support of charge of fraud must make them inconsistent with honest conduct.

The facts stated in support of a charge of fraud, to be sufficient, must be such in character as to make them inconsistent with honest conduct on the part of him against whom they are charged.

3. Judgment \S 883(13)—Claims not reduced to judgment cannot be set off against judgment.

Debts and claims not reduced to judgment cannot be set off against a judgment.

4. Judgment \S 801—Lien of judgment enforceable without return of execution where execution not issued within two years.

The lien of a judgment on which an execution did not issue within two years from the date thereof can be enforced without allegation and proof of the return of an execution thereon unsatisfied.

Appeal from Circuit Court, Monroe County.

Suit by Nelson White against L. H. Moss and others. Decree of dismissal, and plaintiff appeals. Reversed and rendered.

R. L. Clark, of Union, for appellant.

Jno. L. Rowan, of Union, for appellees.

POFFENBARGER, J. The decree complained of on this appeal dismissed a bill for enforcement of the lien of a small judgment, on the one-third undivided interest of two of the defendants in a tract of land containing about 109 acres, on the ground that the judgment was obtained by fraud perpetrated upon two of the judgment debtors, one of whom was the principal debtor and the other a surety and part owner of the land proceeded against.

In the answer originally filed by L. H. Moss, principal, and John Moss, a surety, two of the four judgment debtors, Harve Moss and J. E. Ridgeway being the other two, neither of whom made any defense, payment of the judgment was claimed and relied upon. This claim was founded upon an account for sawing timber, the rental of a saw-mill site, lumber sold the plaintiff, and other small items, which it was averred the plaintiff had agreed to credit on the judgment. With reference to executions on the judgment, the plaintiff amended his bill, and a similar answer to the amended bill was filed. On the issues thus made, depositions were taken. Before the cause was submitted upon the issues made and proof taken, the same two defendants tendered, and were permitted to file, what is termed an amended and supplemental answer, charging fraud in the procurement of the judgment and praying that it be "dismissed and held as invalid" and that they be dismissed with their reasonable costs. Upon that answer and the depositions previously taken and filed, the court entered

the decree complained of, which adjudicated fraudulent procurement of the judgment and dismissed the bills.

It is deemed unnecessary to consider all of the assignments of error predicated upon the procedure in the cause, some of which deny right in the defendants to file the amended answer at the late stage at which it was tendered and the right of the court to read, on the issue raised by it, the depositions previously taken. Our conclusions respecting more important and vital matters involved will obviate the necessity of passing upon them.

Treating the amended and supplemental answer as a cross-bill seeking affirmative relief, vacation of the judgment, the plaintiff demurred to it. Whether it is a cross-bill need not be determined. If it is not, the demurrer can be treated as an exception to it or an objection to the filing thereof. It is only necessary to determine whether the pleading is sufficient in law.

[1, 2] As ground of fraudulent procurement, it charges nothing more than that the creditor, at or about the date of the institution of his action, told the respondents that he was bringing the suit, in order to hold J. E. Ridgeway and him alone, that they need not give themselves any uneasiness, and that they could just let it go; and that, upon this representation and under inducement thereof, they did not appear nor make any defense, and that, but for such representation, they would have appeared and defended. Ridgeway was an indorser on the note. This pleading does not aver any representation on the part of the plaintiff that he would not take judgment against the respondents. They were told he sought a judgment to hold Ridgeway and him alone. That was perfectly consistent with the theory of a judgment against the respondents as well as Ridgeway, in order to prevent his escape on the ground of lack of diligence on the part of the creditor against them. Respondents knew they had been sued or were to be. With this knowledge, they had no right to assume, from the representation they allege, that judgment would not be taken against them. There was no representation that it would not be. This averment is entirely too loose and equivocal. It does not state facts making out a sufficient charge of fraud. Allegation of a mere conclusion will not suffice, nor will a statement of facts clearly consistent with honesty. Fraud must be an almost inevitable deduction from the facts averred. *Loomis v. Jackson*, 6 W. Va. 613, 702; *Pyles v. Furniture Co.*, 30 W. Va. 123, 2 S. E. 909; *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

Respecting the charge of fraud, the evidence corresponds with the pleading. In other words, it is wholly insufficient to prove fraudulent procurement of the judgment.

[3, 4] Some of the items of the account antedate the judgment and are barred by fail-

ure to assert them in the action in which the judgment was obtained, by way of payments or set-offs. Code, ch. 50, § 55 (sec. 2809). Nor can such of them as are not barred be now set off against the judgment, except by the consent of the judgment creditor. *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. 1011.

The evidence is entirely too loose and weak to make out an allowance of the demands set up, on the theory of acceptance thereof as payments on the judgment. It is admitted that there has been no settlement and the plaintiff disputes the validity of nearly all of the items. One of them is 23 years old. There is no admission of an agreement to credit any of them on the judgment, except one, and the amount of it is disputed.

No execution issued on the judgment within two years from the date thereof. In such case, the lien can be enforced without a return of execution unsatisfied. Code, ch. 139, § 7 (sec. 5099). The controversy in the pleadings about abortive or defective executions and returns thereon relates to writs issued after the expiration of said period, which are immaterial and unimportant.

For the reasons stated, a decree will be entered here, reversing the decree complained of, adjudicating the right of the plaintiff to enforce the lien of his judgment against the lands of the defendants, John Moss and Harve Moss, in the bill and proceedings mentioned, and remanding the cause for execution of such decree.

(37 W. Va. 750)

SLEETH et al. v. CITY OF ELKINS.

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(Syllabus by the Court.)

1. Municipal corporations \S 323(1) — Owner may enjoin building new sidewalk, where permanent walk already built.

The owner of a city lot of land who has been ordered, by the proper municipal authorities by ordinance properly passed and notice duly served, to lay a sidewalk along his lot within a specified time, or failing to do so, the same will be done by the city at his cost and charged against his lot and collected as other city taxes are collected, and he has already laid a permanent sidewalk, which is still in good condition, in front of his lot on a street grade formerly established by the city, and the charter and city ordinances provide that where a new sidewalk is ordered by the city on a new grade, to take the place of an old sidewalk on an old grade, the cost thereof shall be borne by the city, and not by special assessment against the abutting property, may invoke equity to prevent the city from laying the new sidewalk at his cost, and to prevent the lien from attaching to his property.

2. Municipal corporations \S 323(1) — Owner may before work done test validity of proceedings for new sidewalk to replace old one.

Under such circumstances, and knowing it would be improper or unlawful to make such special assessment against his property for such costs, he may bring suit to test the question of the validity of the proceedings before the work is done.

Certified from Circuit Court, Randolph County.

Suit by W. H. Sleeth and others against the City of Elkins for an injunction. Temporary injunction awarded, demurrer and motion to dissolve overruled, and questions certified. Affirmed.

B. W. Taylor and R. H. Allen, both of Elkins, for plaintiffs.

Samuel T. Spears, of Elkins, for defendant.

LIVELY, J. W. H. Sleeth and 44 other persons, all residents of the city of Elkins in Randolph county and owners of real estate therein abutting on the streets of that city, presented their bill for injunction against the city of Elkins to the judge of the circuit court of that county on September 1, 1920, alleging, substantially, that they were such residents and owners of real estate similarly situated, and were aggrieved by orders of the city council, which had required them to tear up and abandon the brick sidewalks in front of their lots and dwellings on certain streets and to construct in lieu thereof cement sidewalks; that in pursuance of an order to that effect, passed by the council on May 26, 1920, notices were served on the plaintiffs to construct cement sidewalks within 30 days, or the city would do so, and the cost thereof would be charged against their abutting property and collected as other city taxes are collected; that, upon petition signed by a number of the plaintiffs, presented to the council, asking for a rescission of the order, the council deferred action until the city engineer could make an examination of the sidewalks in question and report thereon, which report was filed on July 2, 1920, when the council again ordered the cement sidewalks to be laid, and notices to be sent to the property owners; that notice had never been served on them in pursuance of this order, but that the first notice had been served; that later, on August 19, 1920, the council advertised for bids for the construction of said sidewalks, and were proceeding to have the sidewalks put down at plaintiffs' expense. Plaintiffs charge, substantially, that the city is without authority to order their permanent brick sidewalks, in good condition and repair, to be torn up and destroyed and new walks of cement put down at their expense, in order to satisfy a whim or caprice of the members of the council; but if such authority is vested in

the council, then its exercise has been unreasonable and arbitrary, is an abuse of power, and amounts to a confiscation of plaintiffs' property. Section 1 of chapter 20 of the charter of the city is as follows:

"It shall be the duty of all persons who are the owners of land or lots which front upon a street or streets which are maintained and kept by the city, to put down and keep in good repair a suitable sidewalk or footwalk along the entire part of such land or lot which fronts upon any such street, and when in the opinion of the council, it has become necessary to repave the same, in such manner, of such width, and of such suitable material, as the council might direct, provided, however, that before any permanent sidewalk or footwalk is laid, it shall be the duty of the city engineer to fix the grade of such sidewalk, and said walk shall be laid in conformity to such grade, and should the city, after said walk is laid, change the grade, the cost of laying a new walk to conform in said changed grade, made necessary by reason of said change of grade, shall be paid by the city, as well as all damages the owner of the land or lot may sustain by reason of said change of grade."

The bill charges that all the brick walks ordered to be torn up have been heretofore laid upon grades established by the city engineer, and that new grades were being established by the city higher than the former grade, which, if done and the new cement sidewalks laid thereon, would greatly damage complainants, and that the city is attempting to compel plaintiffs to lay the new walks on the new grades and pay for the same, notwithstanding it is the duty of the city to bear all the expense and pay all the damage. They further charge that the city has not proceeded, in accordance with the requirements of its charter, to compel plaintiffs to lay these sidewalks, and exhibit all of the orders and proceedings of the council in relation thereto. The bill avers that it is impossible for plaintiffs to comply with the requirements of the city, because it is impossible for them to purchase cement by reason of its scarcity and exorbitant market price; and that if the council is permitted to proceed in its avowed course, plaintiffs will suffer irreparable damage and injury, and prays for an injunction. A temporary injunction was awarded. A demurrer was interposed to this bill, was overruled, and a motion to dissolve the temporary injunction, granted in vacation, was also overruled on November 18, 1920, when the judge certified the following questions to this court:

1. Whether equity has jurisdiction to entertain this suit under the points raised by the demurrer to the effect that there is no jurisdiction to enjoin the city from advertising and letting contract to tear up and rebuild the walks in question under the general powers of the city to reconstruct the walks and pay for same out of general taxes, and that equity

could have no jurisdiction until the city attempted to collect or at least levy the special assessment for the cost of said construction.

2. Whether equity has jurisdiction to entertain this suit under the points raised by the demurrer to the effect that there is no jurisdiction to enjoin the city from advertising and letting contracts to tear up and rebuild the walks in question under the general powers of the city to reconstruct walks and pay for the same out of general taxes in the first instance, and thereupon levy the cost thereof as a special assessment against the abutting property, and that equity could have no jurisdiction until the city attempted to collect, or at least levy, the special assessment for the cost of said construction.

3. Whether, under the charter of the city of Elkins, the defendant can compel the plaintiff to tear up the brick sidewalks which have already been laid pursuant to a former ordinance of said city, and replace the same by a cement walk under a new ordinance.

4. Whether the city of Elkins, after first having established grades for sidewalks, and the same have been laid pursuant to ordinance, can now establish a different grade, raising the walk in front of some lots and lowering it in front of others, and compel the lot owners to lay a new walk on the new grade.

[2] The first two questions are answered in the affirmative by this court in the cases of *City of Avis v. Allen*, 83 W. Va. 789, 99 S. E. 188, and *Damron v. City of Huntington*, 82 W. Va. 401, 96 S. E. 53, 9 A. L. R. 623. These plaintiffs were served with notice to lay the cement sidewalks within 30 days, or, failing to do so, the city would lay the same at the expense of the plaintiffs, to be charged against their abutting land and collected as other city taxes were collected. Should these plaintiffs stand by and wait until the work had been done, afterwards claiming that it was illegally done, and that it was unlawful to charge their property with the cost thereof, they might have waived their right to question the validity of the assessment when made. Knowing facts which would make this assessment illegal, and then permitting the work to be done, might estop them from preventing the assessment or paying the money. *Avis v. Allen*, supra; *Werninger v. Stephenson*, 82 W. Va. 367, 95 S. E. 1035. It is not in all cases that an abutting landowner would be estopped from suit even after the special assessment is laid. If the proceedings were void, then he would not be; but, if irregular or voidable only, he would be estopped. *Moundaville v. Yost*, 75 W. Va. 224, 83 S. E. 910.

[1] Injunction is the proper remedy. 28 Cyc. 1014. "An injunction lies against a municipality to enjoin the removal by it of a brick sidewalk where it appears that to permit the performance of such act would be to allow a breach of trust and an abuse of a power sought to be exercised in bad faith to the wanton injury of the rights and property

of individuals." *Nichols v. Village of Sadorus*, 120 Ill. App. 70.

Certified questions 3 and 4 are in part answered by section 1 of chapter 20 of the charter and ordinances of the city of Elkins. There can be no question of the broad powers of the city to order the sidewalks to be paved or repaved and kept in order, and to be constructed in such manner and of such material as in the judgment of the council are most suitable, and for the best interests of the inhabitants of the city. Neither is there any doubt of the power of the city to establish and change grades, order paving, sewerage, and the like. The city charter expressly gives these broad powers, and they are usual and necessary in municipal government. The courts will not usually interfere with the discretion and authority vested in municipal officers for the exercise of these necessary functions, unless it is clear that there is an arbitrary abuse of power to the irreparable damage of private rights. The city of Elkins can, by ordinance, change the grade of the streets in front of the property of these plaintiffs, and provide for the laying down of new sidewalks, but under the allegations of the bill to the effect that the grade has heretofore been established and the sidewalks laid down in accordance with that established grade, in good faith, by the property owners, it is incumbent upon the city to pay the cost of laying the new sidewalk to conform with the changed grade, as well as the damages to the lot owners caused by such change, as provided in said section 1, c. 20, of the city's charter and ordinances. It appears from the bill and exhibits, especially Exhibit No. 1, that the city is attempting to assess and collect from the abutting landowners all of the cost of laying the contemplated new cement sidewalks. The allegations of the bill, which on demurrer are admitted to be true, aver that no necessity for the new sidewalks exist; that it is impossible at this time to comply with the notice and demand; that the ordinance had been induced by whim and caprice of some members of the council, and irreparable loss will be sustained by plaintiffs if they are compelled to comply. These allegations would be sufficient for an injunction, as the record now stands, and, if sustained by sufficient evidence, would likely perpetuate the injunction. It is intimated by counsel that there is no basis for these charges, and that the sidewalks are old and out of repair, and a necessity exists for those ordered by council to be laid. We cannot anticipate the evidence. Whether or not the city can cause these sidewalks to be torn up is largely a question of the facts as they exist. We do not think it can do so if the facts are as they appear from this bill.

While the regularity and sufficiency of the ordinances and proceedings of the city council with reference to these sidewalks is rais-

ed in the pleadings, it is not included in the questions certified, and we do not discuss it, for that reason, except to say that there seems to have been a substantial compliance with the requirement of the charter. The ordinances were regularly passed and recorded, and, although no notice was given to plaintiffs of the action of the council on July 2d, requiring them to lay their sidewalks within 30 days, notice had been previously served on them to the same effect, they had appeared before the council, petitioned against its action, and seemed to be fully cognizant of all steps taken by the council thereafter, as appears from the bill. One notice is all the charter seems to require.

We sustain the action of the lower court in overruling the demurrer.

(88 W. Va. 49)

GOODWIN et al. v. TONY POCAHONTAS COAL CO. (No. 4204.)

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(Syllabus by the Court.)

1. New trial \S 72—Verdict not set aside because of weight of evidence of one witness over another.

While an engineer who made the measurements of the quantity of material within a certain space to be excavated before the work was done may have been in a better position to make accurate measurements than an engineer whose calculations were made from measurements after the work was done, this will not give to the calculations of the former such a degree of finality as to justify setting aside the verdict of a jury based upon the measurements of the latter.

2. Witnesses \S 347—May be impeached by showing previous inconsistent conduct.

Evidence of a witness may be impeached by showing his previous conduct inconsistent therewith.

3. Trial \S 85, 207—Evidence competent for any purpose properly admitted over general objection.

Evidence competent for any purpose is properly admitted over a general objection. If the party against whom it is offered would have it limited to a particular purpose, he must move the court to that end.

New trial \S 35—Trial \S 59(2)—Order of introducing testimony discretionary; verdict not set aside because of premature introduction of testimony.

The order of introducing testimony is largely in the discretion of the trial court, and even though it appear that testimony has been introduced at a time at which it was not admissible, if the subsequent developments of the trial make it admissible before the case is

finally submitted to the jury, a verdict will not be set aside because of the premature introduction of such testimony.

Error to Circuit Court, McDowell County.

Action by A. T. Goodwin and others against the Tony Pocahontas Coal Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Litz & Harman and G. W. Howard, all of Welch, for plaintiff in error.

Sanders & Crockett and A. G. Fox, all of Bluefield, for defendants in error.

RITZ, P. This writ of error seeks reversal of a judgment in favor of the plaintiffs for a balance claimed to be due them for certain work done under a contract providing for the grading of a siding for the defendant. The contract sued on is not in controversy, and simply provided for the doing of the work at a certain stipulated price per yard. It provided no method for ascertaining the quantity, and when the work was completed the parties were unable to agree upon the number of yards of excavation, and this suit resulted from that disagreement.

The plaintiffs contend that at the time they entered upon the work under the contract defendant, through its engineer in charge, agreed to furnish them cross-sections of the work to be done; that he was called upon a number of times therefor, and, failing to furnish the same, they employed an engineer to make cross-sections of so much of the work as had not been done, and also of that part of the work which had been done. After the work was done they had this engineer calculate the quantities from the measurements taken by him upon the ground, both as to the work which had been done when he took the measurements and as to that part of it which then remained to be done. He ascertained that there had been removed 8,238.8 cubic yards of material. The defendant's engineer likewise calculated the quantity from his measurements made on the ground before the work was undertaken, and ascertained that there were only 5,160.77 cubic yards. Payment was made before and at the trial for this quantity, and this controversy involves the excess. The trial resulted in a verdict in favor of the plaintiffs for substantially what they claimed. The defendant insists that this verdict cannot be sustained, for the reason that the estimates submitted in evidence by the plaintiffs, upon which the verdict is based, are not trustworthy, and should not be allowed to stand in opposition to the estimates made by its engineer; and, second, because the court admitted in evidence proof of an agreement had between the parties, after the contro-

versy arose, to submit the same to the determination of another engineer.

[1] As before stated, the contract provided for the payment to the plaintiffs of \$1.15 for each yard of material excavated, and the sole question which the jury had to decide was the quantity of this material. The defendant's engineer contends that he accurately measured the ground before the work was done and accurately calculated the quantities from these measurements; while the plaintiffs' engineer claims that as to the work remaining to be done at the time he made his measurements the same were absolutely accurate, and that as to the work which had then been done they were as accurate as could be made under the conditions then existing; that in making his measurements he had to guide him some of the stakes yet remaining, the slope of the ground above the cut, and information furnished him by the men who actually did the work, and that from this he was able to make a reasonably accurate calculation as to the number of yards actually removed. Not only is there a substantial difference between the measurements made by these engineers as to the quantity of work which had been done at the time the plaintiffs' engineer made his measurements, but there is likewise such a difference as to the work which then remained to be done. As to the work which remained to be done at that time, admittedly the engineer employed by the plaintiffs was in just as good a position to ascertain the quantities as the defendant's engineer, and there is no suggestion but that he was just as competent for this purpose. His calculation makes this quantity 855 yards more than it is ascertained to be by the defendant's engineer. It is admitted, both by the plaintiffs and by their engineer, that he was not in position to make as accurate measurements of the quantities removed before he went upon the ground as he would have been had he made his measurements before the removal of the material, and as to this work it may be said that the defendant's engineer had superior information and better opportunity to make correct measurements than the plaintiffs' engineer. But this is not conclusive of the question. There are many suggestions in the evidence of inaccuracies in the work done by the defendant's engineer in other particulars, and particularly it is testified by the engineer employed by the plaintiffs that the defendant's engineer furnished him a profile of the work as well as cross-sections thereof, and that there was a very substantial difference between the quantity of the work shown by the profile made by the defendant's engineer and the quantity as shown by his cross-sections. The jury had this evidence before them, and they were the judges, and the sole judges, as to what weight

should be given to the evidence of the witnesses. There was no other way of ascertaining the quantity of material removed by the plaintiffs except to measure it, and while it is admitted that this method might not be absolutely accurate because of the unevenness of the ground, still it was the only practicable method which could be adopted, and it is shown that the result reached, if the measurements were accurately taken, was in all probability within a very few yards of the actual amount of material removed. There is nothing in the nature of the defendant's evidence to give to it the character of finality upon this question. It is quite as probable that the defendant's engineer made mistakes in his measurements and calculations as that the plaintiffs' engineer did. In fact, the jury may well have concluded, because of the discrepancies pointed out in the work of defendant's engineer, that the same was not done with the same care and accuracy as characterized the work done on behalf of the plaintiffs. We think, upon the question as to the quantity of material removed by the plaintiffs, the jury's verdict is not in conflict with such a substantial preponderance of the evidence as would justify setting it aside upon that ground.

[2-4] It is insisted, however, that it was error for the court to permit the plaintiffs to introduce in evidence an agreement had between the parties after the controversy arose to submit the same for decision to an engineer mutually chosen by them. It is contended that this evidence had no tendency to prove any issue involved in the case. It was apparent from the very beginning of the trial, and particularly from cross-examination of the plaintiffs' engineer, that the defendant's contention would be that the estimates made by him as to the quantities removed before he had made any measurements were so uncertain and indefinite as to be unworthy of belief; in fact, that it was impossible to make any measurements after the work was done from which a reliable calculation could be made as to the quantity of material removed, and when the defendant's engineer was placed upon the stand he testified that it was an absolute impossibility to make a reliable estimate as to the amount of material excavated after the excavation had been made. He was the very man who made the agreement to submit the question in controversy to the determination of a third engineer, and his conduct in agreeing that a disinterested engineer might take their work and make his measurements upon the ground, and ascertain the actual quantities, was entirely inconsistent with the testimony he gave that it would be absolutely impossible to make any reliable calculation from such information. This evidence would therefore have a tendency to contradict and impeach the evidence given by the engineer

remaining unpaid purchase money, and even reimbursed Clark for the purchase money he paid on this land to practically the full extent that he had made such payments. Clark, on the other hand, insists that when the corporation was organized a resolution was passed by the stockholders and the board of directors acquiring the right to cut the timber upon the lands held by him upon the basis of paying therefor certain prices per thousand feet for the different kinds of timber, the price being \$8 per thousand and for the larger part thereof, and that the stock of this company by a like resolution was directed to be issued to him in payment for the mill purchased by him from the Thayer Company, and which had not yet been completed, as well as for the benefits arising from a contract entered into by him with the Thayer Company for the sawing of that company's timber at this mill, and the transportation of the Damascus Lumber Company's logs over that company's railroad. In this way he contends that he acquired all of the stock of the Damascus Lumber Company, and that the only interests which that company owned at the time of the institution of this suit was the mill and the right to cut the timber upon the lands owned by him at the prices mentioned in the resolution above referred to, and whatever advantages might be derived from the Thayer contract, which will be hereafter adverted to. If his contention is sustained, then there is no basis in the evidence for any substantial recovery upon the part of the plaintiff, even though the contract set up by him has been fully proven.

It is insisted that, while we held on the former writ of error that the question arising as to the ownership of these assets was one for the jury, at that time only the evidence introduced on behalf of the plaintiff was before the court, and that with the introduction of the defendant's evidence the plaintiff's showing has been so overwhelmed that the jury could not find a verdict for the plaintiff consistent with all of the evidence. It very clearly appears that at the time of the purchase of this timber and these lands immediately before the organization of the Damascus Lumber Company, it was contemplated by the parties that a corporation would be formed for the purpose of holding their interests in that neighborhood. Not only McCullough testifies to this, but, as before stated, several other parties who were employed by Clark and McCullough in acquiring the timber likewise testify, and some of these other parties were to be allowed to take stock in this corporation, Clark agreeing to let them have some of the stock to which he would be entitled as representing his four-fifths interest in the properties. When the corporation was formed it did take possession of the mill, which had been there-

before acquired in an incomplete state, and complete the same, and did enter upon the land and cut the timber thereon and market the lumber derived therefrom through Clark as its selling agent, Clark receiving for all of the lumber thus sold by him 5 per cent. for his services. From 1907 until 1915 it does not appear that any payments were ever made by the company to Clark on account of the timber cut by it, nor does it appear that Clark ever demanded any payments upon this account. It appears that on his books he charged to the company the taxes paid by him upon the land, the money paid by him for the mill before the organization of the company, and the moneys paid by him on account of the purchase of the land, both before and after the organization of the company, and credited the company with all moneys received by him from the sales of lumber, less the 5 per cent. commissions. It is true that the minutes of the organization meeting of the Damascus Lumber Company show that a resolution was passed by its stockholders and its board of directors purchasing from Clark the Thayer contract, including the mill acquired by him from the Thayer people, for all of the capital stock of the corporation fully paid and non-assessable. It is likewise true that the minutes show that Clark made a proposition to the company to sell it the timber upon the tracts of land standing in his name at certain stumpage prices, and it is testified by several witnesses that these resolutions were actually passed at those meetings. McCullough, who was present at the directors' meeting, says that all of the work at that meeting was cut out beforehand, and was passed in a few minutes, and that he does not know anything about such resolutions as these; his contention being that the minutes are fraudulent. But whether they are or not, he insists that no such contract was ever carried out by the company, but that the contract which was carried out was the one existing between him and Clark, the only parties interested in the property, at the time of the formation of the company, to wit, that the corporation should take over the properties, and the interests of Clark and McCullough should be evidenced by the issuance to them of the company's stock in the proportions that they were interested in the property.

It is significant that while Clark contends he was entitled to receive all of the company's stock for the mill and the Thayer contract, one-fifth of this stock was issued to McCullough in strict accordance with his contention as to what the arrangement was; that is, that their respective interests should be evidenced by the issuance of stock in the corporation. Clark now contends that McCullough owes him for this stock, but he does not undertake to explain how it ever

happened to be issued to McCullough originally. The other 80 per cent. of the stock was put at Clark's disposal. Seventy-six per cent. of it is now held by him, and 4 per cent. was acquired by another party from him, which 4 per cent. has since been acquired by McCullough. McCullough says that it is true that there was talk between him and Clark about cutting the timber on these tracts of land upon a stumpage basis. He says that Clark advised him that he (Clark) had agreed to let some of the employees take stock in the corporation out of the four-fifths of the stock assigned to him, but that he did not want these employees to have the benefit of the timber purchases, and that he wanted to make an arrangement for the corporation to cut the timber upon a stumpage basis; that this arrangement would make no difference as between himself and McCullough, for the reason that McCullough had the same interest in the timber held in Clark's name that he would have in the corporation, the only effect of it being that Clark would be enabled to prevent the parties to whom he had agreed to sell stock from getting into the company upon what is termed the "ground floor." McCullough says that Clark insisted that inasmuch as this arrangement would not affect McCullough's interest one way or the other, he should allow him to carry it out because of the effect it would have upon the arrangements he had theretofore made with some of the employees in regard to selling them stock; that when this arrangement was explained to these employees who had agreed to take stock, they all refused to take it, and that upon such refusal Clark agreed with him to abandon the arrangement and carry the whole proposition as they had originally intended, and that this was done. Clark contends, on the other hand, that the only interest which the Damascus Lumber Company has in the timber is the contract as shown by the minutes, that is, the right to cut it on the payment of certain stumpage prices. The oral evidence upon this proposition is conflicting. In order to support his contention Clark introduced in evidence certain books kept by him, or under his direction, in Philadelphia, by which he attempted to show that there was kept during all of the time an account with the Damascus Lumber Company showing the amounts of lumber cut of the various kinds, and the amount due by it to him upon the basis of the stumpage contract.

From the evidence in the record we are justified in saying that this stumpage account is fictitious, and was fabricated after the institution of this suit. It was before the jury in the court below, and it is shown by the testimony of witnesses asked in regard to it that the various items are inserted in most instances at the foot of the pages, and that while this account purports to have

been commenced in 1907, where it is indexed in the various books of Clark, it is below the index of other accounts commenced long afterward, except in a few instances where some other accounts are made to appear below this Damascus Lumber Company stumpage account in the books, but on reference to the book it appears from the testimony that these entries in the index below the Damascus Lumber Company stumpage account are purely fictitious, there being no such accounts in the books. While these books were introduced in evidence on the trial of the case before the jury, they are not brought to this court as part of the record. It appears that notice was given Clark's counsel some time before the hearing here to produce these books upon this hearing, and the only reply that was made to this notice at the bar of the court was that the books had been taken to Philadelphia, for which reason they could not be produced for our examination. We do not think their production would show any more, perhaps, than the oral evidence in regard to them does show, and that is that this stumpage account was a fabrication from beginning to end, and was made up for the purpose of this case.

[2] There is another significant thing in this connection, and that is that when the audit above referred to was made for the purpose of ascertaining Clark's standing with the Damascus Lumber Company, he charged that company with every cent paid out by him for the purchase of the mill, for the purchase of timber, for taxes paid upon timber, and for all expenses incurred by him in connection therewith. It is a little hard for us to comprehend why the Damascus Lumber Company should be treated as owing him for the money advanced for the purchase of this timber, and for the money advanced by him for the purchase of the mill if, as he says, he still owns the timber and the lumber company never had any interest therein, and he received all of the capital stock of the company as the purchase price of the mill. The effect of this is that the Damascus Lumber Company in this audit is made to pay every cent that was paid for the mill and Clark gets all of its capital stock for nothing. It is likewise made to pay every cent paid out by him for the purchase of timber which he claims he still owns. But he says in explanation of this that this audit was made up only for the purpose of a settlement between him and McCullough, and that inasmuch as their interests in the corporation were the same as their interests in the timber and the land, it was not necessary to separate the two transactions and make a settlement showing how he stood in relation to the standing timber, and what his standing was with the Damascus Lumber Company. This explanation would be plausible were it not for the fact that Clark's interest

must be set aside and a new trial awarded. *Steel v. American Oil Development Co.*, 80 W. Va. 206, 92 S. E. 410, L. R. A. 1917E, 975; *Chafin v. N. & W. Ry. Co.*, 80 W. Va. 703, 93 S. E. 822.

The questions propounded by plaintiff for the purpose of eliciting information with respect to the dangers attending the administration of an anæsthetic, and responses of the witness thereto, were irrelevant to the issues involved and therefore improper. They serve no good purpose in cases of this character and may improperly influence or prejudice the jury. The anæsthetic undoubtedly was necessary in this instance, and no harm resulted from its use. As to whether such questions and answers alone would constitute reversible error, we express no opinion, but for reasons stated repetition should be avoided.

The court properly modified plaintiff's instruction by the elimination therefrom of the words "or otherwise," for the only ground of negligence charged in the declaration is that defendant improperly came in contact with plaintiff's truck and thereby caused it to go over the embankment. No alternative ground is relied on, and for that reason the modification was proper.

Of eight instructions requested by defendant three were given. The one directing a verdict for defendant was properly refused, inasmuch as the evidence was such as to constitute a prima facie case of negligence, which required submission to the jury as ultimate triers of disputed facts, without such specific direction as to their finding. To de-

termine what weight and force the evidence was entitled to clearly was within their province. The third instruction was properly refused because covered by defendant's second instruction given. The other three also were properly refused, first, because there is no substantial evidence of plaintiff's contributory negligence; second, because they are embodied, in effect, in the second and third instructions given, which require plaintiff to prove by a preponderance of the testimony that the injury was caused by the negligence of the defendant and that the striking of the truck by defendant's car was the proximate cause of the injury. These two instructions given, by necessary implication, require a finding of no contributory negligence, for in order to arrive at the conclusion that the striking of plaintiff's truck was the proximate cause of the injury, it is necessary to exclude contributory negligence as an intervening cause. But as a matter of fact there is no evidence to support the instructions refused. The nearest approach to it is found in the testimony of W. R. Carter, one of the two witnesses who saw the accident, who said it looked as if plaintiff would have gone over the embankment even if defendant had not struck him. But this is a mere expression of opinion, and without more would scarcely show that plaintiff was contributorily negligent in turning so far to the right in order to give defendant ample space in which to pass.

Our order therefore will reverse the judgment, set aside the verdict, and remand the case for retrial.

(151 Ga. 278)

ALLEN v. ALLEN. (No. 1953.)

(Supreme Court of Georgia. Dec. 17, 1920.
Rehearing Granted Jan. 14, 1921. Judgment
Adhered to March 5, 1921.)

(Syllabus by Editorial Staff.)

1. Evidence ⇨471(19)—Testimony that improvements were substantial, and such as a man would place on his own land, held conclusions.

In a suit for specific performance, testimony of a witness that improvements described by him were substantial in character, and were such as a man would place on his land, rather than such as he would place on rented land, was properly excluded, as mere conclusions of the witness.

2. Evidence ⇨471(24) — Testimony that plaintiff moved on land in pursuance of gift properly excluded.

In a suit by a son against his father for specific performance of an agreement to convey land, the son's testimony, after he had testified that he moved on the land, that he did so "in pursuance of the gift," was properly excluded.

3. Witnesses ⇨240(8) — Question held properly excluded as leading.

In a suit for specific performance, it was not error to exclude, as leading, the question, "Did you understand that it was a deed to carry out the contract?"

4. Specific performance ⇨29(2)—Description in petition sufficiently definite.

In a suit for specific performance, a description of the land as a tract located in a certain county, on a road leading from a certain gin to another designated road at a specified place, and bounded on the north, east, south, and west by lands of named persons, and containing 85 acres more or less, and being the place on which petitioner was residing, was not too indefinite.

5. Specific performance ⇨121(2)—Parol contract and its terms must be clearly established, so as to leave no reasonable doubt.

Where specific performance of a parol contract for the sale of lands is sought, the contract and its terms should be established so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement.

6. Specific performance ⇨121(3) — Evidence indefinite and insufficient to support decree on theory of sale or gift of part of land.

In a son's action against his father for specific performance of an agreement to convey 85 acres of land, for which the son was to pay annually a specified quantity of cotton, because the other children were given only 50 acres, where there was no attempt in the evidence to separate any particular 50 acres, and the evidence did not disclose any agreement to execute a deed at any specified time, but showed that the specified payments of cotton were to be made until the father's death, or until he ceased to exact payment, and that neither event had occurred, the evidence was too indefinite

and insufficient to support a decree, on the theory that there was a sale or gift of part of the land.

Error from Superior Court, Madison County; W. L. Hodges, Judge.

Action by George T. Allen against George H. Allen. Judgment for defendant, and plaintiff brings error. Affirmed.

C. E. Adams, of Danielsville, and John J. Strickland, of Athens, for plaintiff in error.

T. J. Shackelford and Shackelford & Meadow, all of Athens, and Berry T. Moseley, of Danielsville, for defendant in error.

ATKINSON, J. George T. Allen instituted an action against his father, George H. Allen, for specific performance. The contract, as alleged in the petition as amended, was to the effect that the defendant, desiring to divide certain of his real estate among his children, set apart and put the plaintiff in possession of 85 acres of land, under a parol agreement that, inasmuch as the other children were to receive only 50 acres, the plaintiff should pay to the defendant annually the sum of 2,040 pounds of lint cotton, so long as defendant lived, or so long as he exacted the same; the defendant to make a deed to plaintiff, "in proper form, conveying said described tract of land to petitioner for life, and then to his children, if any, and, if not, to the heirs of" the defendant. It was also alleged that on faith of the gift the plaintiff had made valuable improvements on the land, and had made annual payments in cotton to the defendant as stipulated. In the answer there was a denial of the contract; and an issue was presented by the pleadings, as to whether the contract had been made as alleged, and whether the improvements on the land were made at the expense of the plaintiff or the defendant. The defendant contended that plaintiff's occupancy was as the defendant's tenant. After the close of the evidence introduced by both sides, the judge directed a verdict for the defendant. The plaintiff made a motion for new trial, which was overruled, and he excepted. Held:

[1] 1. Where a witness for the plaintiff described certain improvements made upon the land by the plaintiff, in such manner as to enable the jury to determine the character of the improvements, his further testimony that the improvements were "substantial in character," and were of such "character that a man would place on his land," rather than "the character that a man would place on the land that he rented," amounted to mere conclusions of the witness, and were properly excluded from evidence.

[2] 2. After the plaintiff, testifying in his own behalf, stated that he moved on the land after the date of the alleged gift, it was not

cause for reversal to exclude his further testimony that he moved on the land "in pursuance of the gift."

[3] 3. The court did not err in refusing to allow the plaintiff, while testifying in his own behalf, to answer the question, "Did you understand that it was a deed to carry out the contract?" the question being objected to on the ground that it was leading.

[4] 4. The description of the land was not too indefinite to be the basis of a decree for specific performance. The description was:

"A tract of land located in Madison county on a road leading from Lonny Williams' gin to the Danielsville and Athens road at the J. F. Colbert place, bounded on the north by lands of Van Jenkins, on the east by lands of W. T. Allen, on the south by lands of Hassey T. Rowe, and on the west by lands of W. J. Glenn and Robert Born, and contains eighty-five (85) acres, more or less, and being the place on which petitioner now resides."

[5, 6] 5. "Where specific performance is sought for the enforcement of a parol contract for the sale of lands, such contract and the terms thereof should be established so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement." *Lloyd v. Redford*, 148 Ga. 575, 97 S. E. 523, and citations. There was no attempt in the evidence to separate any particular 50 acres to which a gift might apply from any 35 acres to which a sale might apply; nor did the evidence disclose any agreement to execute a deed at any specified time. Moreover, the plaintiff's evidence was to the effect that he was to make specified payments in cotton until the death of defendant or until he ceased to exact payment, and that neither of these events had occurred before institution of the suit. Under these circumstances the evidence was too indefinite to support a decree of specific performance on the theory of a gift of a part of the land, and too indefinite and otherwise insufficient to support a decree for specific performance on the theory of a sale of a part of the land. Construing the evidence for the plaintiff in its most favorable light, the judge did not err in directing a verdict for defendant.

Judgment affirmed.

All the Justices concur.

(151 Ga. 88)

SIGMAN v. ADAMS et al. (No. 1967.)

(Supreme Court of Georgia. Feb. 16, 1921.)

(Syllabus by the Court.)

1. Evidence \S 183(13)—Testimony as to inability to find bond for title held to justify parol evidence of its contents.

In an ejectment suit instituted by an administrator *de bonis non cum testamento* an-

nexo, a defendant proposed to show paramount outstanding title against the plaintiff, relying in part upon evidence that in 1887 the testator had conveyed the land to a lender of money as security for a loan, receiving a bond for reconveyance of the land on payment of the loan, and that after receiving the bond for title the testator transferred and delivered it in pursuance of a contract of sale to a third person. *Held*, that foundation was properly laid for introduction of parol evidence as to the contents of the bond for title, and a transfer written thereon, by testimony of the widow of the alleged transferee to the effect that after the death of the transferee the bond for title, being in her possession, was turned over to a named attorney at law who represented her, and that it was never returned to her, and it could not be found among the papers left by her husband (who was the alleged transferee), and testimony of the son of the attorney at law, since deceased, to the effect that his mother was executrix, that he was in possession of all the papers and other effects left by his father, and that after diligent search among them, made by himself and by his mother, the paper could not be found.

2. Vendor and purchaser \S 219—Paper executed by transferee of bond for title held not conveyance, but admissible as tending to show terms of transfer.

The loan deed and bond for title were executed on May 21, 1887. F. M. Sigman was the grantor named in the deed, and the obligee named in the bond for title. W. T. Sigman was the alleged transferee of the bond for title. A paper dated November 19, 1890, was shown by aliunde evidence to have been signed and delivered by W. T. Sigman to F. M. Sigman, contemporaneously with the transfer of the bond for title, and to have been retained by him until his death, as follows: "Whereas W. T. Sigman, of Newton county, has bought of F. M. Sigman, of said county, said lands lying and being in said county, upon the following conditions, to wit: The said W. T. Sigman is to pay off the debt of F. M. Sigman to Corbin Banking Company, with interest, as it becomes due, and pay off all the indebtedness of said F. M. Sigman that is due other parties that may be due, and that the said W. T. Sigman is to furnish the said F. M. Sigman a two-horse farm and home for himself and wife as long as they live. It is further agreed that the crops grown on the place the present year and fall be applied to the debts of the tenants which the said F. M. Sigman shall be or is bound for. All of which consideration and agreement the said W. T. Sigman binds himself, his heirs, executors or administrators to perform or fulfill, this November 19, 1890." Other extrinsic evidence tended to show that W. T. Sigman recognized and carried out the obligations imposed upon him, as specified in the writing, until his death. *Held*, the paper does not purport to speak the whole contract, and, considered alone, is insufficient as a conveyance; but it was admissible in evidence, in connection with the other evidence in the case, as tending to show the terms and consideration of the contract for transfer of the bond for title.

3. Judgment ¶951(2)—Inadmissible as evidence without showing disposition of appeal.

A transcript from the court of ordinary showing that certain legatees had cited the executrix for a settlement, and that on issue duly made it was found that during his life the testator had disposed of the land now involved in the ejectment suit, and that the case was appealed to the superior court, if otherwise relevant, was not admissible without showing what disposition was made of the case on appeal.

4. Pleading ¶236(4)—Refusal to reopen case to permit amendment of petition held not abuse of discretion.

At the trial term, and after both sides had introduced evidence and announced closed, it was not an abuse of discretion to refuse to open the case for the purpose of allowing the plaintiff to amend the original petition (even if the proposed amendment was otherwise allowable) by setting up matter not alleged in the original petition, and offering new evidence in support of such amendment.

5. Vendor and purchaser ¶214(6) — Instrument reciting that party had purchased on specified conditions held to mean consideration or terms.

The words "upon the following conditions," as contained in the paper quoted in the second headnote of this decision, when properly construed in connection with the context, refer to "consideration" and "terms," and the paper does not create a condition precedent.

6. Appeal and error ¶1052(8) — Ejectment ¶9(3)—Administrator of one receiving and transferring bond for title cannot maintain ejectment against stranger; admission of evidence harmless where uncontradicted evidence shows no right to maintain action.

The plaintiff sues in ejectment in his representative capacity as an administrator with the will annexed. The uncontradicted evidence shows that the testator executed a security deed embracing the land in dispute, whereby he conveyed the legal title to a lender of money, and received from such lender a bond the condition of which was to reconvey to the grantor the land upon payment of the debt. After receiving such bond for title, the obligee therein (the testator) transferred the same under a contract of absolute sale to a third person. *Held*, the testator, by such sale and transfer of the bond for title, divested himself of all interest in the land, and after his death the legal representative of his estate could not maintain ejectment for recovery of the land against a stranger setting up such outstanding title. In view of this ruling, the error in admitting evidence, as ruled in the third headnote, is harmless.

7. Direction of verdict not error.

The judge did not err in directing the verdict for the defendant.

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Action by J. C. Sigman, administrator, against John Adams and others. Judgment

for defendants, and plaintiff brings error. Affirmed.

Etheridge, Sams & Etheridge, of Atlanta, for plaintiff in error.

Rogers & Knox, of Covington, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(151 Ga. 131)

SHEHANE v. GREER et al. (No. 1998.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by the Court.)

1. Action ¶50(10)—Petition in suit to wind up affairs of corporation multifarious, where one defendant was not interested in such winding up; petition in suit by purchasers of lots on contract against grantee held multifarious.

Where a land improvement corporation, the owner of a tract of land divided up into a large number of lots, sold off certain of these lots, deeds being given in certain instances and in others mere receipts, showing that the purchasers had bought under a "contract plan," of which there was no record notice, no bond for title being given, and afterwards the corporation executed a trust deed conveying all of the property, which provided for the execution of deeds by the trustee to purchasers of the lots, and which contained, also, a power of sale upon the happening of stated contingencies, and, the contingencies contemplated having occurred, the trustee sold the property under the power of sale, after duly advertising the same, and executed a deed to the purchaser at the sale, conveying all the lands embraced in the deed from the owner to the trustee except certain designated lots, and the land corporation, the original owner, ceased carrying on the business, a petition in equity, filed by a stockholder of the land corporation, in behalf of himself and other stockholders therein, and in behalf of certain parties who purchased certain of the lots, against the purchaser at the trustee's sale, holding under a deed duly executed by the trustee in conformity with the power contained in the trust deed, to wind up the affairs of the land corporation, and praying the appointment of a receiver to take charge of its assets and do other things necessary until the final winding up of the business of the corporation, was multifarious, because: (a) The purchaser at the trustee's sale was not concerned with the winding up of the affairs of the corporation which had gone out of business. (b) No such relation between the various purchasers of the lots, upon which they base their claim of equity therein, is shown that gives them the right to maintain a joint suit against the purchaser at the trustee's sale and have a decree against her establishing such equity.

2. Action \Leftrightarrow 50(10)—Reformation of instruments \Leftrightarrow 29—Purchasers of lots from mortgagor not entitled to have deed from trustee under power of sale reformed.

No facts are set forth showing the right of the plaintiffs to the reformation of the deed executed by the trust company to the purchaser of the property described in the trust deed.

3. Action \Leftrightarrow 50(10)—Purchasers from mortgagor not entitled to join in suit against trustee's grantee to prevent multiplicity of suits.

Nor was there such a community of right to be established as between the plaintiffs as to authorize them to maintain the petition under the provisions of Civ. Code 1910, § 5419, making multiplicity a ground for the consolidation of causes.

(Additional Syllabus by Editorial Staff.)

4. Mortgages \Leftrightarrow 372(1)—Grantee, to whom trustee conveyed under power of sale, held not charged with constructive notice of rights of purchasers from mortgagor.

Under a deed of trust covering land divided into lots, and providing that the mortgagor might sell lots by warranty deed, and that the trustee would execute quitclaim deeds on deposit of \$50 for each lot, one to whom the trustee conveyed under power of sale on default was not charged with constructive notice of the equities of those who had purchased lots on contract, and who had neither a deed nor a bond for title on record.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by R. L. Greer and others against Mrs. J. F. Shehane. Demurrers to the petition were overruled, and defendant brings error. Reversed.

The Southland Estates Corporation (hereinafter referred to as the Southland Company), a Georgia corporation, undertook to develop a certain tract of land located near Atlanta for residential purposes. The tract was named "Westland Estates," and was subdivided into approximately 1,950 lots. To procure the money necessary for this development, first mortgage bonds in the amount of approximately \$28,000 were issued, and to secure them the Southland Company executed to the Hillyer Trust Company (now the Atlanta Trust Company), as trustee, a trust deed to this real estate. The property was described in terms of acreage in the deed. A copy of the trust deed is attached to one of the amendments filed in the case and made a part of the record. It was provided in this trust deed that the active management of the property was to remain in the Southland Company, and that it should be "permitted to improve, sell, or transfer" any part or all of the property by warranty deed countersigned by the trustee, and that, upon deposit by the Southland Company with the trustee of a sum equal to \$50 for each 25-

foot unit lot sold, the trustee should issue quitclaim deed to such lot to the purchaser. The trust deed further provided that—

"The company shall have the entire and exclusive charge, control, and management of said property, and shall make such improvements from time to time as shall be deemed necessary for the better and more rapid sale of this property, and shall collect and receive all moneys paid in and for any contracts for the sale of any lot on the contract plan of sale."

It further provided that all such moneys so received over and above 20 per cent. of the amount of sale of each lot up to the amount of \$50 on each 25-foot unit lot of land so sold should be deposited with the trustee, to be applied to the payment of the bonds. Pursuant to the purposes for which it was organized, and under the powers expressly given it in the trust deed, as above set out, the corporation proceeded to sell off the lots into which the property had been subdivided, and to further promote the sale of the lots a contract plan of sale was instituted, whereby lots were sold on installment basis, with a small cash payment, and monthly notes for the balance. The contract provided that when the payments were completed the company should deliver to the purchaser a warranty deed to the lots bought by him.

In the early part of 1919 the corporation became in arrears in the payment of its obligations to the bondholders and to the trustee. The trust deed provided that in such event the trustee should have the right and power to take possession of the property, and—

"to sell any or all unsold portions of this property, either by private sale or public outcry, in whole or in part, for the benefit of the bondholders, and to convey by deed to purchasers land so sold."

Upon the default by the corporation above mentioned, the trustee advertised the entire property for sale, describing same in acreage as in the trust deed, and excepting only those lots for which warranty deeds had been issued by the corporation and quitclaim deeds given by the trustee. In April, 1919, it was sold to Mrs. James F. Shehane, the plaintiff in error. Thereupon the trustee executed a deed to Mrs. Shehane, conveying the entire property conveyed by the trust deed, excepting certain specified lots for which warranty deeds by the Southland Company and quitclaim deeds by the trustee had been given to purchasers. This deed, therefore, covered in terms all of the lots which had been sold by the company under the contract plan of sale, as above set out, upon which the payments had not been completed, and to which warranty and quitclaim deeds had not been issued. At the time of this sale there were

1,541 lots which had not been sold in any manner, and there were outstanding contracts with some 250 persons, who had purchased approximately 500 lots under the contract plan of sale. All of them had paid at least a part of their purchase money; others had paid in full. After the sale to Mrs. Shehane, the trustee refused to accept money tendered to it by the Southland Company on account of these lots, and to give quitclaim deeds to the purchasers upon the completion of their payments for same. It is alleged that at the time of said sale by the trustee Mrs. Shehane and the trustee had both actual and constructive notice of all of the details of the "contract plan of sale," and of the fact that a great number of these lots had been sold under same to various purchasers.

At this stage suit was instituted by R. L. Greer, a stockholder of the Southland Company, against that company and the trustee, both residents of Fulton county, Ga., and against Mrs. Shehane, a resident of Oglethorpe county, in behalf of himself and other stockholders and the purchasers of lots under the contract plan of sale, asking for a receiver for the corporation to wind up its affairs. The original petition and amendments set forth this state of facts, as well as allegations that the Southland Company had ceased to conduct any business, and that its only assets were the purchase-money notes on the lots sold as above stated, and that the corporation was making no effort to collect them. A temporary receiver was appointed by the court. The case coming on to be heard on July 4, 1919, the Southland Company was, on its answer and prayer, and without objection, made a party plaintiff by order of court, and the temporary receiver previously appointed was made permanent.

Interventions were filed by two of the holders of contracts of sale, asking that they be made parties plaintiff, and that they be granted relief to prevent the loss of the money which they had paid in on the lots purchased by them. One of these parties has paid all of the balance due on his purchase price, the other has met all of his payments under his contract as they became due, and now stands ready, able, and willing to continue his payments according to his contract. All of the plaintiffs pray that the affairs of the Southland Company be wound up under the direction of the court; that the defendants, the trustee and Mrs. Shehane, be compelled to execute such papers as are necessary to give good, legal title to the purchasers under the contracts of sale upon payment by them of the balance due; and that the deed from the trustee to Mrs. Shehane be so reformed as to include only those 1,541 lots of this real estate which had never been sold by warranty deed or contract plan of sale or otherwise.

The plaintiff in error filed demurrers,

both general and special, to the original petition and all amendments and interventions in the case. Among other grounds of demurrer are those which, in substance, raise the contentions: (1) That the superior court of Fulton county had no jurisdiction over the defendant Mrs. Shehane, on the ground that substantial relief is not prayed against any of the other defendants, and therefore that the suit should be brought in the county of Oglethorpe where she resides. (2) That a stockholder, not having complied with the provisions of section 2224 of the Civil Code, could not bring a suit for and in behalf of others and of the purchasers, and ask for the appointment of a receiver for the corporation and other relief. (3) That there is a misjoinder of causes of action, and of parties plaintiff and defendant, and that the petition is multifarious. (4) That there is no equity shown by the petition. The court overruled the demurrers upon all the grounds.

McWhorter & McWhorter and Erwin, Erwin & Nix, all of Athens, for plaintiff in error.

Mallet & Bell, Troutman & Freeman, Wm. A. Fuller, and King & Spalding, all of Atlanta, for defendants in error.

BECK, P. J. [1-3] Certain of the grounds of the demurrer it is unnecessary to discuss or consider, except as incidentally involved in the contention made by one of the defendants, Mrs. Shehane (who is hereinafter referred to as the defendant), in her several demurrers, that the petition as it originally stood and the petition considered together with the several interventions was multifarious. It is unnecessary to determine whether she is in a position to urge her contention, set forth in one ground of her demurrer, that Greer had no right to bring the suit, not having complied with the provisions of section 2224 of the Civil Code relating to proceedings by minority stockholders for fraud or acts ultra vires, against a corporation, because, so far as Mrs. Shehane is concerned, the case should have been dismissed as to her on the ground that the suit is multifarious, and that she could not be proceeded against in a suit brought in Fulton county; Oglethorpe being the county of her residence. The defendant bought the tract of land formerly owned by the Southland Estates Corporation (hereinafter called the Southland Company) at a sale by the trustee, the Atlanta Trust Company (hereinafter referred to as the Trust Company), in pursuance of a power contained in a trust deed made by the Southland Company. That deed contained the following provision, among others:

"Beginning with the date of these presents, and for and during the term of trust, the company (meaning the corporation), shall manage

and operate the aforesaid real property and be permitted to improve, sell, or transfer any part or all of this property upon the terms and conditions following, that is to say: The company shall be permitted to sell from time to time, by issuance of warranty deed or deeds, which warranty deed or deeds shall be countersigned by the aforesaid trustee for any lot or lots in said property hereinbefore described, and known as Westland Estates on terms and conditions, as follows: That upon deposit by the company with the trustee of a sum equal to fifty (\$50.00) dollars for each twenty-five (25) foot unit lot in the property hereinbefore described, the trustee shall issue to the person or persons, firm or firms, corporation or corporations, designated by the company, a quitclaim deed or quitclaim deeds to such lot or lots as may be so specified by the company. When making such deposit a plat of the property is to be filed with the trustee fully and clearly locating said lot or lots. Such payments made by the company to the trustee as hereinbefore set forth shall be used by the trustee for the payment of interest or the retirement and cancellation of bonds until all bonds are retired and interest paid, and for no other purpose. The company shall have entire and exclusive control, charge, and management of said property, and shall make such improvement from time to time as shall be deemed necessary for the better and more rapid sale of this property, shall keep all places, wherever of sufficient value to warrant, insured, and shall pay all taxes and improvement charges which may be assessed from time to time against the property, and shall collect and receive all moneys paid in for any contract for the sale of any lot on the contract plan of sale; but all such moneys so received over and above 20 per cent. of the amount of sale of each lot up to the amount of fifty (\$50.00) dollars on each twenty-five (25) foot unit lot of land so sold shall be deposited with the trustee, to be by him applied to the payment of said bonds, interest and principal."

[4] Neither in the part of the deed set forth immediately above nor in any other part of the deed do we find anything that would give to the purchaser at a trustee's sale constructive notice of the equities of those who had purchased on the contract plan from the Southland Company, where they had neither deed nor bond for title recorded. Counsel for defendants in error insist in their argument that Mrs. Shehane had both constructive notice and actual notice of the rights of the numerous persons actually parties to the suit or for whose benefit the suit is instituted; but nowhere in the pleadings is there any attempt to point out what the actual notice was that Mrs. Shehane had received. The claim that she had constructive notice is based upon the wording of the trust deed. There is nothing in the trust deed nor in the advertisement of the property to show that the trustee was not selling what had been conveyed to it by the Southland Company, except the designated lots. If Mrs. Shehane had had constructive notice

of the claims of numerous purchasers on the contract plan, there would have been no merit in her demurrer on the ground of multifariousness. There would have been a unity in the nature of the plaintiff's and the interveners' equities, which would have welded the claims of equity on the part of the purchasers into a harmonious whole, and they could have been joined in one suit as parties plaintiff. But, there being nothing to show constructive notice to Mrs. Shehane of these equities, then each one of the purchasers of the lots, who had no deed or bond for title recorded, must rely upon proof of actual notice. The suit does not indicate what actual notice was conveyed to her before she purchased; and in seeking to establish their equities, the proof to show actual notice will be as varied as the persons bringing the suits. If there had been one act, or possibly a class of acts, which could be insisted upon as giving actual notice—as if there had been an announcement at the sale that certain parties were vested with equities under these contracts for the sale, or some similar fact constituting notice—then possibly the parties could have made that unity in the character of the notice, it being common to all, the basis of a joint suit. But the claim of constructive notice not appearing to be valid, and no common fact being urged as constituting actual notice which would support the claims of equity on the part of the purchasers on the contract plan, there is no right shown to unite these purchasers in one suit against Mrs. Shehane to have their claims established and deeds executed to them.

So far as concerns the contention that the plaintiffs should have the right to maintain this joint action for the establishment of alleged equities, on the theory that it is necessary to reform the deed from the Trust Company, that also must fall so far as it affects Mrs. Shehane's rights, for the reason that the Trust Company executed the kind of deed that it was authorized to execute under the terms of the trust deed, and there was nothing in the latter instrument to indicate to Mrs. Shehane that there were outstanding equities adverse to the title conveyed to her.

So far as the petition seeks to make Mrs. Shehane a party to the proceedings to wind up the affairs of the Southland Company and to join all the parties with claims of equity based on the payment of a part of the purchase money who had no deed or bond for title recorded, the petition in this case is multifarious, and the court erred in not sustaining that ground of the demurrer. So far as it was a proceeding against Mrs. Shehane and the Trust Company, in order to compel the execution of deeds, the petition must fail, because as to the relief sought in this part of the petition Mrs. Shehane is the only party against whom substantial relief is sought,

there being no case shown to authorize the reformation of the deed as against Mrs. Shehane.

Judgment reversed.

All the Justices concur, except GEORGE, J., disqualified.

(151 Ga. 180)

HOUSTON v. CAMPBELL. (No. 2076.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by Editorial Staff.)

1. **Fraudulent conveyances** §295(4)—Claimant in execution entitled to show note on which judgment was based was obtained by fraud and did not represent indebtedness.

Where after a note was given, but before judgment was obtained thereon, the maker made a voluntary conveyance of land to his wife, and execution was levied on the land and a claim interposed by the wife, she was not concluded by the judgment, but could show that the note was procured by fraud, and that the husband did not owe the payee anything.

2. **Fraudulent conveyances** §295(4)—Claimant in execution, having voluntary conveyance from husband, entitled to show husband was solvent and conveyance in good faith.

A wife, claiming property levied on under an execution against her husband, under a voluntary deed from him, was entitled to show that the husband was solvent when the deed was executed, and that the transaction was in good faith, and not for the purpose of hindering or delaying creditors.

Error from Superior Court, Worth County; R. Eve, Judge.

Proceedings on a statutory claim by Mrs. N. I. Houston to property levied on under a judgment in favor of J. E. Campbell. Judgment for the plaintiff in *fi. fa.*, and the claimant brings error. Reversed.

J. H. Tipton, of Sylvester, for plaintiff in error.

Passmore & Forehand, of Sylvester, for defendant in error.

ATKINSON, J. [1] 1. A husband gave his promissory note to one claiming to be his creditor; a judgment was obtained on the note, and execution issued thereon was levied on land as property of the husband; and his wife interposed a statutory claim. On trial of the claim case it appeared that the wife was in possession of the land under a duly recorded voluntary deed executed by the husband to her after execution of the note, but before institution of the suit on the note. Held, that the wife was not concluded by the judgment, and on the trial of the claim she was authorized to introduce evidence tending to show that the note was procured by fraud of the payee practiced on the husband, and

that the latter did not owe the payee anything at the time the note was given or at the date of the conveyance from the husband to the wife. *Ruker v. Womack*, 55 Ga. 399; *Morris v. Murphey*, 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81; *Elwell v. New England Mortgage Sec. Co.*, 101 Ga. 496, 28 S. E. 833; *Moody v. Millen*, 103 Ga. 452, 30 S. E. 258; *Marshall v. Charland*, 106 Ga. 42, 31 S. E. 791; 15 R. C. L. 1028, § 503, notes 18, 19.

[2] 2. Applying the principle above announced, the trial court erred in rejecting the evidence offered by the claimant, tending to show that the note did not represent an existing debt owed by the donor, at the time the deed was executed; that the donor was solvent; that the transaction between the donor and his wife was in good faith, and not made for the purpose of hindering or delaying creditors. The error in rejecting such evidence affected the verdict finding the property subject; and the judgment refusing a new trial must be reversed.

Judgment reversed.

All the Justices concur.

(151 Ga. 14)

PUTNAM MILLS & POWER CO. v. STONECYPHER et al. (No. 1957.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error §130—Order not referring to previous restraining order or refusing interlocutory injunction held not reviewable.

In a suit to enjoin defendants from obtaining a charter to furnish electricity, where a temporary restraining order was granted, but at the preliminary hearing the judge made an order declaring that it was the duty of the court to grant the application for a charter, but not referring to the prior restraining order or expressly refusing an interlocutory injunction, there was no judgment which would support a writ of error.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Suit by the Putnam Mills & Power Company against I. L. Stonecypher and others. To review an adverse order, plaintiff brings error. Writ of error dismissed.

See, also, 105 S. E. 482.

Davidson, Callaway & De Jarnette, of Eatonton, for plaintiff in error.

R. C. Jenkins, of Eatonton, for defendants in error.

FISH, C. J. The Putnam Mills & Power Company brought an action against I. L. Stonecypher and others, seeking to enjoin the defendants from obtaining a charter in the name of Stonecypher's Light Company to

furnish electricity for light, heat, and power. Upon presentation of the petition the judge of the superior court granted an order requiring the defendants to show cause why the injunction should not be granted, and temporarily restrained them until further order. At the preliminary hearing the judge passed the following order:

"After hearing the application for injunction, the court is of the opinion that, under paragraph 2 of section 2823 of the Civil Code, it is the duty of the court to grant the application for charter of the Stonecypher Light Company, as it is legitimately within the purview and intention of said Code. This judgment is not intended to give to the Stonecypher Light Company any legal rights as to the streets of the city of Eatonton, or debar the complainant of hereafter raising the question as to any vested rights that they may now have."

The petitioner filed a bill of exceptions setting forth the case, the order as quoted, and then continuing as follows:

"To which order the plaintiff in error, the said Putnam Mills & Power Company, then and there excepted, and now excepts, and assigns the same as error as being contrary to law, and says that the judge should then and there have granted said injunction."

The order passed by the judge at the preliminary hearing did not refer to the prior restraining order, nor expressly refuse to grant an interlocutory injunction. There can be no order or judgment by inference or implication that can be the subject of review by an appellate court. As there was no judgment upon which error could be assigned, the bill of exceptions must be dismissed.

Writ of error dismissed.

All the Justices concur.

(151 Ga. 154)

WRIGHT et al. v. TOMLIN. (No. 2071.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by Editorial Staff.)

Now trial \Leftrightarrow 78(1)—Grant of second new trial in suit against administrator purchasing intestate's land held not error.

Where an administrator sold his intestate's interest in land for which he had a bond for title, and individually purchased it from the purchaser, and thereafter made final return including the proceeds of the sale, and the guardians of minor heirs contested the return and obtained judgments for a larger amount than as reported, and, after attaining majority, certain of the children sued to set aside the conveyances and recover an interest in the land and mesne profits, the grant of a new trial to defendant *held* not error, though he had already been granted a new trial by the judge presiding on a former trial.

Error from Superior Court, Carroll County; J. R. Terrell, Judge.

Action by Horry Wright and others against W. T. Tomlin. A new trial was granted on defendant's motion, and plaintiffs bring error. Affirmed.

S. Holderness and Smith & Smith, all of Carrollton, for plaintiffs in error.

F. S. Loftin and D. B. Whitaker, both of Franklin, and A. H. Freeman, of Newnan, for defendant in error.

ATKINSON, J. In 1893 B. E. Wright bargained with J. K. Roop for the purchase of a certain tract of land, agreeing to pay therefor \$272 in subsequent separate payments. He paid a portion of the price, and died in possession, holding his vendor's bond for title. Early in 1898 the administrator upon the estate of B. E. Wright, having obtained an appropriate order of sale from the court of ordinary, sold his intestate's equitable interest in the land at public outcry. A deed was executed to the successful bidder, who on the same day executed a deed conveying such equitable interest to the administrator in his individual capacity. The administrator having no funds belonging to the estate to pay the obligor named in the bond for title the balance of the purchase money, made a personal contract with him for his interest in the land for such amount, and paid it with his individual money and received a deed from such obligor for the entire interest in the land. During the same year the administrator made a final return to the ordinary, in which was included as an item against himself the proceeds of the sale of his intestate's interest in the land. The guardians of the minor children of the intestate, who were his only heirs at law, appeared in the court of ordinary and contested the administrator's return, and upon an appeal to the superior court they obtained judgments against the administrator for a larger amount than as reported in his return, which judgment included the proceeds of the sale of the equitable interest of the intestate in the land. This judgment was rendered at the September term, 1898, of the superior court, and the amounts thereof were duly paid by the administrator to the guardians of the several minors. In 1914 three of the children of the intestate, who in the meantime had attained majority, instituted an action against the administrator to set aside the conveyance made by him to the purchaser at administrator's sale, and also the deed from such purchaser to the administrator in his individual capacity, and to recover an undivided three-fourths interest in the entire land, and mesne profits. At the time the action was brought the petitioners were respectively 23, 25, and 27 years of age. No attack was made on the judgments ob-

tained by the petitioners against the administrator. A special verdict was rendered in favor of the petitioners, which included a recovery of a three-fourths interest in the entire land. *Held*, that the court did not err in granting the defendant a new trial, notwithstanding the fact that a new trial had been formerly granted him by another judge who presided on a former trial.

Judgment affirmed.

All the Justices concur.

(151 Ga. 141)

ANDERSON v. THORNTON. (No. 2094.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 1078(6) — Grounds of motion for new trial not argued in brief are abandoned.

The general grounds of a motion for a new trial are considered as abandoned in the Supreme Court when not argued or mentioned in the brief for plaintiff in error.

2. Cancellation of instruments \S 51—Charge that grantor must act at once on discovering fraud faulty, but not fatal.

In a suit to cancel a deed for fraud and undue influence, an instruction that a party seeking to set aside a contract for fraud must act at once to set the contract aside on the discovery of the fraud, though not beyond criticism, did not mean that she must file suit at once, but that she must act in some manner to put defendant upon notice that she had repudiated the conveyance and demanded a reconveyance.

3. Appeal and error \S 1066 — Inaccurate charge on fraud held harmless where there was no evidence of fraud.

In a suit to cancel a deed for fraud and undue influence, an inaccurate charge as to plaintiff's duty to act promptly on discovery of the fraud was harmless where there was no evidence to sustain the allegation of fraud.

Error from Superior Court, Elbert County; W. L. Hodges, Judge.

Suit by Janie Anderson against O. G. Thornton. Judgment for defendant, and plaintiff brings error. Affirmed.

Grogan & Payne, of Elberton, for plaintiff in error.

Worley & Nall, of Elberton, for defendant in error.

GILBERT, J. This is a suit to cancel a deed on the ground of fraud and undue influence, and because no consideration passed. The plaintiff alleges that she had confidence in her brother, and believed that he would carry out his promises to hold title to the property for her benefit and pay to her one-half of the rents received therefrom, and thus make her secure against the loss of the

same through her husband. The defendant denied these allegations and alleged that the deed was made freely and voluntarily by his sister in settlement of a pre-existing indebtedness due by her to him, and that this was the consideration for the deed. The jury returned a verdict for the defendant. The plaintiff made a motion for new trial on the general grounds and afterwards amended by alleging error because the court charged the jury as follows:

"I charge you that a party on the discovery of the fraud—that is, where he seeks to set aside the contract for fraud—on the discovery of the fraud must act at once to set the contract aside."

Movant insists that the charge is contrary to law, and that it virtually charged the plaintiff out of court, because suit had not been filed immediately on discovering the fraud. *Held*:

[1] 1. The general grounds of the motion for new trial were not argued or mentioned in the brief of the plaintiff in error, and accordingly they are considered as abandoned.

[2, 3] 2. Under a fair construction of the charge excepted to, the words "must act at once" do not mean that the plaintiff must file suit at once, but that it was incumbent upon her to act in some manner to put the defendant upon notice that she had repudiated her act in executing the deed, and that she demanded a reconveyance. While the charge is not entirely beyond criticism, as a charge that the plaintiff must act promptly would have been more accurate, the charge as given is not ground for reversal under the facts of the case; for, while fraud is alleged, there is no evidence to sustain that allegation.

Judgment affirmed.

All the Justices concur; ATKINSON, J., in the result.

(151 Ga. 140)

TIFT et al. v. SHAW, Sheriff. (No. 2079.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by Editorial Staff.)

1. Judgment \S 435—Failure of deputy clerk of city court to notify attorney held not to support suit attacking judgment.

Where judgment in a claim case in a city court was rendered against the claimant in the absence of him and his attorney, the failure of the deputy clerk to notify the attorney when court would convene, send him a calendar, and keep him informed as to when the case would be tried did not furnish ground for attacking the judgment in equity.

2. Injunction \S 135—Refusal of interlocutory injunction against judgment rendered in claim case in claimant's absence held not abuse of discretion.

In a suit by a claimant of property levied on under a f. fa. from the city court, against whom

judgment was rendered in his absence, to enjoin prosecution of a suit on his forthcoming bond, the refusal of an interlocutory injunction held not an abuse of discretion.

Error from Superior Court, Tift County; R. Eve, Judge.

Suit by A. C. Tift and others against J. M. Shaw, Sheriff. An interlocutory injunction was refused, and plaintiffs bring error. Affirmed.

B. C. Williford, of Tifton, for plaintiffs in error.

Passmore & Forehand, of Sylvester, and Ridgill & Mitchell, of Tifton, for defendant in error.

ATKINSON, J. A statutory claim was interposed to a levy made on personalty under a fl. fa. issued from the city court of Sylvester. The claimant executed a forthcoming bond and obtained possession of the property. On the trial of the claim case, on call of the docket at a regular term of the city court, during the absence of claimant and his attorney, a verdict was returned, finding the property subject, and judgment was duly entered. The property was readvertised; and, the claimant having failed to produce it as provided in the bond, the sheriff instituted suit in the city court, for the use of the plaintiff in fl. fa., against the claimant and the surety on the forthcoming bond. Thereafter the claimant brought an equitable suit in the superior court against the sheriff, to enjoin prosecution of the latter suit, and for other relief. The exception is to the refusal of an interlocutory injunction. Held:

[1] 1. The failure of the deputy clerk of the city court of Sylvester to notify the attorney of record for the claimant, when the court would convene, and to send such attorney "a calendar and to keep him informed" as to when the case would be tried, will not furnish ground for attacking in equity the judgment rendered in the claim case as void, although neither the claimant nor his attorney had actual notice of when the case would be tried. *Johnson v. Driver*, 108 Ga. 595, 34 S. E. 158; *Park v. Callaway*, 128 Ga. 119, 57 S. E. 229; *Lanier v. Nunnally*, 128 Ga. 358, 57 S. E. 689.

2. Another ground of attack upon the judgment, alleged in the equitable petition, was that claimant's attorney had employed the attorney for plaintiff in fl. fa. (without knowing that he was such) to assist him in the trial of the claim case, and that the attorney so employed, without notifying claimant's attorney when that case would be tried, proceeded in his absence, for the plaintiff in fl. fa., with the trial of the claim case, and obtained judgment against claimant. The answer denied such employment or any duty to inform claimant's attorney when the case

would be tried; and the evidence submitted at the interlocutory hearing of the suit in equity on those issues was conflicting, and did not require a finding for the plaintiff.

[2] 3. There was no abuse of discretion in refusing an interlocutory injunction.

Judgment affirmed.

All the Justices concur.

(151 Ga. 122)

FOWLER v. JOHNSON.

JOHNSON v. FOWLER.

(Nos. 1932, 1992.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by Editorial Staff.)

1. Pleading \S 36(3)—Testimony cannot be permitted to contradict and overcome averment of witness to the contrary which has not been stricken.

Where in a suit for partition of partnership property defendant pleaded a settlement, under which he purchased plaintiff's interest, and performance of the contract by him except as to payment for plaintiff's interest, which he alleged had been tendered, his testimony that a payment made by him to plaintiff was consideration for all of plaintiff's interest could not be allowed to contradict and overcome his averment, never stricken, to the effect that such payment was to reimburse plaintiff for certain advances.

2. New trial \S 24 — Attacks on decree not proper ground of motion.

Attacks on a decree furnished no ground of a motion for a new trial.

3. Partnership \S 329—In suit for partition of property, verdict held properly directed for plaintiff.

In a suit to partition partnership property, where the evidence for plaintiff sustained his case as laid in the petition claiming a one-half interest in the property, and that for defendant failed to substantiate his answer alleging a settlement and payment made under agreement that defendant was to get all of plaintiff's interest, direction of a verdict for partition was required.

Error from Superior Court, Worth County; R. Eve, Judge.

Action by E. M. Johnson against T. J. Fowler. Judgment for plaintiff, and each party brings error. Affirmed on defendant's bill of exceptions, and plaintiff's cross-bill of exceptions dismissed.

Pope & Bennet and Milner & Farkas, all of Albany, and Perry & Williamson, of Sylvester, for plaintiff in error.

Claude Payton, of Albany, and J. H. Tipton, of Sylvester, for defendant in error.

FISH, O. J. This action was brought by E. M. Johnson against T. J. Fowler for a partition of property belonging to a partnership composed of the plaintiff and the defendant, and consisting of extensive farm lands, live stock, farm products, and implements, and for a receivership and rents. The plaintiff's contention is, in effect, that he and the defendant each own an equal undivided interest in all of the property; that defendant had wrongfully taken exclusive possession of all of it, and refuses to recognize plaintiff's rights. The defendant in his answer contends, in substance, that the parties had a settlement of the entire partnership business, under the terms of which the defendant was to pay the plaintiff the balance of defendant's indebtedness to him for defendant's part of the original purchase price of the property, defendant to assume and pay all of the indebtedness of the firm, and in addition a stated amount in payment for plaintiff's one-half interest in the property; that such agreement was carried out by the defendant except as to the payment to the plaintiff for his interest in the property; that defendant offered to pay this latter amount, and tendered it to plaintiff in accordance with the contract, but plaintiff refused to accept and to consummate the agreement. Defendant alleges a continuous tender, and prays that upon payment of the amount agreed on to plaintiff that he be decreed to convey his interest in the property to defendant. On the trial the evidence for the plaintiff was sufficient to sustain the case laid in the petition. The evidence for the defendant, consisting principally of his own testimony, failed to substantiate his answer, but tended to show that he had purchased from the plaintiff his entire interest in all of the partnership property, had paid him for the same, and that plaintiff had, in writing, conveyed his interest to the defendant, and placed him in possession. Held:

(a) In view of the pleadings and the evidence a proper decision of the case here does not depend upon the application of the statute of frauds.

[1] (b) Defendant's testimony relied on to show that the payment made by him to the plaintiff was the consideration for all interest which the plaintiff had in the property should not be allowed to contradict and overcome the averment made in the defendant's answer, which was never stricken, to the effect that such payment was made for the purpose of reimbursing the plaintiff for the money he had advanced in payment of the defendant's share in the property, and for a balance which the firm was due to the plaintiff on open account, which amounts had been ascertained by an accounting between the parties. See *Florida Yellow Pine Co. v.*

Flint River Naval Stores Co., 140 Ga. 821, 78 S. E. 900.

[2] (c) Attacks upon a decree furnish no ground of a motion for a new trial. *Sweetman v. Owens*, 147 Ga. 436, 94 S. E. 542.

[3] (d) Under the pleadings and the evidence the verdict directed as to the partition of the property was required, and so much of it as related to the recovery of rents was set aside.

Judgment on main bill of exceptions affirmed.

Cross-bill of exceptions dismissed.

All the Justices concur.

(151 Ga. 149)

FIELD v. PROCTOR. (No. 1961.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by Editorial Staff.)

1. New trial \S 108(2)—Newly discovered evidence held not such as would probably produce different result.

In an action involving a dispute as to the location of a boundary, newly discovered evidence produced on motion for a new trial held not such as would probably cause a different result on a second trial.

2. New trial \S 70—Refusal not error, when verdict supported by evidence.

When there was ample evidence to authorize the verdict, the refusal of a new trial on the general grounds was not error.

Error from Superior Court, Bulloch County; A. B. Lovett, Judge.

Action by J. T. Proctor against F. E. Field. Judgment for plaintiff, and defendant brings error. Affirmed.

Brannen, Booth & Cowart, of Statesboro, for plaintiff in error.

Fred T. Lanier, of Statesboro, for defendant in error.

FISH, C. J. This is an action to recover a small strip of 4.65 acres of land lying along a disputed dividing line between the premises of the parties. The verdict was for the plaintiff, and the assignment of error is upon a judgment overruling the defendant's motion for new trial. The three special grounds of the motion are based on alleged newly discovered evidence, in substance as follows:

(1) The testimony of a witness (who testified at length, and in much detail on the trial in behalf of the defendant) to the effect that, some 12 or 14 years previously, the plaintiff pointed out to him "a corner tree, and also the location of what he then claimed to be the line between his land and movant's," which is the line contended for by movant; and the witness remembered that none of

the land cleared by a designated witness for the plaintiff was on the defendant's side of the line.

(2) The testimony of another witness (who testified at length on the trial for the defendant), and two new witnesses, that there are now standing three pine trees on or near the line claimed by movant as the true line between his land and that of the defendant, on each of which trees there are three ancient side chops, the chops being nearly covered over with the growth of the bark on the trees "but unmistakable signs of the line when discovered."

(3) The testimony of a witness (who testified for the plaintiff on the trial) to the effect that he was mistaken in his testimony given on the trial as to the dates when he moved to and away from the land in question; this, in view of the respective contentions of the parties being material. Held:

[1] (a) The court did not err in overruling the motion on these special grounds. It would seem that the alleged newly discovered evidence could have been discovered by proper diligence before the trial, and, moreover, it is not probable that it would cause a different result on a second trial. See, as to the last special ground, *Clark v. State*, 117 Ga. 254, 43 S. E. 853; *Heath v. Clark*, 141 Ga. 65, 80 S. E. 288.

[2] (b) There was ample evidence to authorize the verdict, and the refusal of a new trial was not error.

Judgment affirmed.

All the Justices concur.

(151 Ga. 145)

VICKERY v. SWICORD et al. (No. 1888.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by Editorial Staff.)

1. Pleading \S 221—Overruling demurrer is adjudication that petition states cause of action.

A judgment overruling a general demurrer to the petition, unless excepted to and reversed, is an adjudication that the petition states a cause of action, of which the court may not by indirection deprive plaintiff.

2. Trial \S 139(1)—Nonsuit erroneous, when evidence tends to support allegations.

When the evidence for plaintiff tended to sustain the material allegations of her petition, the court erred in granting a nonsuit.

Error from Superior Court, Campbell County; C. W. Smith, Judge.

Action by A. A. Vickery against R. A. Swicord and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. F. Golightly, of Atlanta, for plaintiff in error.

Dickson & Camp, of Fayetteville, for defendants in error.

GEORGE, J. [1] 1. "A judgment overruling a general demurrer to a petition, unless excepted to and reversed, is an adjudication that the petition sets forth a cause of action; and the court may not by indirection deprive the plaintiff of the estoppel he is entitled to urge as against the defendant." *Turner v. Willingham*, 148 Ga. 274 (2), 96 S. E. 565, and cases cited.

[2] 2. The evidence for the plaintiff tended to sustain the material allegations of her petition, and the court erred in granting a nonsuit and dismissing the petition.

Judgment reversed.

All the Justices concur.

(151 Ga. 184)

SPELL v. SPELL. (No. 2100.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by the Court.)

Trial \S 139(1)—Verdict improperly directed when there is some evidence to support contrary verdict.

Under the evidence in this case, there being some evidence to support the contentions of the plaintiff, the court should have submitted the case to the jury, and it was error to direct a verdict for the defendant.

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Action by Mrs. E. P. Spell against Mrs. C. B. Spell. Judgment for defendant, and plaintiff brings error. Reversed.

A. S. Bradley, of Swainsboro, for plaintiff in error.

F. H. Saffold, of Swainsboro, for defendant in error.

BECK, P. J. After a careful consideration of all the evidence contained in the record, we are of the opinion that there are conflicts in the evidence upon the material issues in the case that should have been submitted to the jury for their determination. On the trial of a case, however strongly the evidence may preponderate in favor of parties, the court cannot direct a verdict if this evidence is controverted by other material evidence. And we find in the brief of the evidence contained in this record some evidence upon the part of the plaintiff that entitled him to have his case submitted to a jury. It is true that much of the evidence, especially portions of it introduced by the plaintiff, is vague and unmeaning, because

the witness delivering the evidence frequently referred to a map which evidently was before him at the time of his testifying, and would indicate the location of certain alleged points and lines by saying that such and such a line or point or boundary was "here" or "there," to which statement the reporter added in parenthesis "indicating." And we want to say here, what we have had more than once to say in regard to such testimony, that statements like this by a witness, though they may have been perfectly clear to the court and the jury, who could see from the map the lines or points or boundaries indicated, can have no meaning to one who reads the evidence without being able to know what point was indicated or pointed out on the map or diagram. But there is sufficient evidence in the record intelligible without the maps to show that there was a conflict on the material issue, and the court should have submitted the case to the jury and have refused to direct a verdict.

Judgment reversed.

All the Justices concur.

(151 Ga. 179)

KELLEY v. CARTLEDGE. (No. 2074.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 750(5)—Assignment of error to denial of new trial does not reach direction of verdict.

Where defendant did not assign error on the direction of a verdict for plaintiff, but only on the overruling of the motion for a new trial, which was on the usual general grounds, the Supreme Court cannot review the direction of the verdict.

2. New trial \S 70 — Properly refused, when evidence authorized verdict.

The refusal of a new trial was not error, when there was evidence sufficient to authorize the verdict.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by M. R. Cartledge against N. A. Kelley. Judgment for plaintiff, and defendant brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, and Samuel A. Massell, of Atlanta, for defendant in error.

FISH, C. J. The bill of exceptions recites: "After hearing the evidence the court directed the following verdict: 'We, the jury find in favor of the injunction prayed in the within petition, and against the prayers of the answer and cross-bill'"—and that thereupon

it was adjudged that the plaintiff recover for the use of the officers of court the costs in the case. There is a further recital that the defendant at a stated time filed a motion for new trial, that on a given date the motion was overruled, and that defendant "then and there excepted, and now excepts and assigns the same as error," because such judgment overruling the motion for new trial was error "because same was: (1) Contrary to law; (2) contrary to the evidence and without evidence to support it; (3) contrary to the law and evidence, and against the principles of justice and equity." The motion for new trial is on the usual general grounds that the verdict "is contrary to law, contrary to the evidence, and contrary to the law and evidence, and against the principles of justice and equity." Held:

[1] 1. There being no assignment of error upon the direction of the verdict, this court has no authority to decide whether the trial court erred in so directing. *Stone v. Hebard Lumber Co.*, 145 Ga. 729, 89 S. E. 814.

[2] 2. There was evidence sufficient to authorize the verdict, and the court did not err in refusing a new trial.

Judgment affirmed.

All the Justices concur.

(151 Ga. 181)

WALLER v. DUNN. (No. 2083.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by the Court.)

1. Mortgages \S 32(6)—Absolute deed may be shown to be security.

A deed absolute in form may be shown to have been made to secure a debt, where the maker remains in possession of the land. *Mercer v. Morgan*, 186 Ga. 632, 71 S. E. 1075.

2. Vendor and purchaser \S 232(1)—Actual possession is notice of right or title.

Actual possession is notice to the world of the right or title of the occupant. *Mercer v. Morgan*, supra; *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97, 8 L. R. A. (N. S.) 463, 115 Am. St. Rep. 118; *Austin v. Southern Home, etc., Ass'n*, 122 Ga. 489, 50 S. E. 382.

3. Vendor and purchaser \S 228(1)—One purchasing with notice of outstanding equity takes subject to enforcement thereof.

One who purchases land with notice of an outstanding equity in the property held by a third person takes subject to the right of such person to enforce it. Civil Code, \S 4529; *Stone v. Georgia Loan & Trust Co.*, 107 Ga. 524, 33 S. E. 861.

4. Mortgages \S 608½—Grantor under security deed may sue grantee's successor for accounting and recovery of land.

Where the owner of land executes a deed of the character mentioned in the first note,

and remains in possession of the land, and the grantee conveys the land to another person who has no actual notice of the undisclosed agreement that the deed shall operate as a security for debt, and who has made no inquiry of the occupant, but, notwithstanding such possession of the owner at the time of his purchase, subsequently takes possession without consent of the owner and derives therefrom rents and profits sufficient to discharge the secured debt, the owner may by appropriate equitable pleadings sue for an accounting and recovery of the land, on the ground that such rents and profits were sufficient to discharge the debt. If on the trial it should appear that the debt has been partially, but not wholly, discharged, a verdict may be rendered declaring the amount of the debt remaining unpaid, and finding the property for the plaintiff on payment of such amount. *Berry v. Williams*, 141 Ga. 642 (3), 81 S. E. 881.

5. Petition not demurrable.

The petition as amended alleged a cause of action, and was not subject to any of the grounds of demurrer.

6. New trial \S 70—Properly refused when evidence sufficient.

No complaint was made of any error of law committed at the trial. The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Treutlen County; E. D. Graham, Judge.

Suit by M. C. Dunn against J. W. Waller. Judgment for plaintiff, and defendant brings error. Affirmed.

W. J. Wallace, of Soperton, for plaintiff in error.

Eschol Graham, of McRae, and A. C. Safold, of Vidalia, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(151 Ga. 138)

HENRICH v. McCAULEY. (No. 2056.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by Editorial Staff.)

Trial \S 236(2)—Instruction as to impeachment of witness held error.

It was error for the court, after charging the provision of Civ. Code 1910, \S 5881, that a witness may be impeached by contradictory statements as to relevant matters, to further charge that it was for the jury alone to say whether any witness had been thus impeached, and that, if they should find that any witness had been so impeached, they would discard his testimony from their consideration in its entirety unless corroborated in whole or in part by other competent testimony. (Per Hill, Atkinson, and Gilbert, JJ.)

Fish, C. J., and George, J., dissenting.

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Proceeding by M. J. Henrich for the probate of a will to which Ruby McCauley filed a caveat. Judgment in the superior court in favor of the caveatrix, and the propounder brings error. Reversed.

Little, Powell, Smith & Goldstein, of Atlanta, and Colley & Colley and R. C. Norman, all of Washington, Ga., for plaintiff in error.

Alvin G. Golucke, of Crawfordville, and Clement E. Sutton, of Washington, Ga., for defendant in error.

HILL, J. Martha Henrich filed a petition to the court of ordinary of Lincoln county for the probate of the will of Carl Henrich, deceased. Mrs. Ruby McCauley filed a caveat to the probate of the will on the ground that it was not signed by Carl Henrich or any one authorized by him. On appeal to the superior court the jury trying the issue found in favor of the caveatrix against the propounder. A motion for new trial being overruled, the propounder excepted.

1. The amended motion for new trial involves the question as to the charge of the court on the subject of impeachment of a witness by contradictory statements made by him previously as to matters relevant to his testimony and to the case, and also whether the charge was authorized by the evidence. It was error for the court, after charging the jury Civil Code 1910, \S 5881, which is as follows:

"A witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case," etc.

—to charge:

"It is for you and you alone to say whether or not any witness or witnesses have been thus impeached in the way set out in the section of the Code just read to you. If you should find that any witness in the case has been thus impeached and in the way set out, then you would discard his or their testimony from your consideration in its entirety unless corroborated in whole or in part by other competent testimony in the case." *Powell v. State*, 101 Ga. 9, 20, bottom of page, 29 S. E. 309, 317 (65 Am. St. Rep. 277); *Waycaster v. State*, 136 Ga. 95 (3), 70 S. E. 883.

2. There is sufficient evidence in the record to authorize a charge on the subject of impeachment of a witness by contradictory statements made previously as to matters relevant to his testimony and to the case.

3. As the case is to be returned for another hearing, we express no opinion on the suffi-

dency of the evidence to support the verdict.

Judgment reversed.

All the Justices concur, except FISH, C. J., and GEORGE, J., dissenting, and BECK, P. J., concurring in the judgment.

(151 Ga. 150)

SMITH et al. v. SMITH. (No. 1978.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by Editorial Staff.)

Wills \S 294—Copy of lost will cannot be probated without calling living witnesses.

Under Civ. Code 1910, \S 3863, providing that a copy of a lost or destroyed will, clearly proved to be such by the subscribing witnesses and other evidence, may be probated, a copy of a lost will could not be probated on evidence of the existence and contents of the will and its destruction by fire without producing the living witnesses, though it was admitted that, if present, they would testify that they had no recollection of witnessing the will, but might have done so.

Error from Superior Court, Wilkinson County; J. B. Park, Judge.

Proceeding by W. W. Smith against R. C. Smith and others. Judgment admitting a will to probate, and defendants bring error. Reversed.

Victor Davidson, of Irwinton, and Allen & Pottle, of Milledgeville, for plaintiffs in error.

HILL, J. Where a propounder offered for probate in the court of ordinary a paper purporting to be a copy of the will of the testatrix, which he sought to establish in lieu of the original, which was alleged to have been burned subsequently to the death of the testatrix, and where on the trial of the case on appeal in the superior court it was admitted that one of the witnesses to the will was dead and the other two witnesses were in life, but the two living witnesses were not produced (it being admitted, however, that they would testify if present that they had no recollection of witnessing the will offered for probate, though they may have done so), a verdict setting up the will and admitting it to probate was unauthorized by the evidence, there being no proof of the execution of the will, though evidence was adduced to show the existence and contents of the will and its destruction by fire after the death of the testatrix. Civil Code 1910, \S 3863; Scott v. Maddox, 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263; Mosely v. Carr, 70 Ga. 333.

Judgment reversed.

All the Justices concur.

(151 Ga. 155)

DRAKE v. WARD-TRUITT CO. (No. 2082.)

(Supreme Court of Georgia. Feb. 18, 1921.
Rehearing Denied Feb. 28, 1921.)

(Syllabus by Editorial Staff.)

1. Trial \S 25(16)—Too late to claim right to open and close after close of evidence.

Where the claimant in a statutory claim case permitted plaintiff to assume the burden of proof and open and conclude the introduction of evidence without admitting possession in the defendant in execution or claiming the right to assume the burden of proof and open and conclude, it was too late, after the evidence had closed, for her to assert the right to open and close the argument.

2. New trial \S 70—Refusal not error when verdict authorized.

The refusal of a new trial was not error where there was evidence to authorize the verdict.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Proceedings on a statutory claim interposed by Cora Drake to property levied on under an execution in favor of the Ward-Truitt Company. Judgment for plaintiff in execution, and the claimant brings error. Affirmed.

J. A. Mitchell, of Crawfordville, for plaintiff in error.

Alvin G. Golucke, of Crawfordville, for defendant in error.

FISH, C. J. [1] 1. Where on the trial of an issue in a statutory claim case the claimant did not, before the commencement of the introduction of evidence, admit possession in the defendant in execution, or in any manner claim the right to assume the burden of proof and to open and conclude the argument, but permitted the plaintiff in execution to assume the burden of proof and to open and conclude the introduction of evidence (both parties submitting evidence), it was too late, after the evidence had closed and before the argument began, for the claimant to assert for the first time the right to the opening and conclusion, on the ground that the entry of levy, which the plaintiff in execution had put in evidence, recited that the land was levied on as the property of the defendant, and that he was in possession at the time of the levy, and it was not error in such circumstances to allow the plaintiff in execution to open and conclude the argument to the jury. Taylor v. Brown, 139 Ga. 797 (3), 77 S. E. 1062; Chandler v. Collins, 149 Ga. 64, 99 S. E. 38.

[2] 2. There was evidence to authorize the

verdict finding the property levied on subject to the execution, and the court did not err in refusing a new trial.

Judgment affirmed.

All the Justices concur.

(151 Ga. 168)

McWILLIAMS v. PAIR et al. (No. 1896.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by Editorial Staff.)

1. Adoption \S 6—Surrender of custody of illegitimate child is consideration for agreement to adopt.

The surrender of an illegitimate child by its mother to its father was a sufficient legal consideration for the father's agreement to take the child as his own and adopt him as such with all the rights and powers of a legitimate child.

2. Specific performance \S 86—Agreement to adopt child performed by all save legal adoption is enforceable as to child's equitable property rights.

Where the mother of an illegitimate child surrendered his custody to the father on the father's agreement to support and adopt him, and there was full performance by all parties, but no steps were taken to adopt the child, he had such equitable rights in the father's property undisposed of by will as could be enforced in equity.

3. Specific performance \S 19—Agreement to adopt held enforceable by child's representative, though child predeceased parent.

Where an agreement by the father of an illegitimate child to support and adopt him as his own child with all the rights of a legitimate child was fully performed by all parties during their lives, except that there was no legal adoption, the fact that the child predeceased the father did not prevent the maintenance of an action by his personal representative to enforce the child's equitable rights in the father's property undisposed of by will.

Error from Superior Court, Cobb County; John D. Humphries, Judge.

Action by S. P. McWilliams, administratrix, against J. W. Pair and others. Judgment for defendants, and plaintiff brings error. Reversed.

Geo. D. Anderson, H. B. Moss, Mozley & Gann, and Clay & Giles, all of Marietta, for plaintiff in error.

John H. Boston, of Marietta, for defendants in error.

GEORGE, J. The petition (though set out in two counts), construed with respect to the matters material to a decision in this case, alleged in substance the following: The father of an illegitimate son received the son, while an infant, into his home, under a

parol agreement with the child's mother that the father should have the sole custody, care, service, and company of the child during its minority; the father promising and agreeing to take the child as his own and to adopt him as such, with all the rights and powers of a son born to him in lawful wedlock. There was full performance of the agreement by the mother, the son, and the father during the minority of the son and during the life of all parties concerned, though no steps were taken by the father to legally adopt the son. The father survived the son, and both the father and the son died intestate. Held:

[1] 1. The surrender of the illegitimate son by its mother to its father was a sufficient legal consideration for the contract. See *Pair v. Pair*, 147 Ga. 754, 758, 95 S. E. 295.

[2, 3] 2. The son had such an equitable status and such equitable rights in the property of the father, undisposed of by will, as could have been enforced in a court having equitable jurisdiction. *Crawford v. Wilson*, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. (N. S.) 773; *Lansdell v. Lansdell*, 144 Ga. 571, 87 S. E. 782. The action being for specific performance of contract and for the recovery of a designated interest in described property, the fact that the son predeceased the father will not prevent the maintenance of the action by the personal representative of the son. See *Pair v. Pair*, 147 Ga. 754, 95 S. E. 295; cf. *Bell v. Elrod*, 150 Ga. —, 105 S. E. 248.

3. Accordingly the petition was not subject to general demurrer.

Judgment reversed.

All the Justices concur.

(151 Ga. 156)

JUKES v. HULL et al.

HULL et al. v. JUKES. (Nos. 2087, 2089.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by the Court.)

1. Life estates \S 28—Evidence held insufficient to authorize finding that release by life tenant was on condition that remaindermen also sign.

The evidence, construed in the light most favorable to the claimant, Mrs. Hull, was insufficient to authorize the finding that the release was signed by her to be delivered to Mrs. Jukes on condition only that the remaindermen also signed. Her evidence shows merely that she believed the release would be ineffectual without the signature of the remaindermen, and that she did not believe they would sign. This requires a reversal of the judgment refusing to grant a new trial.

2. Execution \S 193—Amendment of issue in claim case held not demurrable.

The court did not err in overruling the demurrer to the plaintiff's amendment to the issue tendered.

3. Other assignments held not to require reversal.

The remaining assignments of error in the main bill and the cross-bill of exceptions are insufficient to cause a reversal.

Error from Superior Court, Clarke County: Thos. F. Green, Presiding Judge.

Proceeding on a claim interposed by Mrs. Rosa D. Hull and others to property levied on under a fl. fa. in favor of Nancy A. Jukes. Judgment for the claimants, and the plaintiff in fl. fa. brings error, and the claimants file a cross-bill of exceptions. Reversed on the main bill of exceptions, and affirmed on the cross-bill.

A fl. fa. for \$500 principal, issued in favor of Nancy A. Jukes against J. T. Anderson, as executor of T. C. Deloney, was levied upon described land as the property of the estate of T. C. Deloney, deceased. A claim to the property was interposed by Mrs. Rosa D. Hull, Rosa Hull Carson, and Lella May, Henry, and Deloney Hull. It appears that T. C. Deloney was the brother of Mrs. Rosa D. Hull; that under the will of their mother Deloney had a life interest in the property levied upon; and that in the event he died without children Mrs. Hull would take a life interest, with remainder to her children, who are the other persons named as claimants in this case. By amendment to the issue tendered the plaintiff in fl. fa. pleaded that the property had been acquired by Deloney with the belief that it would belong to him absolutely; that he had contributed from his individual funds a portion of the purchase price and had expended considerable labor on the place before being informed that the claimants in this case would claim an interest in remainder; that subsequently Mrs. Hull had on divers occasions promised that she and her children would quitclaim to him their interest in the land, and upon the faith of this promise he had expended \$3,600 in improving the place; that in equity and good conscience the estate of T. C. Deloney should have such interest in the land as would represent the enhancement in the value due to the improvements placed thereon by him; that this amount should be ascertained and subjected to the plaintiff's debt; that Mrs. Hull was estopped from claiming her life interest in the land, because she had executed a contract which recited that it was made between the persons [naming them] who are claimants in this case and Mrs. Jukes, for the purpose of enabling T. C. Deloney to borrow money upon the security of said land, containing the following language:

"The said parties of the first part [Mrs. Hull and the other claimants], each for himself or herself, hereby releases to the said Nancy A. Jukes all his or her interest in the tract of

land hereinafter described to the extent of the \$1,500 to be loaned by the said Nancy A. Jukes, and consent for the said T. C. Deloney to make title to the said Nancy A. Jukes to secure a note for \$1,500.00 principal, due 12 months after date, with interest at 8 per cent., to the following land "

—describing it. This instrument was signed by Mrs. Rosa D. Hull alone. Deloney made to Mrs. Jukes a security deed conveying the land. Claimants allege that it was contemplated by plaintiff in fl. fa., at the time of the execution of the paper relied upon, that all of the children of Mrs. Hull should sign the same; that she signed the same "only with the agreement with the representative of the plaintiff in fl. fa. that, if her children did not also sign, said instrument was to be void and of no effect"; that the amount of money loaned is different from that stated in the instrument relied on, and the loan was not made upon the faith of the signing of that paper; and that the signing of the paper by Mrs. Hull was an act of suretyship on her part, and the loaning without her knowledge or consent of an amount different from that stipulated in the writing constituted such a novation as would relieve her from liability. The evidence relating to the question whether Mrs. Hull executed the release upon the condition that it should be signed also by the remainderman was as follows:

Mrs. Hull testified in substance, that J. T. Anderson presented the paper and urged her to sign it; that she stated to him, "I will sign the paper, but it won't do any good; I am afraid my children will not sign the paper;" that he requested her to sign it, and stated that he would then see if he could procure the signature of the only one of her children present; that this child refused to sign; that he led her [Mrs. Hull] to believe it wouldn't do any good without the children signing it; that he told her "It was no good." In answer to the question, "Was anything said by Mrs. Hull at the time of signing that paper, if others didn't sign, for you not to deliver that—it would not be binding on her?" Anderson replied:

"Why, of course, that applied to her. Mr. Strickland wanted Mrs. Hull's signature, and he wanted the children's signatures; and when I acquainted her with the fact that we wanted to get Tom this money, she said she would write to the children, and I think probably she did, or any way told me she had written to the children, and there was one she stated to me that was unwilling to sign it."

He also testified that Mrs. Hull did not tell him that he should not deliver the paper until it had been signed by all her children; that he stated to her that, while they desired the signatures of her children, the attorney representing Mrs. Jukes had informed him "that it would be all right just for her

to sign it," and that the amount to be loaned would be reduced from \$1,500 to \$500 in consequence of the failure of the children to sign.

The jury found the issue in favor of the claimant, Mrs. Hull. A motion for new trial, filed by the plaintiff in *fi. fa.*, was overruled, and she excepted to that ruling in the main bill of exceptions. In the cross-bill of exceptions error is assigned upon the overruling of a demurrer to the amended issue tendered by plaintiff in *fi. fa.*, upon the admission of certain evidence, and upon a portion of the charge of the court.

W. M. Smith and John J. Strickland, both of Athens, for plaintiff in error.

Erwin, Erwin & Nix, of Athens, for defendants in error.

GILBERT, J. Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur.

(151 Ga. 165)

WILKES et al. v. FOLSOM. (No. 2130.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by the Court.)

1. Ejectment \S 84(1)—Evidence that defendant's deed was from minor and for specified purpose inadmissible under pleadings.

It was error for the court to admit and to refuse to rule out on timely motion of the defendant, based upon the ground that there was no appropriate pleading upon which to base the same, evidence by C. S. Wilkes, a witness for the plaintiff, that "at the time I made the deed to my mother I was a minor; there was no consideration for same; it was made because I wanted to borrow some money, and I made the deed to my mother for her to borrow the money, and she never did use the deed to borrow the money, and I never got the money." It necessarily follows that the court erred in giving to the jury instructions based upon the evidence thus admitted.

2. Evidence \S 317(4)—Testimony of witness concerning conversation with defendant held hearsay; testimony that grantor said sale was agreeable to former grantee held hearsay.

It was error for the court to admit evidence by a witness for the plaintiff, to the effect that he saw Margaret Wilkes, one of the defendants, and that she agreed to and acquiesced in the sale of the land by C. S. Wilkes to the plaintiff, and that he had reported such agreement to the purchaser; the defendant having interposed timely objection based on the ground that such evidence was hearsay. For the same reason it was error to allow the plaintiff to testify in substance that C. S. Wilkes said that the sale was agreeable to Margaret Wilkes.

3. Other assignments.

The above rulings are controlling, and require a reversal of the judgment refusing a new trial. Other assignments of error not specifically mentioned are mere repetitions of the foregoing assignments, or are not of such character as are likely to occur again on another trial, and do not require special mention.

4. Sufficiency of evidence.

Since the case is remanded for another hearing, we express no opinion upon the sufficiency of the evidence to support the verdict.

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Suit by I. L. Folsom against G. W. Wilkes and another. Judgment for plaintiff, and defendants bring error. Reversed.

See, also, 149 Ga. 512, 101 S. E. 185.

Folsom filed a petition against G. W. Wilkes and Mrs. Margaret Wilkes alleging, in substance, as follows: Petitioner is the owner of described land. The defendants are in possession thereof under a contract to work the place for one-half of the crop raised thereon. The contract has expired, and the defendants are holding over and retaining possession of the premises and the houses thereon, and refuse to deliver possession to the plaintiff without authority of law. Mrs. Margaret Wilkes is claiming title and right of possession of said land, and G. W. Wilkes, her husband, is holding the same under the alleged title of Mrs. Wilkes. Mrs. Wilkes claims title under an alleged deed dated February 14, 1914, but not filed for record until July 9, 1914, and recorded July 11, 1914, made to her by her son, C. S. Wilkes. The plaintiff claims title under a deed executed to him by C. S. Wilkes on June 23, 1917, and filed for record on the same day. At the time of the purchase of said land by the plaintiff he had no knowledge or notice, actual or constructive, of the existence of the deed from C. S. Wilkes to Mrs. Margaret Wilkes, if it was in existence at that time, but bought said land in good faith, paying therefor the sum of \$750. G. W. and Mrs. Margaret Wilkes are insolvent, and during the year 1918 plaintiff received nothing from Wilkes on his contract for one-half of the crop. G. W. Wilkes and Mrs. Margaret Wilkes are trespassers upon the property, and are remaining in possession thereof without lawful authority or title, and have failed and refused to deliver possession to the plaintiff upon demand, and their remaining in possession, cultivating the land, and using the premises and houses thereon is a continuing and willful trespass in violation of the rights of the plaintiff. The defendants are incompetent farmers and are not preserving the fertility of the land,

but are allowing it to run down and lose value because of their failure to properly cultivate and fertilize the soil; and the damage to plaintiff is irreparable. The prayers are: (a) For process; (b) that the defendants be enjoined from further trespassing upon plaintiff's property, and from withholding the possession of it from the plaintiff, and from keeping thereon or in the houses thereof their property and effects, "and from using the same in any way, or from doing anything else in defiance of or in violation of the rights of the plaintiff as the owner and possessor of said property, or from interfering in any way with the possession, use, and enjoyment by the plaintiff of said property;" (c) "that the plaintiff may have and recover said property from the defendants, and that the defendants may be ejected therefrom and the same may be decreed to be the property of the plaintiff." Rule nisi was issued, and the court granted an ad interim injunction restraining the defendants from "further trespassing upon said property, or withholding possession of said property from the plaintiff, and from keeping their property and effects thereon." The defendants sued out writ of error to the Supreme Court, *Wilkes v. Folsom*, 149 Ga. 512, 101 S. E. 185. Thereafter the defendants filed an answer denying that they were in possession as croppers or otherwise holding under the plaintiff, and alleging that the plaintiff obtained his deed from C. S. Wilkes with notice of the title and interest of Mrs. Margaret Wilkes. The case came on for trial, and a verdict was returned for the plaintiff; whereupon the defendants filed a motion for a new trial, to the overruling of which they excepted.

J. J. Murray, of Valdosta, for plaintiffs in error.

Branch & Snow, of Quitman, for defendant in error.

GILBERT, J. [1-4] The first headnote, relating to the second special ground of the motion for new trial, alone requires elaboration. During the trial, and before any evidence was admitted, the plaintiff offered an amendment, which was duly allowed and ordered filed, as follows:

"That the deed made by C. S. Wilkes to the said Margaret Wilkes, which bears date of February 19, 1914, referred to in the seventh paragraph of the petition, was not made by C. S. Wilkes for a valuable consideration, but was made by C. S. Wilkes for the purpose of conveying the said land to Mrs. Margaret Wilkes, for the sole purpose of allowing her to borrow a sum of money at the time on said deed, and the said Mrs. Margaret Wilkes did not use said deed for said purpose at said time; and said deed was made by the said C. S. Wilkes when the said Wilkes was only 18 years of age, and was a minor, and was therefore not a valid deed."

Counsel for defendants objected to the amendment upon the ground that it set up a new cause of action. Upon the allowance of the amendment the defendants pleaded surprise, announcing in open court that they were not in position to meet the amendment so offered and allowed. The court thereupon announced from the bench, "That seems to come up to the rule," and, addressing plaintiff's counsel, "They are entitled to a continuance." Thereupon plaintiff's counsel said:

"We will take an order striking the amendment in the case just offered, for the purpose of going into the trial of the case."

The case proceeded to trial, and C. S. Wilkes, a witness for the plaintiff, testified as follows:

"At the time I made the deed to my mother I was a minor; there was no consideration for same; it was made because I wanted to borrow some money, and I made the deed to my mother for her to borrow the money, and she never did use the deed to borrow the money, and I never got the money."

Counsel for defendants thereupon moved the court to rule out said evidence, upon the ground that it was irrelevant, immaterial, and prejudicial to the rights of defendants, and upon the further ground that there were no pleadings to authorize the same, the plaintiff having withdrawn the amendment which sought to attack the deed on the grounds that it was without consideration and that the grantor was a minor at the time of making the deed. The court held the ruling in reserve at the time; but at the conclusion of the plaintiff's evidence the defendants' counsel renewed their objection as made to the evidence; whereupon the court ruled as follows:

"I don't understand that that operates to estop them upon this particular issue. I will have to overrule the motion."

This ruling is assigned as error. We think the objection was well taken, and that the court erred in refusing to rule out the evidence. The court had already expressed his opinion that this was a material feature of the case, by his ruling that the amendment set up a new cause of action entitling the defendants to a continuance. The amendment was withdrawn expressly upon the ground that the plaintiff desired to avoid a continuance. Manifestly, if the amendment was of such materiality and importance as to require a continuance of the case on motion of the defendants, it was prejudicial to the latter to permit proof of the facts stated in the amendment without pleading. The plaintiff cannot attain the end sought by the amendment by dispensing with the pleading and proceeding with the evidence, for the sufficient reason that there must be

appropriate pleading to permit the proof. This ruling was prejudicial to the defendants, and the court should have granted a new trial.

Judgment reversed.

All the Justices concur.

YAUGHN et al. v. HARPER. (No. 2126.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by the Court.)

1. Partition \S 5—Parol partition followed by possession gives equity which will support recovery against one entering without better title.

Where tenants in common agree by parol upon a partition, defining in the agreement the boundaries of the part assigned to each in severalty, and each enters into possession, thus executing the agreement, the partition clothes each with a perfect equity, and is thus the equivalent of legal title; and on such title recovery may be had in ejectment, or in a statutory action for land, against one who subsequently enters without a better title.

2. Estoppel \S 29(1)—Owner who accepts deed from another conveying a life estate only is not divested of title.

Though one who is the owner of land, having perfect title, accept a deed from another purporting to convey to such owner and a third person a life estate, with remainder to the children of the grantor, the interest of the owner of the land is not thereby reduced to a life estate; nor does the conveyance to the owner and the third person of a joint life estate in the land, with remainder over, constitute a covenant binding upon the owner, though he accepted the deed.

Error from Superior Court, Crawford County; H. A. Mathews, Judge.

Suit by Mrs. G. R. Harper against Mrs. Lula Yaughn and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Mrs. G. R. Harper brought suit, alleging that she was sole heir at law of G. R. Harper, deceased; that her husband died seized and possessed of the land in controversy, the west half of a designated lot of land; that the defendants, Lula Yaughn and the children of A. Y. Yaughn, were asserting that they had an interest in the property, and that they were doing acts inconsistent with and destructive of petitioner's rights. The prayer was for injunction and other equitable relief. Demurrers to the petition were filed by the defendants, and were overruled. Upon the trial the jury returned a verdict in favor of the plaintiff, and a decree was entered accordingly. A motion for a new trial was overruled, and the defendants excepted.

L. D. Moore, of Macon, for plaintiffs in error.

R. Douglas Feagin, of Macon, for defendant in error.

BECK, P. J. A deed executed on the 9th day of January, 1911, by W. J. Marshall, conveyed to George R. Harper and A. Y. Yaughn lot No. 27 in the Sixth district of Crawford county, Ga. Subsequently to the execution of this deed, Yaughn and Harper, the tenants in common, made a parol agreement for a partition of the land, defining in the agreement the part each was to have. According to the contention of the plaintiff, her husband, George R. Harper, was to have the west portion, and Yaughn the east. Harper was in possession of the west portion, as the plaintiff contends, under the parol agreement for partition; and defendants introduced evidence to show that Harper took the east portion and Yaughn the west portion, and that after the line was run Harper continued to occupy the east half and Yaughn the west half of the lot. The testimony was conflicting, and the court submitted the issues to the jury. In the course of his instructions the court charged the jury:

"If G. R. Harper and A. Y. Yaughn, after having bought this land, agreed upon a division of it, and if Harper upon that agreement went into possession of the west part of it, or if Harper and Yaughn agreed upon a division by which Harper was to take the west part, and after that a line was run and agreed on, dividing the west from the east side, at a time when Harper was holding and occupying the west part and Yaughn the east part, then the absolute fee-simple title vested in Harper to the west part to the dividing line agreed upon, if such a line was agreed upon, and the same kind of title vested in Yaughn to the east part. That is to say, if these two parties, Harper and Yaughn, owning the entire tract, agreed between them that one would take the west part and the other the east part, and a line was run and each took possession of what he had agreed to take, why that became a conveyance of the land in law as between the parties; and if Yaughn had the east part under the agreement when the line was run, then Yaughn took title to the east part; and if Harper took the west part under that agreement, and that was the understanding at the time the division was made, and Harper took possession of the west part with the knowledge and consent of Yaughn, and Yaughn took the east part, then Harper took an absolute title to the west part and it became his without any deed. * * * If such a division was made between the parties, and no agreement was made at the time about any deed, but they merely divided it between them in that way, and no deed was made, as I said, the very fact in the case would determine the title of the parties; and if Harper took the west part under that agreement, and a dividing line was run, then the land became his in fee simple, that is, he owned the entire title in the west half. * * * Now I charge

you that if Harper took a title of that sort to the west half, and you believe the evidence so shows, and that the division was made without reference to any deed or any agreement about any deed, but merely a division, if you believe that he took that sort of title, then Mr. Yaughn had no right or title in the west at all; he had nothing to convey to Harper or any one else; provided there had been an independent division of the land between the two men who owned it in common, by a dividing line, and an agreement by which Harper took the possession of the west part."

[1] These instructions were excepted to on several grounds, but especially upon the ground that the court in giving them ignored a deed, which, many years after the division, was executed by Yaughn conveying a life interest in the west half of lot No. 27 to George R. Harper and Lula Yaughn, jointly, and after their death to the children of A. Y. Yaughn. The instructions given contain substantially the law relating to oral partition of lands between joint tenants and occupation of the lands in accordance with the terms of the agreement. The principle is stated in several cases decided by this court that—

"Where tenants in common agree by parol upon a partition, defining in the agreement the boundaries of the part assigned to each in severalty, and each enters into possession, thus executing the agreement, the partition clothes each with a perfect equity and is thus the equivalent of legal title; and on such title recovery may be had in ejectment, or in a statutory action for land, against one who subsequently enters without a better title." *Adams v. Spivey*, 94 Ga. 676, 20 S. E. 422.

See, also, *Powell's Actions for Land*, § 145, and cases cited.

The charge complained of substantially applied this principle to the facts in the record.

[2] But the plaintiffs in error insist that, several years subsequently to the parol partition between them, there was a mutual interchange of deeds, that Harper executed and delivered to A. Y. Yaughn a deed conveying the east half of lot No. 27, and Yaughn made the deed to Harper and Lula Yaughn recited above, conveying the west half of the lot; and it is insisted that these deeds were part of one transaction, and that the acceptance of the deed by Harper vested the latter and Lula Yaughn with a life estate in the property and the remainder to the children of A. Y. Yaughn. If there was a parol partition, as petitioner insisted and adduced evidence to show, and possession was taken in accordance with that agreement by the parties, then Harper acquired a perfect equity to the west portion, which was the equivalent of legal title; and the mere fact that Yaughn afterwards executed a deed conveying to Harper and another person a life estate in the land did not divest his title nor

reduce it to a life estate. The mere fact that he executed a deed which conveyed a life estate to Harper and to the other person could not divest Harper of his title to the entire estate. The plaintiffs in error insist that the recitals in the deed were in the nature of covenants, but do not undertake to discuss or state the purpose of the covenants. Counsel argues that it was a case for the application of the principle of law contained in section 4180 of the Civil Code that—

"When a grantee accepts a deed and enters thereunder, he will be bound by the covenants contained therein, although the deed has not been signed by him."

We cannot construe the grant in this deed of a life estate to G. R. Harper and Lula Yaughn, with remainder to the children of the grantor, as containing either a covenant or condition binding upon the grantees. There is nothing in the language that placed upon Harper the implied obligation to convey or deliver the land to Lula Yaughn or the children of the grantor, and we do not see how any act upon the part of Yaughn would divest Harper of title and convey it to some one else.

The charge of the court submitted the real issues in the case; and the court did not err in giving those portions of the charge excepted to, nor in refusing the requests to charge.

Judgment affirmed.

All the Justices concur.

(151 Ga. 97)

LEWIS v. TRIMBLE. (No. 2063.)

(Supreme Court of Georgia. Feb. 16, 1921.)

(Syllabus by Editorial Staff.)

1. Specific performance ¶64—Granted as of course respecting contract for sale of land.

Where a written contract for the sale of land signed by both parties is certain and fair, for an adequate consideration, and capable of being performed, it is a matter of course for a court of equity to decree specific performance.

2. Specific performance ¶66—Compellable at instance of vendor of land.

Specific performance of a written contract for the sale of land which is certain and fair, for an adequate consideration, and capable of being performed, may be compelled at the instance of the vendor as well as the vendee.

3. Vendor and purchaser ¶22—Description capable of application to land intended by extrinsic evidence is sufficient.

The description of land in a contract of sale is sufficiently definite where the premises are so described as to indicate the grantor's intention to sell a particular lot of land and is capable of practical application to the land intended by extrinsic evidence.

4. Specific performance §117—Plaintiff must allege and prove extrinsic matter applying description to particular property.

In a suit for specific performance of a contract to exchange lands where the description of defendant's land is sufficient but that of plaintiff's requires extrinsic evidence to apply it, plaintiff must allege and prove such extrinsic matter as will definitely apply the description to the land intended to be conveyed by him.

5. Exchange of property §3(1)—Specific performance §29(2)—Description held sufficient to support contract, but not to authorize specific performance without allegation and proof of extrinsic matter.

A description of property in a contract of exchange as two brick store buildings, being four storerooms, one hotel building, two dwellings, one negro house, and ten vacant lots, being all the property owned by the party in E., can be applied by extrinsic evidence to the contemplated subject-matter, and is sufficient to support a valid contract, but will not authorize specific performance in the absence of allegation or extrinsic evidence applying it to the land intended to be conveyed.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Suit by H. H. Trimble against B. M. Lewis. Judgment for plaintiff, and defendant brings error. Reversed.

R. J. Lewis, W. A. Covington, and Dowling & Askew, all of Moultrie, for plaintiff in error.

Shipp & Kline, of Moultrie, for defendant in error.

ATKINSON, J. [1, 2] 1. "Where a contract for the sale of land is in writing signed by both parties, is certain and fair, is for an adequate consideration, and capable of being performed, it is as much a matter of course for a court of equity to decree the specific performance of it as it is for a court of law to give damages for a breach of contract. Specific performance of such a contract may be compelled at the instance of the vendor as well as at that of the vendee." Clark v. Cagle, 141 Ga. 703, 82 S. E. 21, L. R. A. 1915A, 817.

[3] 2. The description of land in a contract of sale is sufficiently definite where the premises are so described as to indicate the grantor's intention to sell a particular lot of land, and is capable of practical application to the land intended to be conveyed, by introduction of extrinsic evidence. King v. Brice, 145 Ga. 65, 88 S. E. 960; Dean v. Turner, 105 S. E. 603 (2).

[4] 3. The principle stated in the preceding note is applicable in a suit for specific

performance of a contract for exchange of lands; and where the description of the plaintiff's land is such as to require extrinsic evidence to apply it to the land intended to be conveyed by him, and the description of the land of the defendant is sufficient without the aid of such extrinsic evidence, it is necessary for the plaintiff to allege and prove such extrinsic matter as will definitely apply the description of his property, as stated in the contract, to the land intended to be conveyed by him. McIntosh v. Roane, 148 Ga. 273, 96 S. E. 387.

Without such allegations and proof the plaintiff would not carry the burden of showing the whole contract to be certain and fair.

[5] 4. In a suit instituted by H. H. Trimble against B. M. Lewis for specific performance, the contract (omitting the caption and signature of the parties and witnesses) was:

"This agreement entered into between B. M. Lewis, of the first part, and H. H. Trimble, of the second part: First party agrees to trade a tract of land, being south half of lot No. 156 in the Eighth land district Colquitt county, Ga., with all improvements on this place, for two (2) brick store buildings, being four storerooms, one hotel building, (2) two dwellings, one negro house, ten vacant lots, this being all the property now owned by party of the second part in Ellenton, Ga., and fifty-five hundred dollars (\$5,500.00). Party of the first agrees to give possession the 1st of January, 1919. Party of the second part agrees to give possession of one dwelling and sheet iron shop on vacant lot by December 1, 1918, and to give possession of all the other property by the 1st day of January, 1919. The fifty-five hundred dollars is to be paid as soon as loan can be obtained on property (farm) of the second part."

The land which H. H. Trimble was to convey was described in the petition only as set forth in the contract. On the trial there was no extrinsic evidence tending to apply the description of the plaintiff's land, as expressed in the contract, to the land intended to be conveyed by him. Held:

(a) The description of the land of H. H. Trimble set forth in the contract was of such character as that it could be applied by extrinsic evidence to the subject-matter contemplated by the parties, and consequently was sufficient to support a valid contract.

(b) However, as there was no allegation or extrinsic evidence in support thereof tending to apply the description expressed in the contract to the land intended to be conveyed by H. H. Trimble, the verdict for the plaintiff was unauthorized, and it was error to refuse a new trial.

Judgment reversed.

All the Justices concur.

(151 Ga. 154)

LANCASTER v. WILSON et al. (No. 1983.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by Editorial Staff.)

1. Specific performance \S 32(3)—Contract of exchange describing defendant's land sufficiently, but not plaintiffs', lacks mutuality.

Where an agreement to exchange lands contains a sufficient description of the land of one of the parties, but not of the other, a suit to specifically perform the contract cannot be maintained by the party owning the land insufficiently described, for want of mutuality in the contract.

2. Specific performance \S 29(2)—Contract of exchange held not to describe lands sufficiently to support suit.

An agreement to exchange "certain property owned by the said W., W., and O. in Monticello, Fla., for a certain hotel owned by the said L. in Forsyth, Ga." does not sufficiently describe the land to support a suit for specific performance.

3. Exchange of property \S 3(1)—Defective description not cured by execution of deeds left with parties' attorneys.

Where an agreement to exchange property did not sufficiently describe the property, the defect was not cured or the agreement ratified by deeds executed by both parties accurately describing certain lands and left by them with their respective attorneys.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. C. W. Wilson and others against Mrs. H. T. Lancaster. A temporary injunction was granted, and a receiver appointed, and defendant brings error. Reversed.

Reagan & Reagan, of McDonough, for plaintiff in error.

Moore & Pomeroy, of Atlanta, for defendants in error.

HILL, J. [1-3] 1. Where two parties sign an agreement to exchange lands belonging to them respectively, although the description of the land belonging to one of the parties is sufficient, if there is an insufficient description of the property belonging to the other party to such contract, a suit to specifically perform the contract could not be maintained at the instance of the party owning the land insufficiently described, for want of mutuality in the contract. *Lewis v. Trimble*, 106 S. E. 101; *Buick Motor Co. v. Thompson*, 138 Ga. 282, 75 S. E. 354. Accordingly an agreement to "exchange certain property owned by the said Wilson, Walker, and Cox in Monticello, Fla., for a certain hotel owned by the said Mrs. Lancaster in Forsyth, Ga." is not a sufficient description of the land so as to form the basis of a suit for specific perform-

ance. *Clayton v. Newberry*, 138 Ga. 735, 76 S. E. 63. The fact that both parties executed deeds accurately describing certain lands, which deeds were left with their respective attorneys, would not have the effect of curing the defect or of ratifying the agreement.

2. Applying the above ruling to the facts of this case, the trial court erred in granting a temporary injunction and appointing a receiver.

Judgment reversed.

All the Justices concur.

(151 Ga. 150)

SOUTHERN TIMBER CO. v. NEWPORT LAND CO. (No. 1983.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by Editorial Staff.)

1. Evidence \S 353(14)—Description of land in entry of levy held not insufficient to admit deed as evidence of title.

An entry of levy on a *fi. fa.* describing the property levied on as "95 acres, more or less, in the 1359th district G. M. of said county [Liberty county], said land described as being lot No. 14 of subdivision of tract of land containing 763 acres, more or less, recorded in Book of Deeds AC, p. 563," was not insufficient, and the sheriff's deed was admissible in evidence as a muniment of title.

2. Pleading \S 129(1)—Statement that defendant could not admit or deny allegation held evasive, and allegation to be taken as true.

In a suit to enjoin the cutting of timber, in which the petition alleged that both parties claimed title under S., and that defendant claimed title under a year's support assigned to the wife of S., but that before the death of S. the land was sold by the sheriff at a sale under execution, a statement in the answer that defendant could neither admit nor deny the allegation that the parties claimed title from a common grantor and that plaintiff's title was superior to defendant's held evasive, and the allegations to be taken as true under Civ. Code 1910, § 5637.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Suit by the Newport Land Company against the Southern Timber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Newport Land Company filed a petition against Southern Timber Company, Dunlevie Lumber Company, and E. V. Dunlevie to "enjoin them from cutting or removing, or in any manner entering upon, injuring, or interfering with the trees and timber upon said tract of land, and from trespassing upon said land in any way or manner, and from entering upon or passing over the same."

There was a prayer also that the title to the timber and trees and to the land be decreed in the plaintiff. The petition alleged that the plaintiff was the owner in fee simple of "all that tract or parcel of land containing 95 acres, more or less, lying and being in the 1359th district of Liberty county, Ga., known as lot No. 14 in the subdivision into lots of that tract of land containing 763 acres, more or less, conveyed to Greig and Jones by Henry G. Waite by deed dated October 14, 1892, and recorded in the office of the clerk of the superior court of Liberty county, Ga., in Book AA, pp. 95, 96, said lot bounded north by lot No. 7 of said subdivision, east by the Sunberry tract, south by the road from Hinesville to Sunberry, west by lot No. 13 of said subdivision." The third paragraph of the petition alleged that the tract of land was conveyed by Benjamin Greig and Francis F. Jones to Edward Solomon by deed dated June 10, 1897, and recorded August 4, 1898, in Book AC, p. 568, of the Record of Deeds for Liberty county, Ga., and "both your petitioner and said defendants claim title under and through the said Edward Solomon, as common grantor." Paragraph 4 of the petition alleged that the defendants claimed title to the land or the timber thereon under a year's support assigned to Nancy Solomon and her children from the estate of Edward Solomon, Nancy Solomon, under the name of Nancy Burk, being alleged to have conveyed the land to one Alfred Le Conte, under whom defendants claim title to the timber on the tract of land in controversy. The fifth paragraph of the petition alleges that before the year's support was assigned to Nancy Solomon and her children, and before the death of Edward Solomon, the land was sold by A. B. Brewer, sheriff of Liberty county, to E. P. Miller, and was conveyed by the sheriff to Miller as the property of Edward Solomon by deed dated April 4, 1905, under an execution issued by the superior court of Liberty county in the case of A. L. Jones v. Edward Solomon. It was alleged in paragraph 6 that by reason of the sheriff's sale Edward Solomon had no title to the property in controversy at the time of the assignment of the year's support, and that the title claimed by the defendants, or any of them, under the year's support is void. The defendants filed an answer, in which the Dunlevie Lumber Company and E. V. Dunlevie disclaimed any title or interest in the land or timber. Answering the third paragraph of the petition, the substance of which is set out above, defendants neither admit nor deny the allegations contained therein. In answer to paragraph 4 it was averred that the defendant Southern Timber Company "admits that it claims title to said timber, but denies that Dunlevie Lumber Company, or E. V. Dunlevie, or either of them, claim any rights, title, or interest in the said timber." To

paragraph 5 defendants answer that for want of sufficient information they can neither admit nor deny the allegations contained therein. Defendants amended their answer by further answering the fourth paragraph of the petition, as follows:

"Defendant Southern Timber Company claims title to said timber under a lease from Alfred Le Conte, Manerver Le Conte, Frank Mallard, and Mabel Mallard, and under a previous from Nancy Solivan to said parties, and a prescriptive title under said deed. For want of sufficient information defendants can neither admit or deny the other allegations in said paragraph."

At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit, which motion was overruled, and the defendant excepted. The defendant offered no evidence; whereupon the court directed a verdict for the plaintiff, and entered a decree enjoining the defendant as prayed.

N. J. Norman, of Savannah, and A. S. Way, of Reidsville, for plaintiff in error.

Travis & Travis, of Savannah, for defendant in error.

HILL, J. [1] 1. On the trial of the case the plaintiff offered in evidence, as part of his muniment of title, a sheriff's deed to the land in controversy, together with the execution and entry of levy thereon. The entry of levy on the *fi. fa.* was as follows:

"Georgia, Liberty County. I have this day levied the within execution on 95 acres, more or less, in the 1359th district G. M. of said county, said land described as being lot No. 14 of subdivision of tract of land containing 763 acres, more or less, recorded in Book of Deeds AC, p. 568. This Feb. 21, 1905. A. B. Brewer, Sheriff."

The deed and execution with the entry thereon were objected to on the ground that the description of the land was too indefinite, and that the sheriff had no legal right to sell the land under such description, and that accordingly no legal title to the land under such description passed by the sheriff's deed to Miller, the purchaser at sheriff's sale, and under whom, and Solomon, the plaintiff claims title. Held, that the court did not err in admitting the sheriff's deed in evidence. *Tolbert v. Short*, 150 Ga. 413, 104 S. E. 245; *Lewis v. Trimble*, 106 S. E. 101, this day decided.

[2] 2. Under the facts alleged in the petition, the answer of the defendant that he could neither admit nor deny the allegation that plaintiff and defendant both claimed title to the land in controversy from a common grantor (Solomon), and that plaintiff's title was superior to the defendant's, is evasive; and the allegations are to be taken as true. Civil Code 1910, § 5637; *Horne v. Peacock*, 122 Ga. 45 (1), 49 S. E. 722; *Raleigh*,

etc., R. Co. v. Pullman Co., 122 Ga. 700 (5), 50 S. E. 1008. See, also, 39 Cyc. 1713, 1714, and authorities cited.

3. Under the pleadings and evidence in the case the court did not err in overruling the motion for nonsuit, or in directing a verdict for the plaintiff.

Judgment affirmed.

All the Justices concur.

(151 Ga. 85)

COOPER v. HARPER et al. (No. 1921.)

(Supreme Court of Georgia. Feb. 16, 1921.)

(Syllabus by the Court.)

1. Executors and administrators \S 407—One purchasing at executor's sale regularly conducted, without knowledge of intent to misapply proceeds, held to have good title.

The motion for new trial in this case contains only the usual general grounds that the verdict is contrary to the evidence and without evidence to support it. Under the evidence in the record the jury were authorized to find that the defendants in this action, brought to recover certain lands, were the successors in title to those who had bought at executors' sale regularly conducted, after the procurement of proper orders, without notice of any facts or circumstances as to an intent upon the part of the executors to unlawfully divert the proceeds of the sale, which would make void the executors' deed, and the verdict in favor of the defendants should not be disturbed.

(Additional Syllabus by Editorial Staff.)

2. Executors and administrators \S 138(1)—Executors held authorized under will to sell land without order of court.

Under a will devising land to the testator's wife for life, with remainder to the children for life, and with remainder over to their children, naming the wife and two of the children as executors, and authorizing the wife to trade property, provided the value was returned to the estate or divided among the children, and providing that any sale should be made jointly by the wife and executors, the executors, acting jointly, were authorized to sell and convey land without an order from the court of ordinary.

3. Executors and administrators \S 349(2)—Order for sale by executors supports sale, so long as unchallenged by direct attack.

An order of the court of ordinary, regularly granted after the death of one of the executors, who was also a life tenant, for a sale of land, so long as it was unchallenged by direct attack, validated the sale, and gave the purchaser a good title.

4. Appeal and error \S 927(1)—Question of fact presumed properly submitted, in absence of exceptions.

It will be assumed that a question of fact was properly presented to the jury, where there

is no exception to any part of the charge in the record.

Error from Superior Court, Clarke County; H. S. West, Judge pro hac vice.

Action by M. L. Cooper against W. A. Harper and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Holden, Jennings & Holden and Lamar C. Rucker, all of Athens, for plaintiff in error.

Thomas & Thomas, H. A. Nix, Wolver M. Smith, and John B. Gamble, all of Athens, for defendants in error.

BECK, P. J. Henry Jennings died testate, and his will was probated in December, 1862. By its terms his widow was given a life estate in all his property, remainder to his children for life, and remainder over to their children. Susan Jennings was one of his children, and Mary Cooper, the plaintiff in this case, was the daughter of the last named. The will contains, among other provisions, the following:

"I give and bequeath to my children the remainder of all my estate, both real and personal, after the decease of my said wife, to be divided among them all equally. My daughters' portions I give to them severally for their use during their natural lives, and to their children after their death, not subject to their contracts nor their husbands' contracts. * * * I give my said wife leave to trade any property for the interest of the estate, provided the value thereof is returned in the estate or divided among our said children; but whatever sale of property shall be made must be made jointly by my wife and executors. I hereby appoint my beloved wife, Nancy Jennings, my executrix, and my two older sons, James Jennings and Jefferson Jennings, my executors to this my last will and testament. I hereby authorize my said executrix and executors to carry out this my last will and testament, after being duly qualified by the court, without giving security."

The persons named as executors qualified as such. This action of ejectment was brought to recover certain lands, consisting of two tracts, a 14-acre tract and a 26-acre tract (referred to hereinafter as tract No. 1 and tract No. 2). Upon the trial of the case the issues involved were submitted to the jury, and a verdict was returned in favor of the defendants. A motion for a new trial was made by the plaintiff, and was overruled.

[1, 2] 1. The defendants in the case are successors in title to purchasers of the tracts of land involved in this suit, which were sold at executor's sale. Tract No. 2 was sold after the death of the widow of Henry Jennings; tract No. 1 was sold during her life, and she joined with the other executors in the execution of a deed. The will itself authorized these executors, under the power of sale contained in the will, heretofore set forth, to sell

the lands belonging to the estate; and they could have sold it and conveyed the title thereto without an order from the court of ordinary, provided they acted jointly. This was done, and a deed was made by them conveying tract No. 1 to a predecessor in title of the defendants. The executors, in selling tract No. 1, procured an order from the court of ordinary. The application for the order was made by all the executors, including the widow of Henry Jennings, and showed that they were desirous of selling a tract of land, describing it, which included tract No. 1, sued for in the present case; and the application contains, in addition to the usual recitals, the statement that the applicant, "Nancy Jennings, widow of said deceased, having relinquished her life or widowhood interest in the land to be sold, and reserving a portion of the money to arise from the sale thereof in lieu of the said life or widowhood interest," and, further showing that notice of their intention to apply for leave to sell has been duly published, prays "for leave to sell the same in terms of the law and in pursuance of the will of said deceased." The order granted upon this application recites that—

"It appearing that notice has been duly published in terms of the law, and no cause being shown or appearing to the contrary, and it appearing that it is necessary for a division among the legatees, it is ordered that said petitioners have leave to sell said tract of land [including the land in controversy] in terms of the law and in pursuance of the will of said deceased."

The sale of tract No. 1 took place in pursuance of this order, and the deed was executed by all the executors, as stated above. The purchaser at this sale acquired title to the property, though there may have been an intention on the part of the executors to misapply a part of the proceeds, if he was without knowledge of the wrongful intent, or if he did not have knowledge of some circumstance that should have put him upon inquiry as to an intent upon the part of the executors to misappropriate the proceeds of the sale. And the jury were authorized to find that he was without knowledge or notice of any wrongful intent to misapply the proceeds of the sale.

[3, 4] The sale of tract No. 2 was under an order of the court of ordinary, regularly granted after the death of Mrs. Jennings, the widow of the testator. That order, so long as it existed unchallenged by direct attack upon it in a court of competent jurisdiction, made the sale under it valid, and a deed of the executors in pursuance of the order and the sale conveyed title to the purchaser. Whether or not the executors had assented to the legacy of the remaindermen in this case, before the order to sell tract No. 2 was pro-

cured, was a question of fact, which we assume was properly presented to the jury, as there is no exception to any part of the charge contained in the record.

Judgment affirmed.

All the Justices concur.

(151 Ga. 176)

SMITH et al. v. SLADE et al. (No. 2060.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by the Court.)

1. Wills \S 597(1)—Construed as devising fee simple.

A testator bequeathed and devised as follows: "Second. I give and bequeath all the rest, residue, and remainder of my entire estate, both real and personal, to my beloved wife, Emily Harty Slade, to have and to hold to her, my said wife, and to her heirs and assigns forever. * * * Fourth. After said indebtedness has been fully paid I bequeath remainder of said land to remain undivided and under my wife's control until her death. Should she decide to marry again, I then desire said estate to be divided equally between all the heirs of my body and Emily Harty Slade; she receiving a child's part in lieu of dower. I hereby revoke all former wills made by me." Held, that the second item of the will conveyed a fee-simple estate to the wife of the testator.

2. Wills \S 601(1)—Fee devised absolutely will not be reduced by subsequent limitations, unless intention manifest.

The general rule is that courts will not by construction reduce an estate once devised absolutely in fee, by limitations contained in subsequent parts of the will, unless the intention to limit the devise is clearly and unmistakably manifest. *Thomas v. Owens*, 131 Ga. 255, 62 S. E. 218. See *Crumbley v. Scales*, 135 Ga. 300, 308, 69 S. E. 531; *Kimbrough v. Smith*, 123 Ga. 692, 58 S. E. 23.

3. Wills \S 601(3)—Fee simple given wife held not cut down by subsequent provisions.

Subsequent parts of the will do not clearly and unmistakably manifest an intent to limit or cut down the absolute fee-simple estate conveyed in the second item of the will to a life estate. It follows, therefore, that the father of the plaintiffs in error had no interest in the estate to convey, and the purchaser from him acquired no title thereto, for the reason that the entire estate belonged to the mother; she never having remarried after the death of the testator. The plaintiffs in error, as heirs at law of their deceased father, would take one share per stirpes in the estate of their deceased grandmother. The case of *Porter v. Thomas*, 23 Ga. 467, 471, relied upon by the defendant in error, is distinguishable from the case at bar. In the *Porter Case* the language of the will never created a fee-simple estate at all. Here a fee-simple estate is clearly created by the second item of the will, and the question is whether it is cut down to a life estate by subsequent language in the will.

Error from Superior Court, Crisp County;
O. T. Gower, Judge.

Proceeding by J. O. Slade and others
against H. A. Smith, guardian, and others.
Decree construing a will, and defendants
bring error. Reversed.

This case was tried, upon the pleadings
and the following agreed statement of facts,
by the trial judge acting as court and jury:

"J. Z. Slade, the father of J. O. Slade, T. A. Slade, Mrs. J. L. Raines, Mrs. J. T. Ingram, Mrs. Zachie Cox, and Mrs. J. W. Askew, and the grandfather of the minor children, Lucile Slade, Effie Slade, Thomas Slade, Fred Slade, and Lois Slade, died intestate, a resident of Dooly county, Ga., on September 2, 1898. Mrs. Emily Harty Slade, the wife of J. Z. Slade, was likewise the mother and grandmother of the aforementioned parties. The will of the said J. Z. Slade was duly probated in the ordinary's court of Dooly county, Ga. (the territory in which J. Z. Slade lived now being Crisp county), and said will is as follows, to wit:

"Georgia, Dooly County. Last Will and Testament of J. Z. Slade. I, J. Z. Slade, of the county of Dooly and state of Georgia, being of sound mind and memory, do make and publish and declare this to be my last will and testament.

"First. All my just debts and funeral expenses shall be first fully paid.

"Second. I give and bequeath all the rest, residue, and remainder of my entire estate, both real and personal, to my beloved wife, Emily Harty Slade, to have and to hold to her, my said wife, and to her heirs and assigns forever.

"Third. I nominate and appoint my said wife, Emily Harty Slade, to be the executrix of my last will and testament, without bond, for her to sell such perishable property and stock she sees fit to settle all my indebtedness; should such sale be insufficient to settle said debts, she may further sell such lands as she may deem necessary to finish paying the remainder of said indebtedness.

"Fourth. After said indebtedness has been fully paid, I bequeath remainder of said lands to remain undivided and under my wife's control until her death. Should she decide to marry again, I then desire said estate to be divided equally between all the heirs of my body and Emily Harty Slade; she receiving a child's part in lieu of dower. I hereby revoke all former wills made by me.

"In witness whereof I hereunto set my hand and seal, this the 18th day of Aug., 1898.

"J. Z. Slade. [L. S.]

"Witnesses: J. B. Scott, J. M. Lewis, W. E. Hawkins, Howard M. Smith."

"Mrs. Emily Harty Slade * * * duly qualified as executrix of said will upon the probate thereof, and acted as such executrix until the date of her death, on December 17, 1918; she having died intestate. She never remarried, and did not sell any of the real estate of which J. Z. Slade died seized and possessed, amounting to approximately 700 acres of land, located in the territory now embraced in Crisp county, Ga., and certain city lots in the city

of Cordele, in said county and state, the particular description of which is not deemed essential to this litigation. During the period of her administration as executrix Mrs. Emily Harty Slade sold certain sawmill timber off of the real estate above referred to, receiving therefor the sum of \$5,000 in cash, which she later invested in Liberty bonds of the United States government, and was in possession of the same at the time of her death; and both sides agree that the same stands in lieu of the timber so sold, there being at the time of the sale of said timber no outstanding debts of any kind against J. Z. Slade, deceased, and no necessity, under the terms of the law, compelling the sale of said timber for any purpose. After the death of Mrs. Emily Harty Slade, J. O. Slade, petitioner in the court below, was appointed as administrator of J. Z. Slade, with the will annexed, in the ordinary's court of Crisp county, Ga., J. O. Slade was also appointed by said court as the administrator of the estate of Mrs. Emily Harty Slade, qualified in each of said representative capacities, and is now acting as such in each case. Mrs. Emily Harty Slade, at the time of her death, owed no debts of any kind. The real estate heretofore referred to is so located as that it would be impracticable to divide said lands into as many as 35 divisions, which would be necessary in the event it should be held that the minor children of T. J. Slade, deceased, have an interest therein; and in this latter event it would be necessary that the lands be sold under the direction of the court for division.

"T. J. Slade, the father of the minor children, Lucile, Effie, Thomas, Fred, and Lois, was a son of J. Z. Slade and of Mrs. Emily Harty Slade, and died in 1914, after the death of his father, and before the death of his mother. Prior to his death, and subsequent to the death of his father, T. J. Slade conveyed by deed all of his interest in the estate of his father, J. Z. Slade, to his brother, J. O. Slade, one of the parties in this cause, this being one of the reasons why J. O. Slade is asking that the will of J. Z. Slade be so construed as that by it only a life estate in the property of J. Z. Slade, deceased, passed into his wife, Mrs. Emily Harty Slade. At the time of the will in question by J. Z. Slade, the ages of the children of himself and Mrs. Emily Harty Slade were as follows: Mrs. J. L. Raines, 27 years; J. O. Slade, 25 years; T. J. Slade, 20 years; T. A. Slade, 17 years; Mrs. E. A. Johnson, 13 years; Mrs. J. W. Askew, 9 years; Mrs. Zachie Cox, two months. Mrs. E. A. Johnson is in no wise involved in this proceeding."

The court rendered a decree holding that the will of J. Z. Slade conveyed only a life estate to Mrs. Emily Harty Slade in the property in question, and that upon her death all of the property, including the lands referred to, reverted and became a part of the estate of J. Z. Slade, deceased, and that on account of the conveyance by T. J. Slade, one of the heirs, during his lifetime, of his interest in the estate of J. Z. Slade, the minor children of T. J. Slade, who are the plaintiffs in error in this case, had no interest whatever in the

property. To this judgment the plaintiffs in error excepted.

Whipple & McKenzie, of Cordele, for plaintiffs in error.

Pearson Ellis and Bussey & McNicholas, all of Cordele, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

(151 Ga. 92)

CROFT v. SORRELL et al. (No. 2040.)

(Supreme Court of Georgia, Feb. 16, 1921.)

(Syllabus by the Court.)

1. Mortgages \S 369(3) — Sale not set aside for mere inadequacy, but set aside for fraud, etc., causing gross inadequacy.

Inadequacy of price at a public sale under power will not of itself be a sufficient ground to set aside a sale; yet, when it is grossly inadequate and is connected with fraud, mistake, misapprehension, surprise, or other circumstances which tend to bring about such inadequacy, to the injury of parties interested, the sale will be set aside by a court of equity.

2. Mortgages \S 369(1, 2) — Setting aside of sale for surprise causing inadequacy of price denied; mortgagor's administrator cannot complain of inadequacy when endeavoring to ohill sale.

But under the facts of this case the jury were not authorized to find a verdict in favor of the plaintiff, on the ground of surprise or other circumstances which tended to bring about gross inadequacy in the price bid at the sale by the purchaser, to the injury of the complainant.

3. Refusal of new trial held error.

The court erred in refusing a new trial.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Suit by J. T. Sorrell, individually and as administrator of J. J. Sorrell, deceased, against L. C. Croft and others. Judgment for plaintiff and defendant Croft brings error. Reversed.

James Humphreys and Dowling & Askew, all of Moultrie, for plaintiff in error.

Hill & Gibson and P. Q. Bryan, all of Moultrie, for defendants in error.

HILL, J. J. T. Sorrell, individually and as administrator of the estate of J. J. Sorrell, deceased, brought an equitable petition against L. C. Croft, British-American Mortgage Company, Limited, and Robert L. Shipp, to enjoin the two defendants last named from executing and delivering, and Croft from receiving, a deed conveying 260 acres of land, more or less, to him on the grounds that the land sold had been improperly advertised, and that the

sale of it as the property of the mortgagor, J. J. Sorrell, who at the time of the sale was dead, was illegal. Subsequently the plaintiff amended his petition, alleging that the inadequacy of the price at which the land was bid off, combined with the circumstances attending the sale, amounted to fraud. A general demurrer to the petition was overruled, and also special demurrers; but it appears that the special demurrers were filed after the first term of the court, which was too late. The court did not err in overruling the demurrer. At the trial the judge by his ruling eliminated the question of irregularity in the advertisement of the land under the power of sale contained in the mortgage and the contention that it could not be sold as the property of the mortgagor after his death. The plaintiff acquiesced in this by failing to except thereto; and the case went to trial solely on the question of whether the land was sold for a grossly inadequate price and whether in the sale there was fraud, accident, or mistake, etc.

In the view we take of this case the evidence was not sufficient to authorize the verdict, and the court erred in refusing a new trial. The evidence for the plaintiff showed that the sale had been going on for half an hour, and that it "was a slow sale." R. L. Shipp and Croft, the defendant, had been bidding against each other. Shipp primarily was bidding as attorney for the British-American Mortgage Company, Limited, in order to make the land bring the amount that was due his clients, which was about \$1,000. Croft was bidding for himself. After Shipp had made the property bring the amount of his client's debt, he continued to bid for Mrs. J. J. Sorrell and her son, who were the widow and son respectively of J. J. Sorrell, deceased, the mortgagor. Shipp and Croft had raised each other's bids until the bid was in the neighborhood of \$1,800, the limit that Shipp was authorized to bid for Mrs. Sorrell and her son. When Shipp made his last bid he turned in the direction of J. T. Sorrell, L. L. Moore, and W. W. Stokes, threw up his hands, and repeated twice: "I am through." The three were standing within 10 or 15 feet of Shipp and of the sheriff, Boyd, who was "crying the property." After Shipp announced that he was through bidding, Croft bid the sum of \$1,800; and at least one witness for the plaintiff testified that the sheriff then cried, "One, two, three," and knocked the property off to Croft. J. T. Sorrell testified:

"I was aiming to bid on it, but it was knocked off before I knew it. Mr. L. L. Moore, Mr. W. S. Stokes, and myself were talking. Mr. W. W. Boyd [the sheriff] cried the property, standing up on the porch out there where he usually stands. We were standing about as far away as from here to Mr. Gibson [the at-

torney examining him], I suppose, when it was knocked off. We were standing out there on the ground. I discovered that the property was knocked off when he was reading an advertisement on another piece of property. I did not do anything, but Mr. Moore started to notify Mr. Boyd. * * * I would not say how long he cried it off; the sheriff can answer that for himself. He did not cry it off in the usual tone; he was talking very low towards the last. I did not have a talk with the sheriff after the sale nor with Mr. Less Croft myself. I could not tell how many other mortgages outstanding against the property in addition to the executions which I had as administrator purchased. I have not run any citation on it. I bought one f. fa. other than any of them that ought to have been put ahead of them."

L. L. Moore, sworn for the plaintiff, testified:

"I was there for the purpose of bidding for Mr. J. T. Sorrell. Mr. W. W. Boyd, sheriff, cried off the property for sale. Mr. Boyd was selling it for the British-American Mortgage Company, Limited, and not as an execution sale, and was designated to act as auctioneer. I do not recall how long it was when it was first offered for sale until it was knocked off, but was an ordinary short sale. I do not think we put in a bid, but there was bidding going on, Mr. Croft and Mr. Shipp; and for the purpose of consulting we stepped aside just to the left of the east door of the courthouse, about 12 or 15 feet from Mr. Boyd, the auctioneer; and when we left his presence he was crying bids as the sheriff usually does, with no prospects, and I thought of coming on, and the business was going along, and we had not been gone over the total of half a minute before I discovered the silence around there, and I rushed up to see what had happened, and I was informed that it had been knocked off to Mr. Croft for \$1,800. The sheriff informed me, and I offered him \$1,850 for it and insisted that he accept it. We were ready to pay it at that time, and we were making another bid. I asked him to reoffer the property, but he said that it had been knocked off; and I said, 'Reopen it,' and he said that he could not do it, or refused to do it. I do not remember his exact words. I grant you the sheriff was in good faith then, and could not reopen. * * * We got away for the purpose of discussing the bids a little further, and the sheriff was crying off at that time, and I had an ear open to hear it; and when the silence came I went back to see what had transpired. * * * Certainly I knew that a land sale was going on there. I was trying to get his limit when they were talking to me. I heard the sheriff calling for bids when I left, but I did not hear him say he would knock it off to anybody. I do not think he counted a single thing. If he did, he did it in a low tone, as I was trying to keep up with him and I failed to hear it. I believe Mr. Croft was not over six or eight feet from the sheriff. When I discovered that the property was knocked off, I went up to the sheriff and conveyed to him that I wanted to bid, I think. * * * I heard Less Croft make bids on the property. I do not know whether Mr. J. E. Sorrell bid on the property. My idea was to

get the property bid off into the Sorrell family, and I was there to buy it, and I tried to discourage Mr. Croft from bidding. I told him that I did not know whether it was good or not. I knew the point was raised here as to the administration, but did not have that in mind then, as there was a conflict in the land lines. I thought he would have trouble on that. I knew that there were other lawsuits against the place, as there were some other liens against it."

W. S. Stokes testified for the plaintiff:

"I was sorter a third party in the conversation between Mr. Sorrell, Mr. Moore, and myself. Mr. Moore and Mr. Sorrell were more in the conversation than myself. I would say that I was about 12 to 15 feet from the auctioneer when the property was knocked off. * * * Mr. Shipp stopped bidding and said that he was done, and the sheriff having received a bid from Mr. Croft for more, making the bid for \$1,800, and the property was knocked off, and I remarked about the abruptness with which it was ended, and I think I called Mr. Sorrell and Mr. Moore's attention to the fact. Mr. Moore immediately got busy with a request to reopen. * * * I heard Mr. Shipp bid. The reason I did not bid then was because Mr. Shipp said he was done, and I was not accustomed to seeing it done, without hollering out a few times. We had been there for about half an hour. I do not think that much hollering had been done. Yes; they had been doing that for some little time; it was a slow sale; the bids were small with Mr. Shipp and Mr. Croft, and there was not anybody else bidding toward the last. I was not engaged in the conversation so much, I was not watching the progress of the sale, but I kept up with the bids. The sheriff cried, 'One, two, three,' mighty close on to one another, but I did not know whether he went over it so deliberately."

Robert L. Shipp testified for the plaintiff:

That he had charge of the sale of the land in behalf of the British-American Mortgage Company, which he was representing in the transaction. Sheriff Boyd and Shipp were good friends, and the sheriff for accommodation "cried the sale." "I was present at the sale, and represented the loan company. Mr. Boyd was acting for accommodation, and got no pay for it. J. J. Sorrell was dead at the date of the sale. I do not know how long he had been dead, except that he died before the advertisement started. Mr. Sorrell and I had been friends for years; and his boy asked me to sell this property this way, and it is contrary to the rule of the British-American Mortgage Company. There were only two heirs, J. E. and the widow. Yes; I bid at the sale. * * * I was bidding for them, and I do not suppose they knew. I suppose both of them knew I was trying to save the property for them. My company only had about \$1,000 in it, and there was no question about us getting our money, and whatever I could do there I would do it for them. No; I had no personal interest in the case. * * * I do not remember Mr. Stokes, but Mr. Moore and Mr. Sorrell were on the ground opposite the other abutment. I know that he was about the

sale. I know that Mr. Croft heard Mr. Moore offer to raise the bid. * * * Mr. Moore and Mr. Sorrell were close enough to hear me when I said, 'I am through.' When I got through bidding, I turned around to Mr. Sorrell and Mr. Moore and said I was through, twice; that my bidding was up. I was as close to them as from here to you when I said, 'I am through.'"

We have quoted above entirely from the evidence for the plaintiff. The evidence for the defendant is even stronger against the contention of the plaintiff.

[1] The general rule is that inadequacy in price at a sheriff's sale will not of itself be a sufficient ground to set aside a sale. "Yet, when it is grossly inadequate and is connected with fraud, mistake, misapprehension, surprise, or other circumstances which tend to bring about such inadequacy, to the injury of parties interested, the sale will be set aside by a court of equity." *Smith v. Georgia Loan & Trust Co.*, 114 Ga. 189, 39 S. E. 846. We see no reason for a different rule as to a public sale under a power.

[2, 3] Applying this rule to the facts of the present case, the strongest in the plaintiff's favor being set out above, we do not think that the facts show such a case of legal "surprise," or otherwise, as to bring it within the rule stated above. In order for the plaintiff to prevail, he must show that the circumstances complained of produced gross inadequacy of price, and that he himself was free from fault. From the facts testified to by his own witnesses he was not free from fault at the time of the sale. He had withdrawn himself apart from the place of the sale, and was engaged in conversation with others when the property was knocked off to the purchaser. In addition to that, at least one of complainant's friends endeavored to make this property bring as little as possible in order, according to his evidence, that the Sorrell family might purchase it; and, even if the property actually brought less than its real value, under the circumstances, the plaintiff will not be heard to complain. There is evidence tending to show that he and his friends were endeavoring to chill the sale, according to the evidence of one of his witnesses, speaking of liens against the land, and that there was a dispute as to the land lines, thus endeavoring to keep down competitive bidding at the sale. In addition to this, the evidence shows that, after the land was knocked off to Croft at \$1,800, Moore, for complainant, offered to raise the bid only \$50, which presumably he thought was a fair price. This is a case in equity, and the plaintiff must come into court with clean hands before he can recover.

2. The other grounds of the motion for new trial do not require a reversal.

Judgment reversed.

All the Justices concur.

(151 Ga. 153)

STANDARD LIFE INS. CO. v. CITY OF ATLANTA. (No. 1987.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by Editorial Staff.)

1. Taxation \S 387—"Total value of assets" and "reserve" of insurance companies defined.

As used in Civ. Code 1910, \S 980, providing that the value of the personal property of insurance companies on the legal reserve plan shall be ascertained by deducting from the total value of the assets certain deductions, including the amount of the reserve held for policy holders, the "total value of the assets" refers to assets owned by the company, and "reserve" refers to property not designed to be taxed as property of the company.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reserve—Reserved.]

2. Taxation \S 193, 194—Statute providing method of ascertaining value of personal property of insurance company unconstitutional as exempting the reserve.

Civ. Code 1910, \S 980, providing the method for ascertaining the value of the personal property of companies doing business on the legal reserve plan, though not expressly exempting the reserve, accomplishes the same result, and violates Const. art. 7, \S 2, pars. 1, 2, 4, requiring taxes to be uniform and ad valorem, and prohibiting the exemption of property other than that enumerated in the Constitution.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Standard Life Insurance Company against the City of Atlanta. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 149 Ga. 501, 101 S. E. 122.

Candler, Thomson & Hirsch of Atlanta, for plaintiff in error.

J. L. Mayson and J. M. Wood, both of Atlanta, for defendant in error.

ATKINSON, J. It is declared in the Civil Code, \S 980:

"Every fire insurance company and life insurance company incorporated under the laws of this state, and doing business on the legal reserve plan, shall be required to return for taxation all of its real estate as other real estate is returned, and all of the personal property owned by such company shall be returned as other personal property is returned for taxation, and the value of the personal property owned by it shall be ascertained in the following manner: From the total value of the assets held by the company, both real and personal, shall be deducted the assessed value of all the real estate owned by the company in this state, the nontaxable bonds deposited by the company with the state treasurer, and the amount of the reserve or net value of its policies required by law to be held by

the company for its policy holders and which belong to such policy holders; the remainder shall be the value of the personal property owned by and taxable against such company."

Held:

[1, 2] 1. When considered in connection with the preceding part of the statute, the words "total value of the assets held by the company" refer to assets owned by the company. "Reserve," as employed in the latter part of the statute, refers to property not designed to be taxed as property of the company. Under such construction, deduction of "reserve" from "total value" of the assets held by the company, while not expressly exempting the "reserve" as such, would accomplish a result amounting to the same thing, namely, a reduction of the ascertainable value of the personal property of the company equal to the amount of the reserve.

2. So much of the statute as refers to method for ascertaining the value of personal property is violative of the Constitution, article 7, section 2, paragraphs 1, 2, 4 (Civil Code, §§ 6553, 6554, 6556), providing that taxes shall be uniform and ad valorem and prohibiting the exemption of property from taxation otherwise than is specially mentioned. No question as to constitutionality of the statute was decided in *City of Atlanta v. Standard Life Insurance Co.* 149 Ga. 501, 101 S. E. 122.

3. Under the pleadings and the agreed statement of facts, the judge did not err in directing a verdict for the defendant.

Judgment affirmed.

All the Justices concur.

(151 Ga. 216)

SOUTHLAND S. S. CO. OF DELAWARE v. DIXON, Sheriff. (No. 1981.)

(Supreme Court of Georgia. March 3, 1921.)

(Syllabus by the Court.)

Taxation §371—Foreign corporation authorized to engage in navigation is "navigation company," required to make return to comptroller general.

A corporation chartered under the "general incorporation law" of the state of Delaware, having its capital stock paid in for the purpose of carrying on the corporate business, and having power under its charter to engage in the business of navigation and other industrial enterprises in the state of Georgia, which establishes a branch office and agency in this state and acquires property having a situs in this state for the purposes of taxation, is a navigation company within the meaning of section 8 of the general tax act passed by the General Assembly of Georgia in the year 1918 (Acts 1918, p. 76), requiring "navigation companies," among others, to make returns of their property for taxation to the comptroller general of the state.

Error from Superior Court, Chatham County; P. W. Meldrum, Judge.

Suit by the Southland Steamship Company of Delaware against M. W. Dixon, Sheriff. Judgment refusing an interlocutory injunction, and plaintiff brings error. Affirmed.

Adams & Adams, of Savannah, for plaintiff in error.

Geo. W. Owens, of Savannah, for defendant in error.

ATKINSON, J. The exception is to a judgment refusing an interlocutory injunction against the sheriff of Chatham county, to prevent the levy and sale of plaintiff's property under a tax execution issued by the comptroller general of the state, for state and county taxes on plaintiff's property located in this state, payable in the year 1919. The plaintiff, on April 19, 1919, made a return to the receiver of tax returns of the county of Chatham for the year in question, showing its property and values as follows:

Ossabaw Island, 22,000 acres of land.....	\$150,000
Shipbuilding plant on leased land.....	50,000
Moneys in bank.....	125,000
Office furniture	500

The return was rejected by the receiver of tax returns, at the instance of the comptroller general, who contended that the law required it to be made to him. Upon refusal of the plaintiff to make returns to the comptroller general, he proceeded to assess the property. The assessment was as follows:

Real estate located in Chatham county, known as	
Ossabaw Island	\$220,000
Shipbuilding plant	50,000
Money, notes, and accounts.....	125,000
Office furniture, fixtures, etc.	500

The plaintiff having declined to pay the tax on such assessment, the comptroller general issued an execution on the basis of his assessment. The plaintiff contended that the property was not returnable to the comptroller general, and that, he being without jurisdiction, the execution issued by him was void and should be enjoined from enforcement against its property. The case is therefore reduced to the single question of power of the comptroller general over tangible property of plaintiff located in this state, for the purpose of levying and collecting taxes. Such power is asserted by the comptroller general on the ground that the plaintiff is a navigation company, and as such is required to make returns of its tangible property located in this state to him, in virtue of section 8 of the general tax act of 1918 (Acts 1918, pp. 43-83), which, in so far as is material to the question at issue, provides:

"That all railroad companies * * * equipment and navigation companies through their president, general manager, or agents having

control of the companies' affairs in this state, shall be required to make returns of all property of said company located in this state to the comptroller general, and the law now of force providing for the taxation of railroads in this state shall be applicable to the assessment of taxes from said business as above stated."

The plaintiff is an incorporated company. Its charter was granted December 23, 1918, in the state of Delaware, under the "general corporation law" of that state, applicable for the grant of charters for corporations to engage in any and all kinds of business. Its corporate name was declared to be "Southland Steamship Company of Delaware." Its principal office was required to be in the state of Delaware, city of Wilmington, and it was "to have one or more offices to carry on all or any of its operations and business." The amount of its capital stock with which the corporation would commence business was \$1,000, which was distributed among five original subscribers to stock in the proportion of two shares to each subscriber, one of whom was a resident of the state of Maine and the others were residents of the state of Georgia. The total authorized capital stock was \$5,000,000, divided into 50,000 shares of the par value of \$100 each. Some of the objects of the corporation, as declared in the charter, were:

"To engage in commerce and navigation upon the oceans, seas, sounds, lakes, rivers, canals, bays, harbors, and other waterways between ports of the United States, its territories and/or possessions, Canada, Central America, Mexico, South America, British Isles, Europe, Asia, Africa, Japan, Australia, West Indies, and/or other islands belonging to foreign powers; and, as incidental thereto, for the purpose of contracting for, purchasing, building for its own use and/or owning and/or equipping, furnishing, and fitting, and/or navigating, and/or chartering to or from others, steam, mail, and/or other boats, ships, vessels, and/or other property, to be used in any lawful business, trade, commerce, or navigation upon the oceans, seas, sounds, lakes, rivers, canals, bays, harbors, and other waterways aforesaid, and for the carriage, transportation, and storing of freight, mails, property, and passengers thereon."

The charter also empowered the corporation to engage in general commercial business, and—

"to carry on all or of the business of shipbrokers, managers of shipping property, freight contractors, barge owners, lightermen, forwarding agents, warehousemen, and/or wharfingers, * * * to manufacture, purchase, or otherwise acquire, own, mortgage, pledge, sell, assign, and transfer or otherwise dispose of, to invest, trade, deal in and deal with goods, wares, and merchandise, and real and personal property of every class and description. * * * In general to carry on any other business in connection with the foregoing, whether manufacturing or otherwise, and to have and exercise all the powers conferred by the laws of Delaware upon corporations formed under

the act hereinafter referred to, and to do any and all of the things hereinbefore set forth to the same extent as natural persons might or could do."

A few days after the grant of the charter the corporation was duly organized and its authorized capital stock fully issued. It established branch offices in the cities of New York and Savannah and proceeded to engage in business. Among the things done was the "taking over" of the business and properties of the "Southland Steamship Company," which was a corporation created as a navigation company under the laws of Georgia (admittedly a navigation company) upon application by substantially the same parties who incorporated plaintiff, the Southland Steamship Company of Delaware. This transaction occurred on December 31, 1918, at which time the Southland Steamship Company went out of business, transferring all its property and assets to the Southland Steamship Company of Delaware; the latter corporation assuming all the obligations and contracts of the former and continuing to carry on its business. Included among the properties of the Southland Steamship Company was Ossabaw Island. At the time of the transfer the Southland Steamship Company did not own any ship or vessel.

The petition, which was introduced as evidence, alleged, among other things:

"That petitioner has never owned a ship or vessel of any kind or character; has never at any time engaged in the business of a navigation company; that there is no immediate prospect of petitioner ever doing so; and that petitioner may never in point of fact engage in the business. It will, in any event, not do so during the year 1919. The only business that petitioner has in point of fact done in Georgia has been the construction of some tugs for the United States government, under a contract taken over by the petitioner. Petitioner's New York office has entered into some charter parties and freight contracts for petitioner."

Referring to the charter parties thus spoken of in the petition, one of the witnesses for the plaintiff testified that they—

"were the ordinary charter parties and contracts, involving only the contracts of affreightment; that the charterers or freighters did not become the owners of the ship for the voyage, and there was no demise of the ship to the plaintiff, and the owner of the ship retained the possession, command, and navigation of the ship during the voyage, the master and the crew remaining the servants of the shipowner. * * * These contracts were made in New York by the New York office, are kept in New York City, and are not in Georgia."

A witness for the plaintiff also testified:

"The * * * Southland Steamship Company of Delaware did not, at any time during the year 1919, in any way do the business of a navigation company, and was not at any time during the year 1919 the owner of any ship or

vessel, or equipped in any way for the doing of the business of a navigation company. * * * There is no immediate prospect of the plaintiff ever owning any ships, or of doing the business of a navigation company."

Other evidence was introduced, going into greater details as to the controversy between the parties to the suit; but it is not deemed necessary to go into it at greater length. While some of the evidence as to the character of the business carried on by the plaintiff was in the nature of conclusions, there was no conflict of evidence as to any of the matters stated above. The question is: Was the judge authorized, under the facts as indicated, to hold as he did that the Southland Steamship Company of Delaware was a navigation company, within the meaning of the statutes of this state, and require it as such to make returns to the comptroller general?

It is provided in Civil Code, § 2565:

"All corporate powers and privileges to navigation companies in this state shall be issued and granted by the secretary of state."

In Civil Code, § 2566, it is provided that in the petition for incorporation there—

"shall be stated the names and residences of each of the persons desiring to form said corporation, the name of the navigation company they desire to have incorporated, the amount of the proposed capital stock, the number of years it is to continue, the place where its principal office is to be located, a request to be incorporated under the laws of this state."

In Civil Code, § 2567, the form of the certificate of incorporation is prescribed, which declares that the incorporators may exercise the powers and privileges of a corporation:

"For the purpose of owning, constructing, equipping, maintaining, and operating vessels, steamboats, and all other water crafts to be engaged in navigation."

Civil Code, § 2575, deals further with the subject of power of such corporations, by declaring that they shall be empowered:

"1. To acquire, purchase, hold, and operate all such real and personal property as may be necessary or convenient for the maintenance and operation of its said business and to accomplish the purposes of its organization. 2. To convey persons, vessels, and other property, by the use of steam, sail, or other means, and to receive compensation therefor; and to do all other things incident to a general navigation business, including the right to tow, assist, and rescue vessels. 3. To erect and maintain convenient buildings, wharves, docks, fixtures, and machinery for the accommodation and use of their passengers, freight, and other business. 4. To regulate the time and manner in which passengers, vessels, and other property shall be transported, and the compensation to be paid therefor, subject to any existing law of this state upon the subject. 5. To borrow such sum or sums of money, at such rates of interest and upon such terms, as said company or its directors may agree upon, and to ex-

ecute trust deeds or mortgages, or both, in their judgment the occasion may require it, for securing the payment thereof."

These provisions in the statute tend to show the character of corporation contemplated by the Legislature, when it required, in section 8 of the general tax act of 1918, supra, "navigation companies" to make their returns to the comptroller general. The taxing act, however, extended to all navigation companies, including those incorporated in other states, but having property in this state, as well as those incorporated under the laws of this state. A comparison of the powers conferred in the charter issued in the state of Delaware to the Southland Steamship Company of Delaware, with the provisions of the statutes above indicated, will show that, while it was authorized to carry on other kinds of business, it was also authorized to carry on the business of a navigation company, such as indicated in the statutes of Georgia. It appears that one of the purposes for which the Southland Steamship Company of Delaware was organized, and therefore one of the objects of the subscribers of its capital stock, was to engage in business in Georgia as a navigation company, and that it had ample charter power; also that it had an agency in Georgia and money and other property in Georgia available as a basis of credit, or otherwise, for carrying on a navigation business. To use the language of the witness, there was "no immediate prospect of the plaintiff owning any ships or of doing the business of a navigation company"; but the fact that there was no such prospect would not destroy the power of the company to engage in such business or prevent it from being a navigation company. In the brief of counsel it is said:

"If plaintiff in error had done no business of any kind anywhere, it would not be compelled to make a return to the comptroller. If it had done no business of any kind in Georgia, the same result would follow. This being true, if the only business done in Georgia is that stated without dispute, namely, the building of some tugs for the Government, then the case ought to stand, in logic and in law, just as if it had done no business whatever in Georgia."

This is a forceful statement of the contention of the plaintiff, but it does not exactly state the case. It overlooks the purpose for which the corporation was organized and its capital stock paid; the powers conferred by the charter; the establishment of an agency in Georgia to carry on the corporate business and the acquisition of capital in Georgia, that could be employed directly or indirectly in navigation. It is not necessary that the company should have actually owned or commenced navigating a ship. If that were necessary, it might require several years' preparation in the building of ships or the like, before the company would make return of its

taxable property to the comptroller general. That would not comport with the meaning of the statute. It might as well be said that a railroad company duly organized, which had acquired property consisting of a railroad and equipment—proper subject-matter for taxation—would not be a railroad company within the meaning of the act, and required to make its returns to the comptroller general, until it had commenced to carry on the business of transportation for which it was organized, or, having engaged in such business, its property could not be so taxed, if for any cause there should be a suspension of its transportation business.

The trial judge was authorized to hold that the plaintiff was a navigation company, within the meaning of the statute, and there was no error in refusing an injunction.

Judgment affirmed.

All the Justices concur.

(151 Ga. 98)

CHURCH v. CHURCH et al. (No. 2077.)

(Supreme Court of Georgia. Feb. 16, 1921.)

(Syllabus by the Court.)

1. Process \S 63—Order for perfection of service after lapse of seven terms from filing of declaration held too late.

It is too late for the trial judge to pass an order to perfect service on the defendant, after the lapse of seven terms of court from the filing of the declaration, where no legal reason is shown for the failure to perfect service.

2. Dismissal and nonsuit \S 57—Dismissal when service not made for seven terms held not error.

Under the facts of the case, the court did not err in dismissing the petition on motion.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by R. E. Church against L. M. Church and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. E. Church brought a petition against J. Harry Helmer, a resident of Fulton county, and Mrs. Lillian M. Church, who it was alleged resided without the state of Georgia, and whose place of residence was unknown to the plaintiff, praying that he recover certain described premises in Fulton county, together with mesne profits, and that certain deeds recited in the petition be canceled as clouds upon the plaintiff's title; also praying for process. The process was dated April 10, 1918. On April 11, the sheriff made a return, reciting that the defendant Mrs. Lillian M. Church was not to be found in Fulton county. On the same date Judge Bell passed an order that service be perfected on this

defendant by publication. On May 29, 1919, Judge Pendleton made an order in which it was recited that service had not been perfected on the defendants; it was ordered that the case be made returnable to the September term, 1919, of the superior court, and that service on Mrs. Church be perfected by publication to the September term, 1919, as theretofore ordered on April 11, 1918, and that service be perfected on the other defendant, J. Harry Helmer, according to law to the same term of court. Service was perfected on J. Harry Helmer personally, by the deputy sheriff, on June 9, 1919, and on the same date the deputy clerk of the court certified that he had that day mailed a copy of the Fulton County Daily Report, containing a marked copy of the present suit, properly stamped and addressed to the defendant, Mrs. Lillian M. Church, at a named place in New York. On August 2, 1919, Judge Bell passed an order in which it was recited that service had been perfected on Mrs. Lillian M. Church by publication to the September term, 1919.

On September 18, 1919, the defendants moved to dismiss the petition, for the reasons: (1) That the suit was filed April 10, 1918, and process issued returnable to the May term, 1918. Entry of non est inventus was made as to the defendant Mrs. Lillian M. Church on April 11, 1918, and an order for publication granted, which publication was never had, nor was service ever made on this defendant, although service was claimed to have been made by publication in June and July, 1919. (2) No prayer for amendment of process or new process was ever made, but process did issue on May 29, 1919, in the suit that was already lifeless, and the process was wholly unauthorized by law and void. After this long lapse of time the process could not be amended by the court, and service based upon process which did issue under the circumstances is a mere nullity and the case should be dismissed. Whereupon Judge Bell, on April 1, 1920, dismissed the petition on the ground that seven terms of the court had elapsed, and there was no entry of non est inventus as to the one defendant who was alleged to be a resident of Fulton county, and who had not been served; that the other defendant was not served by publication, though an order was taken at the first term for such service; and that the order of May 29, 1919, authorizing service was a nullity, the case being lifeless, and the judge ordering the service had no jurisdiction. To this order the plaintiff excepted.

Anderson, Rountree & Crenshaw, of Atlanta, for plaintiff in error.

Willis M. Everett and Moore & Pomeroy, all of Atlanta, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. The single question for decision is whether under the facts, after the lapse of more than seven terms of the court without service upon the defendants, service can be perfected, and whether it was legally done in the instant case. Civil Code (1910) § 5570, provides that—

"Whenever process is not served the length of time required by law before the appearance term, such service shall be good for the next succeeding term thereafter, which shall be the appearance term."

In the case of *Branch v. Mechanics' Bank*, 50 Ga. 413, it was held:

"Where a declaration was filed and process attached against a corporation, and a regular return made by the sheriff that the defendant was not to be found, and that the president of the corporation was dead, the plaintiff is not entitled after the lapse of five terms of the court without having taken any further action, or showing sufficient legal reason for the delay, to amend the process so as to make it returnable to the then ensuing term, and to perfect service by publication."

In delivering the opinion of the court in that case *Trippe, J.*, said:

"We are fully aware of the great liberality allowed by law, and as shown by many of the decisions, as to amendments both of declarations and process, and, also, as to perfecting service; but we do not think that any statute or decision has gone so far as to permit a plaintiff to file his petition, and after a return of no service by the sheriff, to await the expiration of five terms without any action whatever, and then, without any legal cause shown for the laches or delay, ask to be permitted to do that which could as well have been done, and should have been done more than two years previously."

In the instant case, so far as the record discloses, there was no effort to serve the resident defendant until after the seven terms of court had passed. In the case of *Brunswick Hardware Co. v. Bingham*, 110 Ga. 526, 35 S. E. 772, it was held:

"It is too late for the trial judge to pass an order to perfect service on the defendant, after the lapse of seven terms of court after the filing of the declaration."

In *Cox v. Strickland*, 120 Ga. 104 (7), 47 S. E. 912, 1 Ann. Cas. 870, the court held:

"The filing of the petition is treated as the commencement of the suit only when followed by due and legal service. If there is no process and no service, and the plaintiff is guilty of laches, the writ becomes abortive, and the court loses jurisdiction to issue process or to have service perfected."

In *McClendon v. Ward-Truitt Co.*, 19 Ga. App. 495, 91 S. E. 1000, the above ruling is repeated and followed. The case of *Sims v. Sims*, 135 Ga. 439, 69 S. E. 545, was one where process was duly issued in a case requiring personal service, but no service was made, by reason of the defendant's absence from the state, and it was held in that case that the judge had the right, upon the return of the defendant to the state, to pass an order amending the process by making it returnable to the next term after the date of the order, and providing for service. In speaking for the court in that case *Fish, C. J.*, said that—

"This court has repeatedly recognized the right of the trial judge, where there was process and no service, but some legal reason for the want thereof, to pass an order, at a subsequent term to the appearance term, amending the process and extending the time for service"—citing a number of authorities.

In the cases relied on by the plaintiff application was made to amend the process at the second term of court, and they are cases where diligence had been shown in amending the process and in perfecting service. In the instant case such diligence has not been shown on the part of the plaintiff, but, on the contrary, he has been guilty of laches in awaiting until after seven terms of the court had passed before moving to perfect service on the defendant. The defendants in error, on the other hand, made their timely motion to dismiss the case after they were served with notice of the purpose of the plaintiff to perfect service.

[2] In view of the foregoing authorities and the facts of this case, the effort of the plaintiff to perfect service on the defendants, after seven terms of the court had elapsed without any effort to do so, was "abortive and void." It follows that the trial judge did not err in sustaining the motion of the defendants and in dismissing the plaintiff's case.

Judgment affirmed.

All the Justices concur.

(151 Ga. 211)

PUCKETT v. HEATON. (No. 2046.)

(Supreme Court of Georgia. Feb. 21, 1921.)

*(Syllabus by the Court.)***1. Receivers §54—Petition for injunction and receiver not bar to petition for receiver on new facts.**

Where one who brought complaint for land subsequently filed an ancillary petition asking for injunction and receiver on account of waste alleged to have been committed by the defendant, and on the hearing a temporary injunction was refused, and no exception was taken; and where subsequently, after a lapse of two years from the filing of the first ancillary petition, a second ancillary petition was filed, and on the hearing of the last petition it appeared that the proceedings instituted by the plaintiff to recover the land had always been continued by the defendant from time to time, the filing of the first ancillary petition and the refusal of the injunction thereunder would not bar a renewed application for receiver, where new and additional facts were alleged and proved, arising since the former hearing, authorizing the appointment of a receiver. See, in this connection, *Winkles v. Simpson Grocery Co.*, 138 Ga. 482 (2, b, c), 75 S. E. 640; *Barrett v. Maynard*, 150 Ga. —, 102 S. E. 896; *Blizzard v. Nosworthy*, 50 Ga. 514 (1).

2. Receivers §19—Properly appointed in suit to recover land where defendant was committing waste and repeatedly had case continued.

The court did not err in appointing a receiver.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action by W. W. Heaton against Dug Puckett. Judgment for plaintiff, and defendant brings error. Affirmed.

On June 26, 1917, W. W. Heaton filed a complaint for land against Dug Puckett, alleging that he was the owner of a certain 50 acres of land in the southwest corner of land lot No. 10 in the 9th district and 5th section of Haralson county, and that the defendant was in possession of the land and refused to deliver possession or to pay plaintiff the annual profits, which he alleged to be \$200 per year. On September 29, 1917, the defendant filed his answer, denying title in the plaintiff, setting up an equitable title in himself, averring that he had paid the plaintiff the purchase price, and praying that the plaintiff be required to execute to him title to the land. On February 1, 1918, the plaintiff filed an ancillary petition to his petition for complaint for land, alleging that the defendant was committing waste by cutting, hauling, and removing the timber on the land without the consent of plaintiff; that the defendant had already disposed of as much as \$100 worth, and had received the

rents and profits valued at \$200 for the year 1917, and was threatening to make another crop on the land; that the defendant was insolvent and could not respond in damages for rents; and that the damages would be irreparable unless the defendant was restrained. The prayer was that the defendant be enjoined from cutting and removing the timber and wood; and that a receiver be appointed to take charge of the land and preserve the rents and profits pending a recovery. On February 25, 1918, the defendant filed his answer to the ancillary petition, denying the material allegations, and setting up certain improvements which had been made by him and the payment of taxes on the land. On January 30, 1918, the judge granted a restraining order, and required the defendant to show cause why an injunction should not be granted and a receiver be appointed. On October 30, 1918, Judge Bartlett revoked the restraining order, but no express ruling was made by the judge on the prayer of plaintiff for the appointment of a receiver. On February 14, 1920, the plaintiff filed against the defendant an additional ancillary petition, in which the grounds were substantially the same as those filed February 1, 1918, except that the plaintiff alleged that since the date of commencing the suit the plaintiff had been unable to obtain a trial of the case, although he had made every possible effort to do so; that the case had been set for trial several different times, and each time it had been continued by the defendant, and he had refused to try the case; that he had been all the while in possession of the land receiving the rents and profits and refusing to pay them to the plaintiff; that the defendant is absolutely insolvent and unable to respond to any judgment that plaintiff may recover against him in the final trial of the case, if he ever succeeds in getting a trial; that he has a perfect title to the land, and that the defendant has no title and no right to the rents or profits. It is charged that to allow the defendant to retain possession of the land and to receive and use the rents and profits will amount to allowing him to have the same without paying anything therefor; and that as long as he is allowed to use the land without payment of rent or the giving of security for the same he will continue by every dilatory practice possible to delay and to continue the case as he has done in the past. It is prayed that a receiver be appointed to take charge of and rent the land, and collect and hold the rents and profits, until the final determination of the case. To this ancillary petition the defendant, on February 28, 1920, answered, and averred that on the first ancillary petition the plaintiff alleged the same facts that are alleged in his present petition, and that on that petition the court made an

order revoking the temporary restraining order and setting it aside. Wherefore the defendant averred that the former judgment, which was unexcepted to, was a final adjudication of the cause of action now sued upon. He also denied the material allegations of the ancillary petition. On the hearing the court adjudged that the pleas of res adjudicata be overruled on the ground that the present petition is an application for receiver, the former one being for injunction. It was further ordered that the defendant give to the plaintiff a bond in the sum of \$500, conditioned to pay whatever sum may be recovered as mesne profits or rents on the trial of the main case, and that in default of making bond in 10 days, the sheriff of the county be appointed as receiver to take charge of the premises described, rent the same, and collect and hold the rents to be applied on any judgment that may be recovered as mesne profits. To this judgment the defendant excepted.

Taylor Smith, of Bremen, and M. J. Head, of Tallapoosa, for plaintiff in error.

Griffith & Matthews, of Buchanan, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(151 Ga. 102)

WILLINGHAM v. SMITH et al. (No. 2124.)
(Supreme Court of Georgia. Feb. 16, 1921.)

(Syllabus by the Court.)

1. Deeds §§56(1, 2, 4), 208(2)—Undelivered voluntary conveyance to imbecile held ineffective where proof of intention that it should take effect insufficient; intent essential to delivery.

Even if, in order to invest an imbecile with title to land, it may not be absolutely essential that there should be in every instance a manual delivery to such imbecile, or some one else for him, of a voluntary conveyance in which he is named as grantee, yet no effect can be given to an instrument of that character which the maker thereof, after signing and acknowledging in the presence of witnesses, retained in his own custody, in the absence of satisfactory proof that it was his intention that such instrument should operate to immediately convey to the imbecile the legal title to the premises therein described.

2. Deeds §66—Existence of facts constituting delivery is for jury, but sufficiency is for court.

Whether the facts constitute a delivery of a deed is a question of law; whether such facts exist is a question for the jury. Where the undisputed facts are insufficient to constitute a delivery of the deed, the court need not submit the issue of delivery to the jury.

Error from Superior Court, Troup County; J. R. Terrell, Judge.

Suit by Clarence Willingham, as guardian of Hughey Smith, against Mrs. Hattie Smith and another. Judgment for defendants, and plaintiff brings error. Affirmed.

E. A. Jones, of La Grange, for plaintiff in error.

F. P. Longley and A. H. Thompson, both of La Grange, for defendants in error.

GEORGE, J. The plaintiff, as guardian of Hughey Smith, filed a petition in equity against Mrs. Hattie Smith and Mrs. Nena Myers Boney. The purpose of the suit was to have title to a tract of land in Troup county decreed in plaintiff as guardian of Hughey Smith, and to have recovery of the land, with judgment for rents and profits. At the conclusion of the plaintiff's evidence the court granted a nonsuit, and the plaintiff excepted. The petition and the evidence made the following case: Hughey Smith had been since birth an idiot. He was a cousin of Sam P. Smith, with whom he resided for many years, and until the death of Sam P. Smith in 1910. Sam P. Smith died intestate, leaving his widow and adopted daughter, the defendants in the suit, as his sole heirs at law. Some time prior to his death (the exact time not being disclosed) Sam P. Smith made a deed to the land in question to Hughey Smith for life, with remainder to Mrs. Nena Myers Boney. The deed was attested in the presence of two witnesses, one of them being an official witness. It was never recorded. After the death of Sam P. Smith the deed was found among the private papers of the maker and in an envelope marked, in the handwriting of the maker, "For Hughey." The envelope also contained certain corporate bonds. Sam P. Smith also made deeds to certain other relatives, but none of these deeds were recorded or delivered. Some time prior to his death (the exact time not being disclosed) he stated to a witness "that he had made Hughey a deed to the Cleveland place," the land involved, and that he had also made deeds to certain other named relatives. About three days before his death he again stated to the same witness:

"I am not able to do any business to-day, but you come back in a short time. I want to turn those papers over to you."

The witness was trustee for Mary Paul Smith, a minor, to whom Sam P. Smith wished to make a gift of certain stocks and bonds.

[1, 2] A legal act does not come into existence as such until its utterance is final. At common law a deed of grant came into existence as such at the stage known as "delivery." Hence the delivery of a deed is es-

sential to its validity; that is, the delivery is a part of the execution thereof. The expression "delivery," as applied to written instruments, had its inception in connection with written conveyances of lands. Nevertheless the question of delivery seems identical, whatever the character of the deed or covenant. 1 Williston on Contracts, 424, § 211. In the early English cases the delivery of a deed of grant was regarded as in effect the symbolical transfer of the land itself, analogous to livery of seisin. Hence a physical or manual delivery was deemed essential. Contrary to the doctrine of the earlier cases, the modern English view seems to be that delivery is largely a question of intention. In *Xenos v. Wickman*, L. R. 2 H. L. 296, followed in *Roberts v. Security Co.*, [1897] 1 Q. B. 111, it was held that a policy of insurance was delivered, though still in the possession of the insurer, on the ground that the evidence showed an intention on the part of the insurer to execute the policy as an immediately binding obligation. The Supreme Court of this state, in *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134, though it did not go quite so far as the English decisions, seems to have accepted the English doctrine that the thing essential to delivery is some manifestation by word or act on the part of the insurer that the instrument is to be an immediately binding obligation. Nevertheless the Civil Code 1910, § 4179, provides that—

"A deed to lands in this state must be in writing, * * * and delivered to the purchaser, or some one for him."

Under the decisions of this court, delivery, as applied to deeds, depends not only on act, but also on intent. In deeds of bargain and sale and in voluntary deeds the mere manual delivery to the grantee or donee is not sufficient; an intention to surrender dominion must be present. *Story v. Brown*, 98 Ga. 570, 25 S. E. 582; *Ross v. Campbell*, 73 Ga. 309; *O'Neal v. Brown*, 67 Ga. 707 (2); *Bowman v. Owens*, 133 Ga. 49, 51, 65 S. E. 156. The delivery of a deed is complete as against the maker at the moment when the deed is in the hands or in the power of a grantee or donee or some one for him, with the consent of the grantor and with the intention that the grantee shall hold it as a muniment of title. *O'Neal v. Brown*, supra. See, also, *Lowry v. Lowry*, 150 Ga. 324, 103 S. E. 813, 814, and cases there cited. In view of the statute quoted above, and the decisions of this court, whether a deed has been delivered cannot be made to turn merely on the question of intention. But, since the donee in the deed in the instant case was an imbecile, it is said that it was impossible to have made delivery to him, and was unnecessary that the deed be actually passed from

the hands of the donor to the donee or to some one else for him. Where a deed is executed in behalf of an infant, its delivery to a witness of the deed for the benefit of the infant grantee is delivery to the infant. *Watson v. Myers*, 73 Ga. 188.

"Where a grandfather delivers to a father a deed conveying to the latter's daughter (an infant of tender years), in consideration of love and affection, title to a tract of land, such delivery to, and possession of the deed by, the father, is evidence of delivery to the infant. This is true, although the deed does not purport on its face to be delivered, but, being signed and witnessed by two persons, neither of whom was an officer, was afterward probated by one of the witnesses and duly recorded." *Parker v. Salmons*, 101 Ga. 160 (3), 28 S. E. 681, 65 Am. St. Rep. 291.

In *Jenkins v. Southern Railway Co.*, 109 Ga. 35, 34 S. E. 355, it was ruled:

"Even if, in order to invest an infant of tender years with the title to land, it may not be absolutely essential that there should be in every instance a manual delivery to such infant himself, or to a third person as his agent, of a voluntary conveyance in which he is named as grantee, yet no effect can be given to an instrument of that character which the maker thereof, after signing and acknowledging in the presence of witnesses, retains in his own custody, in the absence of satisfactory proof that it was his intention that such instrument should operate to immediately convey to the infant grantee the legal title to the premises therein described."

The question, therefore, is whether the deed can be treated as ever having become an operative deed. It was retained by the maker, and was never recorded. The record discloses that the maker of the deed was a man of affairs. We are authorized to infer that he was familiar with the forms of procedure requisite to make a valid conveyance of real estate, in view of the fact that he had requested the witness, a kinsman, to whom he had imparted the information that he had made deeds to several of his relatives, including Hughey Smith, to "come back in a short time," adding, "I want to turn those papers over to you." The most that can be said is that Sam P. Smith signed the deed for the purpose of thereafter delivering the same. Under the evidence, a finding that any of the acts or words of the maker were intended by him as delivery of the deed, or that by his acts and declarations he intended the deed to become presently operative as a conveyance of title, was unauthorized. This being true, the court did not err in granting a nonsuit. *Hill v. Merritt*, 146 Ga. 307, 91 S. E. 204.

Judgment affirmed.

All the Justices concur.

ATKINSON, J., concurs in the result.

(151 Ga. 169)

CASEY v. CASEY et al. (No. 2019.)

(Supreme Court of Georgia. Feb. 19, 1921.)

*(Syllabus by the Court.)***1. Motion to dismiss denied.**

The motion to dismiss the writ of error is denied.

2. Wills §782(10)—Widow not required to elect between will and year's support.

The question as to whether the court erred in instructing the jury that the will did not call for an election on the part of the widow between a year's support and taking under the provisions of the will being for decision by a full bench of six Justices, who are equally divided in opinion, Fish, C. J., and Atkinson and George, JJ., being of the opinion that the court did err, and Beck, P. J., and Hill and Gilbert, JJ., being of the contrary opinion, it is considered and adjudged that the judgment of the court below as to this question stand affirmed by operation of law.

3. Executors and administrators §194(5½)—Instruction that year's support must come out of general and not specific legacies proper, where residuary estate ample.

It appearing from the uncontradicted evidence that the residue of the estate was ample to provide for the payment of the year's support, the court did not err in instructing the jury to the effect that the year's support must come out of the general legacies before any of the specific legacies could be applied thereto. *Rust v. Billingslea*, 44 Ga. 306.

4. Executors and administrators §178—Bequests of household furniture not considered in allowing year's support.

The court did not err in instructing the jury that they should not consider the bequests made to the widow by the testator; nor in the charge that the widow was entitled to the household furniture, and that this should not be considered as a part of the year's support. Civ. Code 1910, § 4041.

5. Wills §782(10)—Widow not required to elect between will and year's support.

One ground of the motion for new trial complains that "the court erred in directing the jury to find against the caveat of the executor, for the reason that this was an invasion of the province of the jury, and that, on the contrary, the court should have charged the jury that, if they should find that the will of W. N. Casey, Sr., contained an annuity for the widow, which had been accepted by her, she would not be entitled to a year's support; and further, even though there was no annuity in the will for the widow, yet, if they should find that there was a provision in the will, either expressly made in lieu of a year's support, or that the intention of the testator to that effect was deducible by clear and manifest implication from the will, founded on the fact that the claim of a year's support would be inconsistent with the will and so repugnant to its provisions as necessarily to defeat them, then in that event they should find against the claim of the widow; otherwise in her favor." *Held*,

that this is controlled adversely to the plaintiff in error by the ruling in the second head-note.

6. Executors and administrators §194(5½)—Jury not limited to passing on return of appraisers allowing year's support.

Error is assigned on the following charge to the jury: "You have the right to set aside this sum for a year's support; in setting aside this sum for a year's support, to designate that it shall be paid out of a certain property, or that it shall be paid out of money, with money, or other property, or that it shall be paid part money and part personal property, or that it shall be paid part money and part personal property and part of realty; that is a matter entirely left to your discretion under the facts and circumstances of the case." *Held*, that this was not error.

7. Cause for reversal not shown.

None of the remaining assignments of error show cause for a reversal, and they are not of such character as to justify discussion.

Error from Superior Court, Camden County; E. D. Graham, Judge.

Proceedings by T. E. Casey against M. E. Casey and others. Judgment for the petitioner, and the defendant named brings error. Affirmed.

Mrs. Mary E. Casey, the widow of W. N. Casey, made application for a year's support. The appraisers appointed made a return setting apart 200 acres of described land and all of the household and kitchen furniture. Caveats were filed by Mrs. Casey, Mrs. Ella Lee Carlton, and Thomas E. Casey, executor of W. N. Casey. The grounds of the latter caveat were that the will of W. N. Casey, which had been probated in solemn form, without objection, contained a provision which by necessary implication was intended to be in lieu of a year's support, and which was so inconsistent with and repugnant to the allowance of a year's support that to allow it would defeat the provisions of the will; that the executor had complied with the provisions of the will, and the widow had elected to take under the will and was thereby barred and estopped from having a year's support set aside. The basis of Mrs. Carlton's caveat was that the land set apart to the widow was specifically devised by the will of W. N. Casey to her, and was not a part of his estate; that the applicant had acquiesced in that disposition of the land in failing to object to the probate of the will; that the land set apart was wild land, yielding no income, and would be a burden and expense to the applicant; and that the residue of the estate was sufficient for the purposes of a year's support. The widow's caveat asserted that the provision made for a year's support was inadequate, and that the appraisers had not considered the cir-

cumstances and standing of the family in setting it apart. By agreement of all the parties the case was appealed to the superior court. The executor demurred to the caveats of Mrs. Carlton and the widow, and objected to the allowance of an amendment to the caveat of the widow. These were overruled, and error is assigned upon exceptions pendente lite taken. Upon the trial in the superior court a certified copy of the will of W. N. Casey was introduced as follows:

"Item third: I give, bequeath, and devise to my beloved sister-in-law, Mrs. Ella Lee Carlton, two hundred acres, more or less, of land in Camden county, granted to me by James M. Smith as Governor of Georgia, on the twelfth day of April, 1873, and bounded in said grant on the north by vacant lands, east by lands of J. B. Mizell, south by the St. Mary's river and west by Smith land. * * *

"Item fifth: It is my will and desire and I hereby direct that in the event my beloved wife shall survive me, then in that event she is to have the free use and enjoyment of the home in which I now live in the city of St. Mary's during her life, and be paid from my estate the sum of forty dollars per month.

"Item sixth: It is my will and desire and I hereby direct that no part of the property herein bequeathed to Mrs. Ella Lee Carlton shall be delivered or surrendered to her during the life of my wife, Mary E. Casey, but that the said property shall be held by my executor during the life of my said wife, and the income from same shall constitute a portion of my estate until the death of my wife, when the same shall be surrendered by my executor to the said Mrs. Ella Lee Carlton."

The jury found against the caveat of the executor, and that the return of the appraisers, so far as the land was concerned, should be set aside, and that in lieu thereof \$2,210 in cash should be set aside from testator's estate. Motion for a new trial filed by the executor was overruled, and he accepted.

Cowart & Vocelle and S. C. Townsend, all of St. Mary's, and Spencer R. Atkinson, of Atlanta, for plaintiff in error.

Bennet, Twitty & Reese, of Brunswick, and Emmett McElreath, of Kingsland, for defendant in error.

GILBERT, J. [1-7] Save the sixth, none of the headnotes require elaboration. The twelfth ground of the amended motion for a new trial, which is quoted in the sixth headnote, squarely makes the issue whether, on the trial of the caveat to the return of appraisers setting aside a year's support for a widow, the amount set aside may be changed or modified, and a judgment rendered to that effect, or whether the sole issue on such a trial is one of allowance or disallowance of the return of the appraisers. It is insisted by the plaintiff in error that on the trial in the superior court, to which the case had

been appealed by consent, the court should have restricted the jury to the simple issue of improving or disapproving the return of the appraisers, that in the event of disapproval "the court should have remanded the case to the court of ordinary for the appraisers to properly perform their function under proper instructions from the court," and that the jury had no right to set aside a year's support if the appraisers' return was void. This contention is based upon the well-recognized rule that in trying an appeal the superior court can deal with no question of merits except such as could have been raised in the inferior court, and can render no final judgment except such as the inferior court had jurisdiction to render. *Greer v. Burnam*, 69 Ga. 734; *Maloy v. Maloy*, 134 Ga. 432, 438, 68 S. E. 80, and cases cited. In considering the question raised in this ground of the motion, we proceed on the theory that the superior court can, on appeal, render only such a judgment as might have been rendered in the court of ordinary. The Code of Georgia makes no express provision for such a situation. While not constituting authority affording justification for deciding the question, it may be stated that the practice in the superior courts of this state, so far as we are aware, has been contrary to the contention of the plaintiff in error. We admit that this alone would not be conclusive; for instances of this kind have been completely overturned when the point was properly raised, as in the case of trover suits. It must be admitted also that to permit the court of ordinary or the superior court to modify or change the return of appraisers setting aside a year's support may bring about complications. This would be especially true where the appraisers set apart a tract of land which for some legal reason could not be set aside, and where the ordinary or the superior court were called upon to substitute another tract or money in lieu of the original tract of land. These complications, similarly to the practices above mentioned, furnish only persuasive reasons for accepting the view of the plaintiff in error as the solution of this question. Again, suppose the jury simply found that the allowance was excessive or insufficient, remanding the matter to new appraisers, with no further explanation than that the allowance was excessive or insufficient; this might result in another allowance being disallowed for similar reasons. If it be argued that the jury should say how much too large or how much too small, thus fixing the amount, it would seem to be absurd to send it back to appraisers with instructions to fix the allowance at an amount stated. This would result only in loss of time and increase in expense with no corresponding benefit. This court has, however,

passed upon the question in two cases. In one of the cases the question cannot be said to have been directly raised except by the assignment of error on the denial of the motion for new trial complaining that the verdict was contrary to law. In that case, *Aiken v. Davidson*, 146 Ga. 252, 91 S. E. 34, there was, as in the present case, an appeal by consent from the court of ordinary to the superior court. The appraisers had set apart the sum of \$1,000 for the support of the widow. On the trial in the superior court this amount was reduced to \$300. A judgment was rendered thereon modifying the return of the appraisers and making the latter sum, by judgment of the court, the amount to be paid to the widow as year's support. A motion for new trial was made, and among the grounds was that above stated, and this court held:

"The verdict finding for the applicant a sum less than that set apart by the appraisers was authorized by the evidence. The refusal to grant a new trial was not erroneous."

The judgment was affirmed, all the Justices concurring. While the precise point now under discussion was not mentioned in the above case otherwise than as stated, the question, it would seem, was necessarily involved and decided. Perhaps counsel in that case did not have specifically in mind the question of law now under discussion, but the ground of the motion for a new trial was so broad and comprehensive as to include it. However this may be, the question seems to have been more directly raised in the case of *Winn v. Lunsford*, 130 Ga. 436, 61 S. E. 9. The second headnote in that case is as follows:

"Where objections to the return of appraisers to set apart and assign a 12 months' support to the widow and children of a decedent have been filed and sustained, so as to have the effect of amending the return, the return of the appraisers and the judgment may be recorded, and will be effective to set apart as a 12 months' support the property or money included in the report as corrected and amended by the judgment."

From the statement of facts it appears that the appraisers set aside as a year's support for the widow and children \$346, constituting the entire estate, as they apparently believed. The widow, and also the children, filed caveats to the return, setting up the fact that small items of personalty had been overlooked by the appraisers. Pending the trial of this issue the caveators reached an agreement among themselves, and on their application the ordinary passed an order in open court reciting that the caveators had come to an agreement and their caveats were withdrawn, and amending the return of the commissioners so as to read as per stated

agreement of the parties. It was further ordered and adjudged that "the said commissioners return, as thus amended, be, and the same is hereby, made the judgment of the court." Thereafter an administrator was appointed upon the estate, and he filed suit in the superior court for the purpose of recovering the property to be applied to the expenses of administration and such lawful claims against the intestate as might be presented, the balance, if any, to be distributed to the heirs at law of the decedent. To this petition of the administrator the widow demurred. The court sustained the demurrer and dismissed the case. The administrator excepted. One of the allegations of the petition of the administrator was that the order of the ordinary setting aside the year's support was void, "because the ordinary had no authority to modify or in any wise change the return of the appraisers." It was said in the opinion of Mr. Justice Evans, speaking for his court, viz.:

"There is no provision, in case the objections are sustained, that the matter be again referred to the same or different appraisers. Where the appraisers file their return with the ordinary, they have discharged their full duty. Their commission becomes *functus officio*. The statute does not contemplate any further action on their part or the appointment of new appraisers. It would therefore seem that the legislative intent must have been that, in case the objections were sustained, the return should be amended conformably to the judgment sustaining the objections, and, as thus amended, should be recorded by the ordinary. As was observed by the present Chief Justice in *Moore v. Moore*, 126 Ga. 739: 'If, in making their return, the appraisers have acted upon insufficient or misleading information as to the property owned by the decedent at the time of his death or as to any other relevant fact upon which their return may in part be predicated, the law provides a remedy for any person whose legal rights may be injuriously affected thereby, by giving to such person the right to caveat the return; and, upon a trial of the issue thus raised before the ordinary, all the relevant facts may be developed by competent and legal evidence introduced for this purpose, and the return, if incorrect and improper, under the facts disclosed, may be corrected.'"

Under authority of the two last-named cases we hold that the court did not err in the instructions to the jury of which complaint is made as above stated. Our attention has been called to the procedure in cases where dower has been set aside; and it is argued that by analogy the same rule should apply in the case of year's support. While there is some analogy between dower and year's support, the two are quite dissimilar in some respects. In the case of dower the proportionate share due the widow is fixed by law. The only question to be determined by commissioners is the selection, and for this purpose explicit provision is made in Civil Code,

§ 5257. In year's support the amount is not fixed, relatively or otherwise, except that—

"Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family * * * to be estimated according to the circumstances and standing of the family previously to the death of the testator or intestate, and keeping in view also the solvency of the estate. If there be a widow, the appraisers shall also set apart, for the use of herself and children, a sufficient amount of the household furniture. The provision set apart for the family shall in no event be less than the sum of one hundred dollars; and if it shall appear upon a just appraisal of the estate that it does not exceed in value the sum of five hundred dollars, it shall be the duty of the appraisers to set apart the whole of said estate for the support and maintenance of such widow and child or children, or, if no surviving widow, to the lawful guardian of the child or children, for their benefit." Civil Code, § 4041.

In that division of the opinion in *Winn v. Lunsford*, supra, which discussed this issue, it was said:

"When it was adjudged that articles of such value as would not enlarge the estate above this sum were omitted from schedule, the appraisers' return could be corrected so as to include them. When the beneficiaries adjusted their differences by agreeing to a different division from that made by the appraisers, it was of no concern to others whether the ordinary had the right to effectuate such an agreement by amending the return in that respect. The whole estate was theirs, and the particular apportionment affected only the beneficiaries, who are not complaining."

We do not think this reference to the adjustment of the differences between the beneficiaries restricts the ruling to a case of that kind. The agreement between them seems to have had reference to the apportionment between the beneficiaries, and does not limit in any way the ruling in regard to the power of the ordinary to correct and amend the returns and to make the same the judgment of the court.

Judgment affirmed.

(151 Ga. 158)

HALEY v. ATLANTIC NAT. FIRE INS. CO.
et al. (No. 2092.)

(Supreme Court of Georgia. Feb. 18, 1921.)

(Syllabus by the Court.)

Executors and administrators § 115—Must not do any act inconsistent with interest of estate; when purchasing property individually after foreclosure in part with foreclosure judgments, not entitled to reimbursement for amount paid for judgments.

It is the duty of an executor of an estate not to accept any position or to enter into any

relation or to do any act inconsistent with the interest of the estate. Applying this principle, the decree complained of was demanded by the evidence.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Proceeding by M. H. Haley, as executrix of Herbert F. Haley, opposed by the Atlantic National Fire Insurance Company and others. Exceptions to an auditor's report were sustained, and the petitioner brings error. Affirmed.

Mrs. Mamie H. Haley, as executrix of the estate of Herbert F. Haley, filed an equitable petition, in which she alleged that the funds of the estate in her hands amounted to \$19,927.45; that the claims against the estate held by numerous creditors were largely in excess of the assets in her hands; that the claimants were asserting various priorities; and that she was unable to determine who were the creditors entitled to receive the funds in her hands. She prayed that the creditors named in the petition be required to prove their several claims and set up their respective priorities; that the assets of the estate be marshaled; and that she be given direction. In the schedule of creditors attached to the petition the plaintiff named herself, as an individual, as a creditor of the estate. Thereafter she filed an intervention, as an individual, asserting a claim for \$12,382.52 against the estate, alleged to have been paid by her to Isaac Block out of her individual funds, in satisfaction of the balance due on three large judgments in favor of Block and against Herbert F. Haley. The case was referred to an auditor for a report on all issues of both law and fact. One of the creditors of Herbert F. Haley's estate, the Atlantic National Fire Insurance Company, hereinafter called the company, resisted Mrs. Haley's claim, but the auditor's findings of law and of fact were favorable to Mrs. Haley. To the report of the auditor the company filed its exceptions both of law and of fact; and the exceptions were approved by the judge. Upon the trial of the exceptions of fact the court directed a verdict sustaining each of the exceptions, and rendered a decree sustaining the exceptions of law. Mrs. Haley excepted.

P. F. Brock, of Macon, for plaintiff in error.

Miller & Jones, P. F. Brock, Ryals & Anderson, R. C. Jordan, Chas. H. Garrett, Ellis & Glawson, and T. S. Felder, all of Macon, for defendants in error.

GEORGE, J. (after stating the facts as above). Herbert F. Haley, during his lifetime, borrowed \$10,000 on his home place on Mulberry street in the city of Macon, \$22,500 on the Findley foundry property, and \$25,000

on the Lawton-Jordan property, all from Isaac Block. The loan on the Lawton-Jordan property was subsequently reduced to \$20,000. Haley failed to pay these loans, and Block instituted proceedings to foreclose them. Haley interposed various objections to the foreclosure proceedings, but Block finally obtained judgments. Further litigation ensued; and when Block advertised the properties for sale Haley interposed affidavits of illegality. Under agreement, one of the affidavits of illegality was withdrawn; and the Mulberry street place, or home place, was sold in May, 1917, and Block became the purchaser of this property. Block entered into an agreement with the Rutherford Investment Company, a corporation, in which Haley was interested and of which he was president, by the terms of which the investment company was to be permitted to redeem the Mulberry street property upon conditions stated. The consideration of this agreement, or a part thereof, was a transfer of certain city lots, parts of the Rutherford place, to Block. At the same time a rent contract was made by Block with Haley, by the terms of which Haley agreed to pay certain rent for the Mulberry street property. One thousand dollars was paid to Block on August 1, 1917, and was credited on the fl. fa.; but other conditions of the agreement were not carried out.

In October, 1917, Block made a new agreement with the Rutherford Investment Company, Herbert F. Haley, Incorporated, and Herbert F. Haley, individually. In substance the agreement recited the terms of the previous agreement and the desire that further time be given on some of the conditions therein named; that judgments had been obtained in favor of Block against Haley on the Findley foundry loan and the Lawton-Jordan loan, and that affidavits of illegality had been filed to said judgments; that in consideration of the withdrawal of the affidavits of illegality Block agreed to give further time to redeem the Mulberry street property, and also agreed not to sell the Findley foundry and Lawton-Jordan properties until the first Tuesday in January, 1918; and that in the event certain payments were made before that time further indulgence should be granted to Haley. The terms of this agreement were not carried out; and on the first Tuesday in January, 1918, the Findley foundry property and the Lawton-Jordan properties were sold by the sheriff, and were purchased by Block for \$5,000 each. On the date of the sale Block entered into another agreement with Haley and the two corporations named, which agreement referred to the previous agreements, and recited that Haley had failed to comply with the terms thereof, and that in consequence the Findley foundry and Lawton-Jordan properties had been sold, but gave to Haley the privilege of redeeming these properties upon named conditions to be performed within 20 days thereafter. At the expiration

of the 20 days the agreement was extended 10 days. On the 10th day after the extension Block's attorney communicated with Haley, and reminded him that his time was about to expire, and that he would be given until midnight to comply with the conditions named in the agreement. Haley promised to comply, but failed to do so. He died the next day. Mrs. Haley qualified as executrix of her husband's will, and her representatives thereafter advised Block's attorney that they had found the agreements hereinbefore referred to among the papers of Haley, and in effect asked that Mrs. Haley be substituted for Mr. Haley in the agreements. Block's attorney and Mrs. Haley's representatives entered into negotiations to that end. In the meantime Block, through his attorney, sold the Mulberry street property at a larger sum than Mrs. Haley was willing to pay for it; and it was agreed that this excess should be credited on the two remaining fl. fas., Mrs. Haley having theretofore advised Block that she would pay the indebtedness due him and take over the properties.

At this point there is some conflict in the evidence. Mrs. Haley contended that an agreed sum was to be paid and was paid as the purchase price of the Findley foundry and the Lawton-Jordan and Rutherford properties, and a separate sum for the judgments against Haley. It is not disputed that Block (the negotiations on his part having been conducted entirely by his attorney) insisted upon the payment of the full balance due upon the judgments after the amount realized from the sale of the Mulberry street property had been credited thereon. In making the calculation it is also undisputed that payments made by Haley during his lifetime on account of his indebtedness, and the rents paid by him for the dwelling house under the first agreement mentioned above, were credited on the remaining fl. fas. It also appears that nothing was charged by way of purchase price except the principal, interest, attorney's fees and cost, taxes, and insurance paid by Block on account of said properties, and certain incidental expenses incurred by him in protecting or defending his claims upon said properties. The amount finally agreed upon was \$48,382.50. Block refused to convey the real estate for any sum which would leave an unpaid balance on the fl. fas.; that is to say, Block insisted upon the payment of the full balance due on the fl. fas., plus certain additional items above mentioned, as a condition precedent to a transfer of the properties or the fl. fas. Mrs. Haley insisted, however, that she was unwilling to pay more than \$36,000 for the land, and that she in fact paid \$36,000 for the Findley foundry property, the Lawton-Jordan property, and the Rutherford lots; and that the balance, to wit, \$12,383.52, was paid for the transfer of the judgments. It is, however, not disputed that the balance of \$12,383.52 was to

be paid for these judgments, because such amount represented the unpaid balance on the judgments after crediting the judgments with the purchase price of the real estate. Two separate checks were given by Mrs. Haley to Block, one for \$36,000 and one for \$12,383.52. The checks were accepted and the deeds to the property from Block to Mrs. Haley were executed and delivered, and the *fi. fas.* transferred to her.

Mrs. Haley contends that Herbert F. Haley, at the time of his death, had no right whatever, by option to purchase or otherwise, in the real estate conveyed to her by Block. On the other hand, the company (the defendant in error) contends that it was not necessary for the estate of Herbert F. Haley to have an enforceable interest in the properties in order to prevent Mrs. Haley from purchasing them at less than the judgment debts, under the admitted facts. This is the controlling question; and in the view we take of the matter it is unnecessary to rule upon the questions of pleading and practice presented by the record.

The evidence establishes without dispute that Block was willing to surrender the real estate and the judgments upon the payment of the judgment debts, including certain items mentioned above, even though he had purchased the properties at foreclosure sale, and even though the right of Haley or the corporation to redeem the property or any part of it had expired. It is likewise undisputed that Block refused to make a conveyance of the properties, or any of them, unless and until he received the full amount due upon the judgments. It appears that it was immaterial to him whether a portion of the money due him should be considered as the purchase price of the real estate and a portion as the purchase price of the *fi. fas.* It is admitted, however, that the amount to be paid for the land, accepting Mrs. Haley's contention as true, was to be credited upon the *fi. fas.*, and that the balance then remaining was to be paid to Block, and that in consideration of the full payment of the balance upon the judgments both the real estate and the judgments were to be transferred. Although no legal obligation rested upon Mrs. Haley, as executrix, to redeem the property for the benefit of the estate, and although the estate had no right to redeem which it could enforce in law or in equity, in effect Block agreed to the redemption of the property by the payment of the amount due him on the judgments. He carried out the agreement. Mrs. Haley must be presumed to have known that the estate had a sum of money in hand, or which would come into her hands as executrix. Accepting Mrs. Haley's version of the transaction as true, when she became the purchaser of the real estate from Block she put herself as an individual in a position that was in conflict with the proper discharge of her duties as executrix. Upon

the terms and conditions named by Block the executrix of Haley's estate, as an individual, was not at liberty to purchase the property and claim the right to be reimbursed out of the funds of the estate for the money paid for the judgments. It is obvious that it was to her interest as an individual to buy the real estate for as low a price as possible. If she had been willing to pay \$48,383.50 for the real estate, the judgments would have been fully paid under Block's agreement. It is manifest, therefore, that under the terms and conditions named by Block the interest of the estate demanded that the value of the lands be placed as high as possible, while Mrs. Haley's interest demanded that she buy the land for as small a price as possible, in order that she might have the largest possible claim against the estate for reimbursement as transferee of the *fi. fas.* We do not assert that Mrs. Haley acted in bad faith. Under the authorities, the question of good faith, in such circumstances, is immaterial. It may be that the purchase by Mrs. Haley was in fact advantageous to the estate. This argument has been often advanced, and as often rejected. The broad rule of equity, applicable alike to agents, partners, guardians, executors, administrators, and directors, and managing officers of corporations, is that it is the duty of a trustee not to accept any position or to enter into any relation or to do any act inconsistent with the interest of the beneficiary. 2 Pomeroy's Equity, 655, § 1077. See *Fleming v. Foran*, 12 Ga. 594; *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Nivens v. Nivens*, 133 Fed. 39, 66 C. C. A. 145; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 306; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; *Fulton v. Whitney*, 66 N. Y. 548. We think the general principle is applicable and controlling here. Although the estate represented by Mrs. Haley had no enforceable right under the contract with Block, she could not as an individual accept the offer of Block and appropriate the benefits of his offer to her own use, to the possible injury of the estate. The controlling fact is that the agreement was made by Block, and that he did actually carry out the agreement in all substantial particulars. Whether the estate represented by Mrs. Haley was in position to accept the offer of Block is likewise immaterial.

Mrs. Haley cannot claim the balance due upon the *fi. fas.*, although such balance was actually paid by her out of her own funds, so long as she withholds from the estate the advantage obtained by her in the transaction by which the outstanding claim was acquired. If she had offered to surrender to the court to be administered for the benefit of the estate, the land that she acquired in the transaction, her right to be reimbursed by the estate for her expenditures in acquiring said

land and judgments could not have been questioned.

It follows from what we have said that the decree rendered by the court was right, irrespective of the correctness of the court's ruling upon the questions of pleading and practice presented by the record.

Judgment affirmed.

All the Justices concur.

(151 Ga. 164)

DE LOACH et al. v. CAMPBELL et al.
(No. 2093.)

(Supreme Court of Georgia. Feb. 18, 1921.)

Error from Superior Court, Bulloch County; A. B. Lovett, Judge.

Action between R. W. De Loach and others and Mrs. Elisha Campbell and others. Judgment for the latter, and the former bring error. Affirmed.

Anderson & Jones and Johnston & Cone, all of Statesboro, for plaintiffs in error.

Deal & Renfro, of Statesboro, for defendants in error.

BECK, P. J. There was sufficient evidence to authorize the verdict in this case; and the charges of the court upon the subject of prescription are not erroneous on the ground that the pleadings and the evidence did not authorize the same.

Judgment affirmed.

All the Justices concur.

(26 Ga. App. 284)

UPSHAW BROS. v. STEPHENS.
(No. 11555.)

(Court of Appeals of Georgia, Division No. 2. Feb. 15, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 1050(2)—Evidence as to collateral issue held not prejudicial.

Admission of evidence as to fact of levy on cotton held to relate only to a collateral issue in the case, and hence not prejudicial if erroneously admitted.

2. Appeal and error \S 728(2)—Assignment of error to documentary evidence, without giving contents, incomplete.

Assignment of error, excepting to certain documentary evidence described as cotton bills only, without giving the contents of the bills or their substance, is incomplete, and cannot be considered.

3. Appeal and error \S 499(3)—Admission of evidence not reviewable, where objection does not appear.

An assignment of error, excepting to admission in evidence of a certain account book kept by the plaintiff, cannot be considered, where it does not appear what objection, if any, was

made to its admission when it was offered in evidence.

4. Appeal and error \S 1068(1)—No complaint of charge relating to set-off, where there was no recovery.

Jury not having found a verdict for defendant's set-off or counterclaim, any error in the charge relating to defendant's right to recover such set-off or counterclaim was harmless to the plaintiff.

5. Trial \S 256(6)—Charge held not erroneous, in absence of special requested charge.

Charge of court in action to foreclose landlord's lien for guano furnished, not stating the issue so that the jury could understand exactly what was their duty, and what issues they really were trying, is not error, in absence of special request to charge.

6. Trial \S 233(1)—Instruction held not erroneous in failing to state issue.

A charge, "You look to the papers and see what the amount is, if I don't correctly quote it; that is the issue, and it is a pure and simple issue of fact which you are to determine," held not erroneous, in that it did not state any issue to the jury.

Error from Superior Court, Douglas County; F. A. Irwin, Judge.

Action by Uphshaw Bros. against Robert Stephens. Judgment for defendant, and plaintiff appeals. Affirmed.

The fourth ground of the amendment to the motion for new trial was as follows:

Because the court did not sustain the objections of J. H. McLarty, counsel for the plaintiff, to objections made of L. O. Uphshaw, a witness sworn for the plaintiff: "Q. What did you do then? A. We levied on some—referring to crop. He had some cotton there and it was levied on by some other party." Mr. Merritt objected and said: "The levy would be the best evidence." The Court: "Just state what they did." Addressing plaintiff's counsel, the court stated: "Have you those liens?" Mr. McLarty says: "I have mine." It is insisted that the court erred in not allowing L. O. Uphshaw, witness for the plaintiff, to explain about the levy, because there was no dispute about it, and Uphshaw would have shown that the plaintiff got nothing on account of the cotton that was levied on, when taken in connection with his other evidence in the record in the case.

The charge relating to defendant's right to set-off or counterclaim was as follows:

"Uphshaw Bros. foreclosed a landlord's lien for guano furnished to make a crop, and levied upon certain property of Robert Stephens, and he filed a counter affidavit, denying that he owed the amount set out in the lien, or any part of it, and further claims, as set out in the papers, judgment against them, says he has overpaid them in this amount, and that makes the issue that you are to try in this case. The plaintiff claims 130 and some odd dollars due and foreclosed their lien for that amount. The defendant filed a counter affidavit, and denied owing any part of that amount, and

in addition sets up the claim that the plaintiffs are indebted to him, I believe, in the amount of \$65. You look to the papers and see what the amount is, if I don't quote it correctly; and that is the issue, and it is a pure simple issue of facts that you are to determine. You look to the papers that have been introduced before you, all the books that have been introduced, and the witnesses that have been examined here on this stand, and see what the truth of this transaction is. You see the witnesses on the stand, hear their manner of testifying, and it is left with the jury to say what the truth is."

It was insisted by appellant that the foregoing charge of the court was error, on the ground that it did not state the issue before the jury clearly, so that the jury could understand exactly what was their duty, and what issues they really were trying, and appellant claimed that the court erred further in this charge in saying to the jury:

"You look to the papers and see what the amount is, if I don't correctly quote it; that is the issue and it is a pure and simple issue of facts which you are to determine"

—on the ground that this is not stating any particular issues to the jury, and it was error in not stating it.—Statement by editor.

J. H. McLarty, of Douglasville, L. Z. Dorsett, of Carrollton, and James & Bedgood, of Atlanta, for plaintiff in error.

D. S. Strickland and Astor Merritt, both of Douglasville, for defendant in error.

STEPHENS, J. [1] 1. The evidence as to the fact of levy, the admission of which is objected to in the fourth ground of the amendment to the motion for a new trial, relates only to a collateral issue in the case, and, even if erroneously admitted, could in no way have operated to prejudice the plaintiff's case before the jury.

[2] 2. The fifth assignment of error, excepting to certain documentary evidence described as cotton bills only, without giving the contents of the bills or their substance, is incomplete and cannot be considered.

[3] 3. The sixth assignment of error, excepting to the admission in evidence of a certain account book kept by the plaintiff, cannot be considered, because it does not appear what objection, if any, was made to its admission when it was offered in evidence.

[4] 4. The jury not having found a verdict for the set-off or counterclaim of the defendant, any error in the charge relating to the defendant's right to recover such set-off or counterclaim was harmless to the plaintiff.

[5, 6] 5. The charge of the court fairly submitted the issues to the jury, and, in the absence of any special request to charge, was not subject to any of the exceptions urged thereto.

6. The evidence supports the verdict for

the defendant which has the approval of the trial judge, and, no error of law appearing, the plaintiff's motion for a new trial was properly overruled.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(88 W. Va. 17)

KAHN v. AMERICAN RAILWAY EXPRESS CO. (No. 4199.)

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(Syllabus by the Court.)

1. Commerce ~~§~~88 — Questions as to commerce regulations determinable exclusively by federal law.

Questions pertaining to the validity, construction, and operation of an interstate commerce regulation prescribed or approved by the Interstate Commerce Commission, under the authority conferred upon it by the Carmack Amendment of the Hepburn Act (U. S. Comp. St. §§ 8604a, 8604aa), passed by the Congress of the United States, are determinable exclusively by federal law.

2. Carriers ~~§~~159(2) — Contract requiring claim for loss to be made within four months after reasonable time for delivery held valid.

As tested by such law, a clause in a contract of affreightment between an express company and a shipper, respecting an interstate shipment, and providing that, in case of the failure of the carrier to make delivery, a claim for loss, damage, or injury must be made in writing to the originating or delivering carrier, within four months after a reasonable time for delivery has elapsed, as a condition precedent to right of recovery, is valid.

3. Carriers ~~§~~159(2) — Requirement of claim for loss within four months held applicable to loss of portion of goods by theft.

The limitation prescribed in such clause is applicable to a claim for the loss of a portion of a package of goods, due to abstraction and theft thereof in transit, and consequent failure to deliver it.

4. Carriers ~~§~~159(2) — Nondiscovery of loss by shipper within time for making claim held not to extend time thereof.

In the absence of conduct on the part of the carrier working hindrance, obstruction, or concealment of such loss, nondiscovery thereof by the shipper within the period of the limitation does not exclude the claim from the operation of the limitation, nor extend the time thereof.

5. Carriers ~~§~~166 — Reasonableness of time for delivery as determining time for making claim held question of law.

If, upon the question of reasonableness of "time for delivery" under such contract, the facts are such as afford no ground for two dif-

ferent and intelligent opinions respecting it, the court may determine it as one of law.

6. Carriers \Rightarrow 159(3) — Carrier held not to have waived limitation of time for making claim for loss.

Although a carrier may waive the benefit of such a limitation by express agreement or by inconsistent conduct, a waiver thereof cannot be predicated upon conduct which neither admits liability nor denies it, upon receipt of verbal notice of the loss, after expiration of the period of limitation, and later invokes protection of the limitation, upon disclosure of actuality of the loss and the time and circumstances thereof.

Error to Circuit Court, Mercer County.

Action by E. Kahn against the American Railway Express Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Russell S. Ritz, of Bluefield, for plaintiff in error.

McClagherty & Richardson, of Bluefield, for defendant in error.

POFFENBARGER, J. The judgment complained of on this writ of error was rendered in favor of the defendant, on a demurrer to the plaintiff's evidence, in an action of assumpsit against a common carrier engaged in interstate transportation, for the value of goods delivered to it at Bluefield, W. Va., for carriage to the city of New York and delivery there, and not delivered, but, on the contrary, lost by the carrier.

The goods in question were part of a consignment of furs, from the plaintiff to the firm of Kruskal & Kruskal of New York, invoiced at the sum of \$1,422.50. The package was delivered to the consignee within three days, but it contained goods of the value of only \$882.50. The balance, amounting to \$540 in value, had been abstracted and stolen therefrom. The loss was not discovered, however, until about six months had elapsed from the date of the shipment. The furs were part of a lot that had been shipped to the plaintiff on consignment, with right of return of such portions thereof as should not be desired or could not be sold. Those in question were returned for credit on plaintiff's account with Kruskal & Kruskal and they were credited as received, but receipt thereof was not acknowledged. The shipment was made October 5, 1918, and settlement was not made until about April 1, 1919. In the checking up at about that date, the shortage and loss were discovered and a demand made upon the carrier for compensation for the loss, through its local manager at Bluefield, very soon afterward. The agent neither admitted nor denied the validity of the claim. He advised the claimant to ascertain all the facts relating to the matter and

obtain an affidavit from the consignees. Having done so, he again applied to the agent, who denied liability, on the ground that the claim had not been asserted or made within the time stipulated in the contract of affreightment, four months after the lapse of a reasonable time for delivery. Avoidance of the effect of this limitation of right of recovery is attempted on the grounds of invalidity thereof, inapplicability thereof to the demand in question, if valid, and waiver thereof, if valid and applicable.

The clause in question, purporting to limit liability, reads as follows:

"Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed."

[1] The shipment having been an interstate one, the issues as to the validity and applicability of the clause in question depend altogether upon the law as declared by the federal courts. The Carmack Amendment of the Hepburn Act (U. S. Comp. St. §§ 8604a, 8604aa) has withdrawn all such questions arising in interstate transportation from the field of state law and legislation. *Robinson v. B. & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323; *Mo., Kan. & Tex. Ry. Co. v. Harriman*, 227 U. S. 665, 33 Sup. Ct. 462, 57 L. Ed. 700; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 814, 44 L. R. A. (N. S.) 257; *Mich. Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

[2] There can be no debatable question about the validity of the stipulation under federal law, whatever it might be under state law. It is not a limitation against liability for negligence or other wrongful conduct. Admitting liability, it requires only reasonable diligence on the part of the claimant in the assertion thereof. Common carriage is a public function and, as such, it is regulated by statute. In the statute, power is conferred upon a commission to determine what are reasonable regulations, and that commission has approved this time limitation upon the right to assert claims for losses. The reasonableness and legal soundness of such a limitation had been affirmed before such authority was conferred upon the Interstate Commerce Commission Express Co. *v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556. Similar regulations have been judicially approved and upheld since. *Mo., Kan. & Tex. Ry. Co. v. Harriman*, 227 U. S. 665, 33 Sup.

Ct. 397, 57 L. Ed. 690; Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

[3] The circumstances and character of the loss do not render it exceptional and the limitation inapplicable. There can be no difference in principle, as regards the duty to exercise diligence, between the loss of an entire package of goods and a part of a package, nor between loss by theft and loss in some other way, resulting in nondelivery. The terms are general and cover all instances of failure to deliver. The terms "failure to make delivery" have been authoritatively defined as being "fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required," Mr. Justice Hughes, in Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co., cited.

[4] Nor can the period of limitation be extended for lack of discovery of the loss. Negligence and unnecessary delay in the assertion of claims for losses in transportation are the evils against which the limitation provides. It allows reasonable time for discovery of the loss and preparation of the claim, and the claimant must avail himself of it. Otherwise, the regulation would be useless and ineffective. Inability to discover the loss in time is not claimed. That it could have been discovered immediately after the happening thereof is obvious. A letter, or telegraphic or telephonic message, of inquiry would have disclosed it in ample time.

[5] Whether nearly 60 days is "a reasonable time for delivery," in transportation by express-carrying trains between Bluefield and New York, is a question about which there cannot be the slightest doubt. The package was delivered within three days. That a period of one or two months suffices is so clearly manifest as to leave no room for two different and intelligent opinions. In all such cases, the function of the jury may be dispensed with and the question disposed of by the court as one of law. *Schoonover v. B. & O. Ry. Co.*, 69 W. Va. 560, 73 S. E. 286, L. R. A. 1917F, 1, Ann. Cas. 1913B, 964; *Hysell v. Central City*, 68 W. Va. 769, 70 S. E. 767. Reasonableness of time for performance of an act of any kind is governed by the general rule as to the functions of court and jury. The question is often one for the court. *Detroit Steel Products Co. v. Daily Telegraph Printing Co.*, 102 S. E. 139; *Craft v. Isham*, 13 Conn. 28; *Manufacturing Co. v. Brower*, 49 N. C. 429.

[6] The undisputed facts relied upon as constituting waiver by the defendant are manifestly insufficient. Its local agent neither admitted nor denied liability at any time before the rejection of the claim for delay in presentation, about a month after the discovery of the loss. When the matter was brought to his attention, he did no more than

ask for information and evidence as to actuality of the loss and its circumstances. When the information was obtained, it revealed inexcusable delay in assertion, and he rejected the claim on that ground. There is no evidence of any promise at any time to adjust or pay the claim, nor of any rejection of the claim on any ground other than delay in assertion. The limitation was invoked and relied upon. There are numerous instances in which the benefit of such limitations has been waived by conduct. *Michie, Carriers*, § 1453, citing many decisions. In this case, however, there is no proof of any fact that can be deemed to have wrought a waiver.

For the reasons stated, the judgment will be affirmed.

(88 W. Va. 777)

DAY et al. v. KRAMER. (No. 4073.)

(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)

(Syllabus by the Court.)

Frauds, statute of § 118(3)—Letters by defendant in suit for specific performance held sufficient compliance with statute.

In a suit for specific performance in which the statute of frauds was pleaded and relied on, the following letter of the defendant, viewed in connection with the prior and subsequent letters of plaintiff and the circumstances and condition of the parties, was sufficient to constitute a memorandum in writing by the defendant to satisfy the statute of frauds:

"Davis, W. Va., April 10, 1919.

"Mr. Wheeler Day, Dear Sir: Your letter of April 7, 1919, received and contents noted. Make the deed for the lot to me and I will take the house and also the vacant lot, so you can make both of the deeds to me. I will collect the rent for the house when your month is up for which he paid you.

"Resp. yours, J. F. Kramer.

"P. S.: If you have not had the release of the deed of trust put on record, kindly bring it with you so that it can be recorded in order to make the title clear on the house and 1/2 lot."

Appeal from Circuit Court, Tucker County.

Suit by Wheeler Day and another against J. F. Kramer. Decree for plaintiffs, and defendant appeals. Affirmed.

W. K. Pritt, of Parsons, for appellant.

D. E. Cuppett, of Thomas, for appellees.

MILLER, J. Specific performance of a contract for the sale and purchase of a house and two lots in the town of Davis was decreed in favor of vendors against vendee. The present appeal by the vendee seeks to reverse the decree below.

The answer admits a verbal contract sub-

stantially as alleged in plaintiffs' bill, except that by its terms the sale was to be conditioned on plaintiffs making and delivering a deed for the property on or about April 13, 1919, which the answer alleges plaintiffs failed to do.

On the question of fact as to whether or not the sale and purchase was so conditioned, the decree below on conflicting evidence was against the pretensions of defendant, and we think the finding of the circuit court thereon was clearly right. The subsequent letters of defendant, admitting a contract, and his conduct in collecting the rent from the tenant before the deed tendered, are corroborative of the evidence of the plaintiffs, and these with the evidence of other witnesses negative any such condition.

But while admitting the verbal contract, defendant pleaded and relied on the statute of frauds; and to overcome this defense plaintiffs pleaded in the bill and introduced in evidence two letters, one written by Wheeler Day on behalf of himself and his sister, Maggie Day, on April 7, 1919; the other defendant's reply thereto, dated April 10, 1919; as follows:

"Petersburg, W. Va., April 7, 1919.

"Mr. J. F. Kramer,

"Dear Sir: I have been looking for a letter from you but have failed to hear from you, and I want to know what you want to do about the lot. I will have the deed made for the house and $\frac{1}{2}$ lot and bring it out with me when I come out. But I do not expect I will get out before the last of this month. The cold spell has put us back with our work. Please let me hear from you at once.

"Wheeler Day."

To which Kramer replied as follows:

"Davis, W. Va., April 10, 1919.

"Mr. Wheeler Day,

"Dear Sir: Your letter of April 7, 1919, received and contents noted. Make the deed for the lot to me and I will take the house and also the vacant lot, so you can make both of the deeds to me. I will collect the rent for the house when your month is up for which he paid you.

"Resp. yours, J. F. Kramer.

"P. S.: If you have not had the release of the deed of trust put on record, kindly bring it with you so that it can be recorded in order to make the title clear on the house and $\frac{1}{2}$ lot."

Kramer's reply was not mailed at Davis until 4 p. m., April 11, 1919. Wheeler Day replied to Kramer by letter dated at Petersburg, W. Va., May 5, 1919, as follows:

"I have made the deeds for both properties and have them in my possession now and will bring them out in a few days, the rent on the property will be yours from the 13th day of April, the rent will be due the 18th of May, so you take the property in your charge.

"Yours respectfully, Wheeler Day."

106 S.E.—9

It seems to us quite evident from Kramer's reply to Day that there was no condition in the contract as originally made for delivery of a deed on a specified day. Kramer makes no mention of such condition in his letter. He took charge of the property, at least to the extent of collecting rent from the tenant, and gave his receipt for the money, on April 21, 1919, eight days after the day on which he says the deed was to have been delivered. He told the tenant he had bought the property; and the record shows that he had told others substantially the same thing.

The pivotal question in the case is: Does Kramer's letter of April 10, 1919, read in connection with the letters from Day to him, introduced in evidence, constitute such a sufficient promise, contract, agreement, representation, assurance, or ratification, or a memorandum or note thereof in writing, as to relieve the contract from the interdiction of the statute of frauds?

As this statute has been previously interpreted by this court, we think Kramer's letter satisfies the statute. At the time of the contract he lived in Davis, W. Va., where the property sold was situated. Plaintiffs resided at Petersburg, W. Va. It is not shown that they had any other property located in the town of Davis. It was therefore perfectly easy to fit the contract evidenced by his letter to the subject matter; and this is sufficient to satisfy the statute, which is at most but a rule of evidence and not of substantive law. In the case of *White v. Core*, 20 W. Va. 272, 274, this court decided that the following memorandum was sufficient to satisfy the statute:

"Received of William White for Samuel White, one hundred dollars, on land purchased of Core; and said Core agrees to divide the said land, and let the said Samuel White have the lower half of said land for nine hundred dollars, this June 13, 1876. W. G. H. Core."

In that case the contract was specifically executed at the suit of White against Core. And in the more recent case of *Crotty v. Effler*, 60 W. Va. 258, 54 S. E. 345, 6 L. R. A. (N. S.) 263, a similar receipt or memorandum was held to be sufficient to satisfy the statute in a suit for specific performance.

It is argued that specific performance is not a matter of right, but lies in the discretion of the court. This is true, but as we have decided lastly at the present term, in the case of *Collins v. Thomas*, 105 S. E. 897, it is equally true that where the conditions of the contract have been complied with, a court of equity can not arbitrarily refuse to give specific performance any more than a court of law can withhold its judgment for damages for a breach thereof.

Our conclusion, therefore, is to affirm the decree.

(87 W. Va. 758)

WARDEN v. HINES, Director General of Railroads. (No. 4149.)(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921.)*(Syllabus by the Court.)***1. Railroads \Rightarrow 419(6)—Not liable for killing cow on railroad crossing, where collision inevitable.**

The killing of a cow by a motor, hauling a train of loaded cars, where it is shown by positive evidence that the cow came from behind a plank fence, where she was hid from the view of the motorman, and onto the railroad crossing about 30 feet before the rapidly moving train, making it impossible to prevent the killing, although the service brakes were immediately set, will not justify a verdict and judgment against the railroad company for negligence although it appeared from the evidence that the crossing could have been seen by the motorman, by aid of the headlight, for a distance of 150 yards or more.

2. Railroads \Rightarrow 415(5)—Stock law does not relieve railroad from duty of keeping reasonable lookout.

Section 3, c. 59, Acts 1919, making it unlawful for horses, cattle, etc., to run at large on a railroad right of way, and fixing a penalty on the owner if injury to property results therefrom, does not relieve a railroad company from the duty of keeping a reasonable lookout for such animals upon its tracks.

Error to Circuit Court, Mercer County.

Action by W. L. Warden against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Reynolds & Reynolds, of Princeton, for plaintiff in error.

John Kee, of Bluefield, for defendant in error.

LIVELY, J. This writ of error and superseas brings up for review a judgment of the circuit court of Mercer county, rendered against plaintiff in error on June 4, 1920.

W. L. Warden owned two milch cows and on the evening of October 6, 1919, drove them in his cowpen at Nemours in Mercer county, and next morning, finding the cows had gone out of the gate, some one having carelessly left it open, tracked them down toward the railroad track of the Norfolk & Western Railway Company, a distance of about 500 yards. One of the cows had gone to the railroad crossing, where she had been struck by a west-bound railroad train, and she was found about 100 yards west of the crossing. The other cow had crossed the railroad right of way fence, which had been partially torn down, some distance east of the crossing, walked a short distance toward the crossing, and went upon the track about 30 feet east

of the crossing, where she had been struck by a railroad train and dragged about 20 yards beyond the crossing. On each side of the railroad a board fence four or 5 feet high extended from the right of way wire fence and immediately east of the county road to a cattle guard at or near the edge of the public crossing. From the crossing to the eastward the railroad tracks curved to the left, and there is some conflict as to the degree of curve, some of the witnesses saying it was a slight curve, and others saying it was a nine degree curve. There was nothing to obstruct the view from this board fence at the crossing for a distance of about 150 yards eastward. After showing these facts, and the value of the cows killed, which he placed at \$125 each, the plaintiff below rested his case.

[1] The engineer or motorman was examined, who testified that he was on a west-bound train as motorman on the night of October 6, 1919, which passed over this crossing at 5:30 in the morning. He was hauling about 25 or 30 loaded cars, was at his post in front of the motor, and was leaning out of the window, watching the track ahead. He said:

"I went around something like a nine degree curve, and I struck this cow on the road crossing, but I didn't see this cow until I got nearly on her, because she come out from the fence and walked on the railroad crossing just as soon as I got about a car length from her, and I drug her about 150 yards west."

In answer to a question propounded by the judge, asking where the cow was when he first saw her, he replied:

"She walked out from the fence; there is a fence on each side of the cattle guard."

His evidence, in substance, was that he was about a car length from the cow when he saw her walk on the track, that he immediately applied the service brake; that it was impossible for him to stop the train in that distance; that he never saw but one cow there; that he did not kill but one cow; that he did not hit a cow east of the crossing; and that he had had 16 years' experience as an engineer.

The motorman was the only one who saw the accident. The fireman was attending to his duties, looking over the machinery of the electric motor, and saw nothing of the cows, and did not know one was killed until the train stopped, and the cow was removed from the pilot.

There was considerable conflict as to the degree of the curve east of the crossing, and as to how far the headlight would lighten the track ahead of the motor. Several witnesses testified that for about 150 yards east of the crossing, from a signal (which they called "the paddle") the headlight would light the track to the crossing. The engineer

or motorman at first said the headlight would light the track ahead of his motor about 30 feet, but afterwards, just before the case was submitted to the jury, upon his request, and by permission of the court, he corrected his testimony by saying that the headlight would light up the track from 200 to 250 feet; that he had made a mistake when on the stand, had become confused, and, having stated the distance of 30 feet, he concluded to "stick to it," until, after having time to "think it over," he desired to make the correction.

We do not think it is very material to this case as to whether the curve was slight or great, or whether the headlight shone on the track for a greater or less distance. If it had been bright daylight and on a straight track, it does not appear that the accident could have been avoided. The only cow that was seen was the one which came out from behind the board fence and walked on the track immediately in front of the motor. There is no evidence that this train killed the cow which was struck east of the crossing. If so, it was not known to the train crew, and the engineer testified he was at his post and watching the track ahead. It is to be presumed that other trains passed that way. The only evidence we have is that both cows were in the cow lot that night, and their tracks led to the railroad, but whether they went singly or together does not appear. Whether they were on the track together and killed by the same train is only an inference. They were found dead after daylight, but whether killed at one time or at different times is very uncertain. Besides, it is shown by the plaintiff that he tracked the cow which had wandered through the right of way wire fence east of the crossing, and she was struck where she had come onto the track. There was nothing to show that she had been standing or running on the track. As the record does not disclose whether or not she came suddenly on the track before this train, or what train killed her, can we say that she was negligently killed? The burden of proof is on the plaintiff. *Underwood v. Railway Co.*, 78 W. Va. 409, 89 S. E. 2; *Harvey Coal & Coke Co. v. C. & O. Ry. Co.*, 69 W. Va. 228, 71 S. E. 178; *Layne v. Ohio River R. R. Co.*, 35 W. Va. 438, 14 S. E. 123. There is no material disagreement about the controlling facts concerning the cow which was struck as she came on the crossing. The night was dark, the cow was first seen when about a car length from the motor; she came out from behind a board fence 4 or 5 feet high, and it was impossible to stop the heavily loaded train in that distance. No one disputes this evidence. The physical facts do not contradict it; on the contrary, they corroborate. If the accident did not so occur, as shown by this witness, can we go into the realm of fancy or speculation and say how it occurred? Is there any tangible evidence on which we can say that this engineer was

negligent or that he wantonly killed this cow? He was at his post of duty and watching the track ahead. Serious railroad wrecks have occurred and human lives have been lost by such accidents, and we must credit the engineer with some instinct of self-preservation, as well as a consideration for the preservation of the lives of his train crew. But of course this is not controlling on the question of negligence, but it is entitled to some weight. A reckless disregard for human life should not be presumed. In *Carper v. Traction Co.*, 78 W. Va. 282, 88 S. E. 843, this court sustained a demurrer to the evidence under circumstances and facts somewhat similar to those here. The steer in that case either got up from lying on the right of way, or came over the top of the fill, about 50 feet from the car and ran about the same distance, when it attempted to cross the track. Expert witnesses testified that at a point in the curve a distance 350 or 400 feet from where the steer appeared to the motorman he could have seen it if he had been on the lookout. *Christian v. Railway Co.*, 78 W. Va. 379, 89 S. E. 17, is a case in point. The engineer was on the lookout, and the train going around a curve, when he observed something in the bushes near the place where the two horses were killed. He did not see the horses, and did not know he had struck them. Plaintiff's witnesses testified that an object could be seen on that particular curve 570 feet before reaching the point where the horses were killed. This court held that a peremptory instruction should have been given for the defendant. It has been often reiterated by our decisions that it is the duty of trainmen, consistently with their train duties, to keep a lookout for domestic animals upon the track, and avoid killing them, and, if they fail to use ordinary care, the railroad company is liable, though they may not have seen the animals in time to avoid killing them. But the care to be exercised is ordinary, not extraordinary.

We are cited by plaintiff's counsel to *Whelan v. B. & O. Ry. Co.*, 70 W. Va. 442, 74 S. E. 410, *Kay v. Director General*, 103 S. E. 108, *Underwood v. C. & O. R. Co.*, 78 W. Va. 409, 89 S. E. 2, and *Gould v. Coal & Coke*, 74 W. Va. 8, 81 S. E. 529, as supporting the proposition that the evidence was sufficient to support this verdict. In the *Whelan* Case the horse was killed in the daytime on a track where it could have been seen 350 to 400 yards, and no effort whatever was made to stop the train, or blow the whistle. On the contrary, the speed of the train was accelerated within this distance, and by ordinary care the train could have been stopped and the accident prevented. In the *Kay* Case no witness saw the accident; but it occurred on a straight track where the cattle had been for several minutes before they were struck. The defendant did not introduce the trainmen as witnesses. Direct evidence was with-

held by the railroad company. This was significant. Judge Poffenbarger said in his opinion:

"The theory of the sudden entry of the cattle on the track, in front of the train, which, if sustained by positive evidence or presumption, would class the case with *Harvey O. & C. Co. v. C. & O. Ry. Co.*, 69 W. Va. 228, 71 S. E. 178; *Lovejoy v. C. & O. Ry. Co.*, 41 W. Va. 693, 24 S. E. 599, and *Toudy v. N. & W. Ry. Co.*, 38 W. Va. 694, 18 S. E. 896, is negatived and excluded by facts tending to prove they had been on the track for several minutes before they were struck."

In the Underwood Case there was no direct evidence of the killing, but the facts tended to show that one cow had been standing on a platform near the track, "had got up to cross the track when the train struck her"; and as to the other cow there was no evidence to show whether she was killed in the daytime or nighttime, or what train killed her. She was found opposite a curve on a steep bank, on a steep hillside, and there was some evidence that she had been feeding near the track. The verdict was set aside. The Gould Case has no application here. The trainmen did not see the horse, were insensible of having struck a horse at the time alleged, and it was not certain whether the horse had been struck by a train or had received his injuries on a nearby trestle. The evidence was insufficient and the judgment of the lower court was reversed for that reason. Wherever it is shown by positive evidence that the animal killed has suddenly appeared and attempted to cross the track, and that the train could not have been stopped in time to prevent the accident, and that the trainmen were on the lookout for dumb animals on the track consistently with their other duties, and, using ordinary care, failed to see the animal, this court has repeatedly said that negligence was not sufficiently shown to sustain a verdict for damages.

The point is made that the motor was not equipped with a proper and sufficient headlight to enable the motorman to see the cow on the track or near the track in time sufficient to avoid killing her. While the motorman was evidently confused as to the distance which the headlight would illumine the track, it was apparent that there was nothing wrong with the light. It was shown that the one on this motor was the usual ordinary one with which the defendant equipped its motors, and a number of the plaintiff's witnesses testified that the headlights on these motors would shine from the paddle to the crossing, a distance of about 150 yards. The motorman afterwards, upon his own request and by consent of the court, corrected his evidence, and gave the reason for his error in

his testimony given at an earlier period of the trial. On this point the plaintiff relies on the case of *Hanger Bros. v. Railway Co.*, 70 W. Va. 212, 73 S. E. 713, where the front of the train had no headlight whatever. The train was backing in the dark when the horse was killed. But in the case here it is shown that the cow was behind a board fence, and walked out on the track immediately in front of the train, and it is not perceived how the accident could have been prevented if the headlight was of more or less intensity and brilliancy, or even if the accident had occurred in the bright light of day.

[2] Section 3, c. 59, Acts 1919, which says:

"It shall be unlawful for any such animal [horse, cattle, etc.] to run at large on any public road or highway or railroad right of way in this state and should such stock while running at large destroy or injure the property of another, the owner shall be guilty of a misdemeanor and fined not less than five dollars and not more than ten dollars, and shall pay to the party whose property shall have been injured or destroyed, the amount of damages sustained by him by reason of such destruction or injury"

—is relied on, with the argument that this statute relieves the railroad company from observing the care with respect to such animals when found on the track or right of way, heretofore imposed; that it should be considered as an element in ascertaining negligence, inasmuch as the trainmen may presume that no such animals will be found on the railroad right of way. We do not think this statute can be construed as a relaxation of the rule laid down that the trainmen must keep a lookout for dumb animals upon the track, consistent with their other duties, and avoid the injuring or killing of them by the use of ordinary care. They must use care and diligence to discover such animals, and to prevent injuring or killing them, if by the use of ordinary care and prudence it can be done, after discovering them and, if they do not do so, the railroad company is liable. The fact that plaintiff negligently allowed his cows to get out of his inclosure and stray down to the railroad track does not in itself preclude recovery. It was not the proximate cause of the injury. It is within common knowledge that cattle will often escape from their inclosures, even where more than ordinary means have been taken to prevent them from so doing. We think the controlling facts in this case bring it within the control of principles announced in *Carper v. Traction Co.*, 78 W. Va. 282, 88 S. E. 843, and *Christian v. C. & O. Ry. Co.*, 78 W. Va. 378, 89 S. E. 17, and the cases there cited, and are of the opinion that defendant's peremptory instruction should have been given.

Reversed and remanded for new trial.

(161 N. C. 515)

STATE v. POWELL. (No. 89.)

(Supreme Court of North Carolina. March 2, 1921.)

1. Abortion ⇐1 — Not necessary that medicine would have desired effect.

C. S. § 4226, making it a felony to prescribe for any pregnant woman, or advise or procure her to take medicine with intent to destroy her child, defines an offense in itself, not an attempt to commit some other offense, and it is not necessary for the state, to establish a violation thereof, to show that the drug, if taken by the woman, would have had the desired effect.

2. Abortion ⇐1—Defendant need not procure medicine prescribed, or woman use it.

To sustain a prosecution for advising or procuring a pregnant woman to take medicine, it is not necessary that defendant procured the drug himself, or that the woman actually used it, if defendant prescribed or advised its use with the illegal intent.

3. Criminal law ⇐1159(2), 1184 — Supreme Court cannot reverse or modify for weakness of evidence.

Where the state's case was very weak, but the court cannot say that there was actually no evidence, the Supreme Court cannot reverse the verdict or modify the punishment.

Appeal from Superior Court, Harnett County; Devin, Judge.

John Powell was convicted of an offense, and he appeals. No error.

Young & Best, of Dunn, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. The defendant was convicted at September term, 1920, of Harnett county superior court, Hon. W. A. Devin, judge presiding, and from the judgment, upon such conviction, appealed to this court.

The statute upon which the indictment is based is section 4226 of the Consolidated Statutes. So far as material to this appeal it is as follows:

"If any person shall willfully 'prescribe for' any woman, either pregnant or quick with child, * * * or advise or procure any such woman to take any medicine, drug or substance whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, he shall be guilty of a felony," etc.

[1] There was evidence that the defendant advised the prosecutrix to take a certain drug, medicine, or substance, with intent to destroy the child. The essential fact charged, and which was required to be proven in the case, is that the defendant advised the woman to take the drug, or other

substance, with intent thereby to destroy the child. State v. Crews, 128 N. C. 531, 38 S. E. 298. This is not an attempt to commit another crime, in which case the overt act must be shown, but the act charged is the offense itself which is denounced by the statute. It is the intent with which the drug is administered, and the purpose to destroy the child, that is made indictable under our statute (Revisal, §§ 3618 and 3619); and it is not necessary for the state to show that administering the drug named would have had the desired effect (State v. Shaft, 166 N. C. 407, 81 S. E. 932, Ann. Cas. 1916C, 627).

[2] It is not necessary to charge or prove that the defendant procured the drug himself or that the woman actually used it. All that is necessary is to prove that he prescribed or advised its use with the illegal intent. State v. Brady, 177 N. C. 587, 99 S. E. 7. Upon these authorities the defendant seems to have been properly convicted.

[3] The jury might very properly have acquitted the defendant, upon the evidence, as the state's case was very weak; but we cannot say that there was actually no evidence. The verdict has very little evidence of a substantial character to rest upon, but we cannot correct or reverse it, or moderate the punishment.

No error.

(181 N. C. 36)

MIZELL v. ATLANTIC COAST LINE R. CO. et al. (No. 104.)

(Supreme Court of North Carolina. March 2, 1921.)

1. Removal of causes ⇐27—Railroad company held a domestic corporation.

A railroad company, which had accepted the provisions of a private act permitting it to consolidate with foreign corporations on condition that such consolidation should not deprive the state court of jurisdiction over the corporation, is, for the purposes of suit, a domestic corporation, and not entitled to remove an action against it to the federal court on ground of diversity of citizenship.

2. Removal of causes ⇐32—Director General of Railroads not entitled to remove for diversity of citizenship.

Director General of Railroads, against whom suit is brought for negligent injury to a passenger, is, for the purpose of that action, the same party as the railroad corporation, and cannot remove the action into the federal court for diversity of citizenship, where the corporation was not entitled to removal, in view of the provision of the Federal Control Act expressly denying the right of removal unless it was vested in the corporation prior to the passage of the act.

3. Constitutional law §106—Accrued cause of action cannot be defeated by statute; "property."

A vested right of action is "property," which cannot be defeated or modified by statute, though a statute may change the remedies therefor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

4. Removal of causes §19(1)—Action against domestic corporation under federal control does not "arise under United States laws."

A right of action against the Director General and a railroad company for injuries to a passenger during federal control does not arise under the federal Transportation Act of March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p), or under the Transportation Act of February 28, 1920, restoring the railroads to private control, and is not removable as a cause arising under the Constitution and laws of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Arise—Arising.]

5. Removal of causes §3—Act terminating federal control did not authorize removal of causes against Director General.

The act of Congress of February 28, 1920, restoring the railroads to private control, which permitted actions within two years thereafter, but contained no provision relating to removal of causes, did not authorize removal of action against the Director General, though it did repeal the federal Control Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p), which expressly prohibited such removal.

Appeal from Superior Court, Berlie County; Lynn, Judge.

Action by Janice Mizell, by W. J. Mizell, her next friend, against the Atlantic Coast Line Railroad Company and John Barton Payne, Director General. From an order denying motion for removal of the cause to the federal court, the defendants appeal. Affirmed.

This is an action to recover damages for personal injuries sustained by the plaintiff while a passenger in alighting from the passenger coach. The injury occurred and the cause of action arose December 19, 1919, during federal control. The action was begun September 28, 1920, after the termination of federal control. The complaint was filed October 5, before the return date of the summons, and on October 23, 1920, the defendants filed their petition for removal to the federal court together with their answer. The cause was transferred by the clerk to the superior court docket, and at the first term the motion to remove to the federal court was denied. Both defendants joined in the motion to remove; John Bar-

ton Payne having been substituted for Walker D. Hines as Director General. From the refusal of the petition for removal, both defendants appealed.

P. A. Willcox, of Florence, S. C., Gillam & Davenport, of Windsor, and A. L. Hardee, of Wilmington, for appellants.

Winston & Matthews, of Windsor, for appellee.

CLARK, C. J. The plaintiff, a student in Greenville, N. C., purchased a ticket to Aulander, in Bertie county, N. C. As she was leaving the train at the latter point the injury occurred, as the complaint avers, for the want of a footstool or any assistance to alight; the distance between the lower step and the ground being about 30 inches.

The petition for removal to the federal court avers that the Atlantic Coast Line is a foreign corporation and a nonresident in the state of North Carolina. It also alleges that Director General Hines resides in New York and John Barton Payne, who was substituted as a defendant, is a citizen of Illinois, and both are nonresidents of this state. The defendants appealed from the refusal to remove, which is the only matter presented for review.

[1] The petition to remove is verified by P. A. Willcox, as attorney in fact of the Atlantic Coast Line, but the power of attorney under which he acted empowers him only to "sign bonds and other instruments" required in courts and other legal proceedings. It gives him no authority to verify pleadings and it would seem the petition is insufficiently verified. We need not discuss the allegation that the Atlantic Coast Line is a nonresident. In *Cox v. A. C. L. R. R.*, 166 N. C. 652, 82 S. E. 979, this point was fully considered, and it was held that the Atlantic Coast Line Railroad Company was not entitled to a removal of its cause from the state court to the United States court on the ground of being a nonresident corporation and that under the provision of its charter on this question of removal it is a domestic corporation. This case has been reaffirmed in *Brown v. Jackson*, 179 N. C. 365, 375, 102 S. E. 739. It was also held in *Staton v. Railroad*, 144 N. C. 145, 56 S. E. 794; and *Railroad v. Spencer*, 166 N. C. 522, 82 S. E. 851.

[2] As to the Director General, the right to remove is also expressly denied in *Hill v. Railroad and Director General*, 178 N. C. 607, 101 S. E. 376, and we have divers cases since affirming the holding in that case that the Director General and the corporation, for the purpose of an action of this kind, are one and the same, and both are properly joined as parties. Indeed, in this present case we find Mr. Willcox verifying the pleadings for

the Director General under the alleged authority of the corporation as its attorney in fact. The statute creating the position of Director General expressly denies the right of removal, except in cases where the right of removal was vested in the corporation prior to the passage of the act. As the Atlantic Coast Line had no such right, the Director General was not entitled to it.

The defendants contend, however, that they have a right to remove upon the ground that the cause of action is one "arising under the Constitution and laws of the United States." This is incidentally mentioned in the petition, but it seems was not argued below.

[3] The injury occurred and the cause of action arose December 19, 1919, before the railroads were discharged from federal control. Action could have been instituted that day. A vested right of action is property. The statute may change the remedies, but cannot defeat or modify a right of action that has already accrued. (*Williams v. Railroad*, 153 N. C. 360, 69 S. E. 402), and this cause of action arose at the very moment the injury occurred. (*Hocutt v. Wilmington*, 124 N. C. 214, 32 S. E. 681).

[4] On December 19, 1919, when this cause of action accrued, the railroad company was under the operation of the Transportation Act approved March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½ a-3115½ p). But that act did not create or confer this cause of action, nor did it arise under or by virtue of that statute. Both North Carolina and Virginia had prior thereto adopted "Lord Campbell's Act." The plaintiff's cause of action did not arise out of the federal statute, which, moreover, denies the right of removal of actions against railroad companies, except in cases where the right to remove existed prior to that statute. 40 United States Statutes at Large, part 1, p. 457. Prior to that act the Atlantic Coast Line could not have removed this cause to the federal court (*Hill v. Railroad*, 178 N. C. 607, 101 S. E. 376), because no federal right or immunity was involved, nor diverse citizenship, and the action could not have arisen under the Constitution and laws of the United States.

The plaintiff's cause of action accrued prior to the Act of February 28, 1920, effective March 1, 1920 (41 Stat. 456). Besides, that act is silent as to the removal of causes, while under the act of March 21, 1918, above mentioned, the carrier, and of course the Director General, could not remove any action that had been brought, or might thereafter be instituted, by or against it, and this action has been begun since that date. Congress did not undertake, after federal control had ceased, to regulate causes that had accrued during such control.

The refusal to dismiss the action as to

the defendant company, because John Barton Payne, Director General, is a party defendant, is not before the court, as he did not except on that ground; but that proposition has been discussed and denied at this term, citing our decisions in *Parker v. Railroad & Director General*, 181 N. C. —, 106 S. E. 755. The question before us is one of removal pure and simple. Besides, John Barton Payne has filed an answer in this case on the merits, reserving only his rights under the motion to remove. The act of February 28, 1920 (section 206), provides:

"Such actions, suits, and proceedings may, when within the periods of limitation now prescribed by state or federal statutes, but not later than two years from the date of the passage of this act, be brought in any court which but for federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

This is explicit authority recognizing the jurisdiction of the state courts is exclusive. The question does not arise whether a corporation chartered by an act of Congress would have the right of removal; but the defendant the Atlantic Coast Line Railroad Company was not made a federal corporation by the statute appointing a manager for domestic railroad companies, as a war expedient. National banks are creatures of national legislation, and a receivership of a national bank occupies the same status; but that is a different proposition from the appointment of the Director General over state corporations, as to which the Director General has the same status, as regards removal, as the corporation itself would occupy. The brief of the defendants admits that the Federal Control Act contains an apparent prohibition against the removal. All the cases cited by defendants, in which removals were allowed on the ground of "a right arising under the Constitution and laws of the United States," are where the corporation was created under a federal charter, which is not the case with the Atlantic Coast Line Railroad Company.

[5] The defendants claim also that, as the first act establishing federal control contained a prohibition against removal, and the second act, repealing federal control, does not, therefore the right to removal exists. This is a nonsequitur, and there is even a very strong implication against it in the latter act, when it says, as above cited, that—

"Such actions, suits, or proceedings may, . . . not later than two years from passage of this act, be brought in any court which but for federal control would have had jurisdiction of the cause of action."

The superior courts of this state had jurisdiction of this action at the time it ac-

crued, and removal to the federal court was at that time prohibited, and there is no statute since that has authorized it. The mere failure to again prohibit removal in the act abolishing federal control cannot possibly have such effect.

The petition to remove was properly denied.

Affirmed.

(181 N. C. 478)

KINSEY v. JEFFERSON STANDARD LIFE INS. CO. (No. 173.)

(Supreme Court of North Carolina. March 9, 1921.)

Insurance §665(6)—Evidence held to warrant jury in finding suicide.

In an action on a life insurance policy, evidence that insured shortly after he entered a room alone was found dead with a bullet wound in his head, with his pistol lying near at hand, and that he had been drinking heavily and was nervous and irritable, *held* to warrant the court in submitting to the jury the issue of suicide by insured, and to warrant the jury in finding that he had committed suicide.

Appeal from Superior Court, Jones County; Bond, Judge.

Action by Carrie H. Kinsey, administratrix, against the Jefferson Standard Life Insurance Company. Judgment for the defendant, and plaintiff appeals. No error.

Civil action to recover upon a life insurance policy issued by the defendant to plaintiff's intestate, Guy T. Kinsey. The case turns upon a single question. Defendant admitted the execution of the policy and its liability thereon, unless its plea of suicide within the stipulated period was found to be valid. Only one issue was submitted to the jury and answered by it as follows:

"Did the insured, Guy T. Kinsey, die by his own hand or act with intent to commit suicide? Answer: Yes."

Judgment on the verdict in favor of defendant. Plaintiff appealed.

Rouse & Rouse, of Kinston, for appellant. Brooks, Hines & Kelly, of Greensboro, and T. D. Warren, of New Bern, for appellee.

PER CURIAM. Plaintiff's chief exception is to the court's refusal to instruct the jury that the evidence was not sufficient to warrant a finding in favor of the defendant. Bearing upon this motion, the following is taken from the plaintiff's brief:

"Briefly summarized, the deceased had only a few minutes before finished eating dinner; he had left the table, going into an adjoining room. His wife heard a noise which attracted her attention. She went to the room and found her husband lying on the floor with a (pistol

shot) wound which was shown to be in his temple, a little above and a little to the front of his right ear. The witnesses locate his body slightly different, but in the main it is agreed by all that his feet were some distance, variously estimated from two to three feet, from a bookcase, that his head was towards the door, and his body lying alongside of, with his right arm slightly under, a table that stood between the bookcase and the door. The deceased's pistol, which usually stayed upon the bookcase, was found slightly under the bookcase from the deceased's head as it lay upon the floor; the distance to the pistol was in addition to the length of his body two or three feet to the bookcase."

In addition there was evidence tending to show that the intestate was a heavy drinker; that he had been drinking for two days immediately preceding his death; that he was a nervous, irritable, and high-tempered man; that the wound on his head was black and ragged and the hair scorched, indicating that the pistol was held in close proximity to his head at the time it was fired.

Upon this evidence we think his honor very properly submitted the issue to the jury, and that they were warranted in answering it in the affirmative.

We have carefully examined the record and plaintiff's exceptions, and find no error of which plaintiff can justly complain.

No error.

(181 N. C. 477)

WYNNS v. ATLANTIC COAST LINE R. CO. et al. (No. 107.)

(Supreme Court of North Carolina. March 2, 1921.)

Appeal and error §927(3)—Evidence considered most favorable to plaintiff on review of motion for nonsuit.

On appeal by defendant from a judgment for plaintiff, where defendant is relying upon a motion for judgment as of nonsuit, the evidence will be considered in its most favorable light for the plaintiff.

Appeal from Superior Court, Bertie County; Lyon, Judge.

Action by F. M. Wynns against the Atlantic Coast Line Railroad Company and another. Judgment for plaintiff, and defendants appeal. No error.

J. N. Pruden, of Edonton, and Gillam & Davenport, of Windsor, for appellants.

Winston & Matthews, of Windsor, for appellee.

PER CURIAM. Upon the argument of this cause, defendants relied entirely upon their motion for judgment as of nonsuit, assigning as error his honor's refusal to grant the same. Considering the evidence in its most favorable light for the plaintiff, the accepted

position on such motion, we think the testimony was sufficient to be submitted to the jury under authority of *Ramsbottom v. Railroad*, 138 N. C. 38, 50 S. E. 448.

No error.

(131 N. C. 40)

HOUSE v. PARKER. (No. 105.)

(Supreme Court of North Carolina. March 2, 1921.)

1. Sales §479(14)—Conditional vendor held entitled to sell property on default of purchaser.

Seller of steam logging loading outfit upon a retained title contract, upon failure of purchaser to pay a note at maturity, had the right to sell the property at public auction and apply the proceeds to the payment of the note, although the contract contained no express power of sale, in view of C. S. § 2587.

2. Contracts §167—Laws in force enter into contracts.

The general laws of the state are a part of a contract.

Appeal from Superior Court, Halifax County; Lyon, Judge.

Action by A. C. House against Surry Parker. Judgment for plaintiff, and defendant appeals. New trial.

This was a civil action for damages, tried upon an alleged wrongful conversion of plaintiff's property by the defendant, Surry Parker.

In July, 1916, plaintiff, a resident of Halifax county, purchased from the defendant, who resided at Pinetown, N. C., a steam logging loading outfit upon a retained title contract. The terms of said agreement touching the reservation of title were as follows:

"The condition of the above contract is that the legal title and right in and to the above-described property is to remain and be vested in Surry Parker, Pinetown, N. C., until the said notes and all interest thereon accrued are paid off; and in case the said party of the second part should fail to pay off the amount due by the said notes, or either of them, at maturity, then the entire debt shall become due and payable, and it shall be lawful for the said Surry Parker, Pinetown, N. C., to take possession of the said property at any time thereafter; but in case the said notes are paid off then the title of said property to vest in the said party of the second part."

The machinery was shipped by freight to the plaintiff at Garysburg, N. C.; bill of lading for same being attached to draft and sent to the Bank of Weldon, with instructions to notify plaintiff. Pending negotiations between the parties as to the correct-

ness of said draft and the execution of the purchase-money notes, the shipment was returned by the railroad companies to the point of origin.

Plaintiff then instructed the defendant to hold the machinery at Pinetown until he could arrange to pay for it or until he could sell it. There was evidence tending to show that the plaintiff's mill had been shut down in the meantime, and that he desired to sell said machinery at Pinetown, if he could do so to advantage.

Upon failure of the plaintiff to pay his last note at maturity, defendant sold said property at public auction as security for his claim. The amount received at said sale was insufficient to pay the balance of the debt. With respect to defendant's right to sell the machinery, after due notice, and apply the proceeds to the payment of the purchase money, his honor charged the jury:

"But if you should find that, after this property was shipped back to Pinetown, House ratified the reshipment and agreed to let the property remain there in the hands of Parker, to be disposed of by him, and that he made the best disposition that he could under the circumstances, though he had no right to sell it under the contract of sale, there being no power of sale in the contract, and has brought no suit to foreclose the sale, he could only sell it by the consent and direction of House."

Defendant excepted.

Judgment in favor of the plaintiff on the verdict, and the defendant appealed.

Ashley B. Stainback, of Weldon, and Daniel & Carter, of Washington, N. C., for appellant.

W. E. Daniel, of Weldon, G. E. Midyette, of Jackson, and George C. Green, of Weldon, for appellee.

STACY, J. Section 2587, C. S., relating to the foreclosure of conditional sales, provides as follows:

"In all sales of personal property wherein the title is retained by the seller to secure the purchase money, or any part thereof, and no power of sale is conferred, and default is made in the payment of said obligation by the purchaser, then in all such cases it is lawful for the owner of such debt thereby secured, without an order of court, to sell such property, or so much thereof as may be necessary to pay off said indebtedness, at public auction for cash, after first giving twenty days notice at three or more public places in the county wherein the sale is to be made, and apply the proceeds of such sale to the discharge of said debt, interest on the same, and costs of foreclosure, and pay any surplus to the person legally entitled thereto. Before making any such sale, in addition to the advertisement above required, the owner of said debt shall, at least ten days before the day of sale, mail a copy of the notice of sale to the last known postoffice address of the original purchaser or his assigns."

[1, 2] Under a proper construction of this statute and on the record, we think his honor erred in charging the jury that the defendant could not sell the property in question without the consent and direction of the plaintiff. It is true the contract contains no express power of sale; but the general laws of the state in force at the time of its execution and performance enter into and become as much a part of the contract as if they were expressly referred to or incorporated in its terms. *O'Kelly v. Williams*, 84 N. C. 281; *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565; and *Von Hoffman v. Quincy*, 4 Wall. 552, 18 L. Ed. 403.

There are other exceptions worthy of consideration; but, as the case goes back for a new trial, and as they may not occur on another hearing, we refrain from further comment.

New trial.

(181 N. C. 29)

CRAFT & BERGESON v. JOHN L. ROPER LUMBER CO. (No. 62.)

(Supreme Court of North Carolina. March 2, 1921.)

Waters and water courses § 154(2)—Proprietors under obligation to properly maintain canal.

Where a drainage canal has been established and used as of right by abutting proprietors in the absence of statutory, contract, or prescriptive regulation to the contrary, the obligation is upon each of the proprietors to clear out and properly maintain the portion of the canal running through his own land, and ordinarily he has no right to compel an upper proprietor to do this for him nor to hold such proprietor in damages for not doing it, in view of C. S. §§ 5272-5274, 5280, et seq.

Appeal from Superior Court, Washington County; Calvert, Judge.

Action by Craft & Bergeson against the John L. Roper Lumber Company. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Plaintiffs, lower proprietors, owning land abutting on both sides of a drainage canal used by them in part for draining their lands, sue the defendant, one of a number of upper proprietors also abutting on said canal, and using the same for drainage, for damages to plaintiffs' land and crops, particularly for the year 1919, caused by the negligent and wrongful failure of defendant to clear out and properly maintain the portion of said canal running through the lands of plaintiff and below same. On denial of liability a jury was impaneled, and at close of plaintiffs' evidence, on motion, there was

judgment of nonsuit. Plaintiffs excepted and appealed.

Ward & Grimes, of Washington, N. C., for appellants.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee.

HOKE, J. The evidence offered in support of plaintiffs' cause of action tended to show that the McRae canal was a drainage canal from two to three miles in length, lying in said county, having its outlet into Beaver Dam swamp, some distance below lands of plaintiffs; that it has been established for 60 years and more and used by abutting proprietors for drainage purposes, the lands affected amounting to 2,500 to 3,000 acres; that plaintiffs, lower proprietors, owned a tract of about 70 acres of land on either side of this canal, about 40 acres of which were cleared and in part drained by the use of the McRae canal; that defendant, one of a number of upper proprietors, also using said canal for drainage, owned a large body of land, the second tract above plaintiffs' land, from 400 to 600 acres of which were cleared and drained by ditches leading into the main canal; that the portion of the McRae canal within the bounds of plaintiffs' tract had been allowed to fill up so that it did not afford proper drainage for same, and that on very slight rains the water would pond back into plaintiffs' ditches and sob and injure their lands, and particularly in 1919 caused great damage to the crops of plaintiffs planted and growing thereon; that this was due to the alleged wrongful failure on the part of defendant to clear out the portion of the McRae canal on plaintiffs' tract, which had been filled up 2 to 3 feet above the original bottom and caused in part by defendant's drainage into same. On these, the facts chiefly pertinent to the inquiry, the authoritative decisions here and elsewhere are to the effect that, where a drainage canal has been established and used as of right by abutting proprietors in the absence of statutory contract or prescriptive regulation to the contrary, the obligation is upon each of the proprietors to clear out and properly maintain the portion of the canal running through his own land, and ordinarily he has no right to compel an upper proprietor to do this for him, nor to hold such proprietor in damages for not doing it. The general principle as stated was approved and applied by this court in the recent case of *Lamb v. Lamb*, reported in 177 N. C. 150, 98 S. E. 307. There Abner Lamb, a grandfather, and owner of a large body of land, having established and maintained a system of drainage for same permanent in character, died leaving his lands to his two sons in separate tracts as upper and lower proprietors along the

lead ditches constituting principal features of said drainage system. Plaintiff, successor in title to the proprietor of the lower tract, sued the successor and proprietor of the upper tract for failure to keep open and maintain the lead ditches through plaintiff's land. On the facts suggested, relief was denied to plaintiff, and, speaking to the principal question the court said:

"It is undoubtedly the general rule that, in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone; that he has a right of entry upon the servient estate for the purpose indicated, and may be held liable for injuries arising from his willful or negligent breach of duty in these matters. The position finds support in *Hair v. Downing*, one of the North Carolina cases heretofore cited, and is very generally approved in the decisions and text-writers on the subject. *Bellevue v. Daly*, 14 Idaho, 545; *Oney v. West Buena Vista Land Co.*, 104 Va. 580; *Dudgeon v. Bronson*, 159 Ind. 652; 9 R. C. L. 794, 795; 14 Cyc. 1209; *Jones on Easements*, § 821. But in such case the owner of the dominant estate is not required to maintain or repair the easement for the benefit of the servient tenement. He may, ordinarily, abandon it altogether, without infraction of any rights of the servient owner (9 R. C. L. 795, citing *Pomfret v. Riccroft*, 1 Saund. 321, 10 Eng. Rul. Cases, 18, and *Mason v. Shrewsbury*, etc., Ry. Co., L. R. 6 Q. B. 578, 10 Eng. Rul. Cas. 22, and note), a general principle recognized and applied in this state in *Canal Co. v. Burnett*, 147 N. C. 41. But where, as in this case, a system of drainage has been constructed for the benefit of the two properties and is used and enjoyed by the owners of both, the general rule is, or should be, as held by the court below, that each is required to maintain the portion of the system on his own land, unless the conditions and circumstances presented should make such an obligation so unequal and burdensome on one at the expense of the other that a different method of adjustment would be required."

In *Lamb's Case* it was suggested that as between two proprietors in case of gross inequality a different method of adjustment might be upheld and applied by court decision, but where there are more than two proprietors, and in any case, in the absence of some intelligent and legalized administrative regulations apportioning the respective burdens, the difficulties of making proper adjustment of these claims by ordinary civil action alone would be well-nigh insuperable. Recognizing this our Legislature has wisely enacted, in addition to the statutory provisions for the creation of regular drainage districts, that wherever a drainage canal has been established and used as of right by abutting proprietors in the absence of contract stipulation or statutory or prescrip-

tive provision controlling the matter, the question of proportionate burdens may be determined on petition duly filed before a justice of the peace or clerk of the superior court, who shall by commissioners or jury of view cause the respective obligations and burdens to be ascertained and fixed and apportioned among the respective proprietors, and on this report duly made and confirmed collection may be enforced as the statute provides. 2 Consolidated Statutes, §§ 5272, 5273, 5274, 5280, et seq., section 5280 providing, among other things, that "after a canal has been dug along any * * * depression or waterway and maintained for seven years, it shall be prima facie evidence of its necessity," and proceedings may be had for apportionment and collection of the respective burdens, etc. We were referred by counsel for appellant to the case of *Briscoe v. Parker*, 145 N. C. 14, 58 S. E. 443, as authority in favor of his present claim, but in that case no canal had been established, and it was held that, when an upper proprietor had gathered his drainage water into ditches and so carried it up against a lower proprietor's land without more, causing said water to "ooze through and sob and injure the same, an action would lie for the injury." But here, as stated, a canal had been established for 60 years and more and used as of right by abutting proprietors, and the question presented is not one of trespass, but of proper apportionment of the respective burdens, and on the facts as now presented the statutory method of relief is the only one open to plaintiffs.

On the record, we find no error in the judgment of nonsuit, and the same is affirmed.

Affirmed.

(181 N. C. 519)

STATE v. CALDWELL et al. (No. 91.)

(Supreme Court of North Carolina. March 9, 1921.)

1. Criminal law § 659—Defendants held not deprived of their trial by action of lawless mob.

The defendants in a homicide case held not deprived of that fair and impartial trial guaranteed them by the Constitution and laws of the state by reason of the action of a lawless mob who wanted to lynch them, the mob being overcome by the courageous officers and brave citizens of the community at the commencement of the trial and the judge demeaning himself throughout with firmness, wisdom, and impartiality.

2. Criminal law § 858(3)—Jury not permitted to take documentary evidence to jury room.

Unless by consent and in certain restricted instances allowed by statute, the jury in a criminal case must determine the cause on the

evidence as it is heard by them or as presented in open court and is not allowed to take to the jury room with their documentary or other evidence for their private inspection, and court did not err in declining to allow jury to take with them to the jury room statements of defendants made before coroner.

Appeal from Superior Court, Wayne County; Devin, Judge.

Harry Caldwell, alias Harry Chaplan, alias Henry Williams; Jesse Foster; Frank Williams; George Bearsall; and Jim Hill were convicted of murder, and they appeal. No error.

The facts in evidence on the part of the state tended to show that in the latter part of November, seemingly Sunday the 21st, defendants were in the car of defendant Foster, and between 4 and 5 o'clock p. m. went to the store of deceased, four miles east of Goldsboro, N. C., and were seen standing about the gas tank buying a small amount of gasoline; that this was paid for by defendant Caldwell, handing to Jones a \$20 bill, and that in making the change Jones displayed a large roll of money, which he took from his pocket; that when this gasoline was bought and paid for all of defendants were standing around the gas tank, and could see the money shown by deceased; that on the same night between 7 and 8 o'clock, when Jones and his wife and three of their children, a colored boy who helped about the house, and a white boy who was crippled and had to move with crutches were sitting in a front room of the Jones residence, which was a short distance from the store, these five defendants in the car drove past the house into the back yard, and came up on the back porch; that defendant Foster came into the room where Jones and the family, etc., were, and told deceased that some one out there wished to see him, and Foster then shook hands with the colored boy, and engaged him in conversation; that Jones went out and down the hallway towards the back door, there being at the time a lighted lamp in the hall, and when he had gotten near the back door and about opposite or just beyond the dining room door, some one of the party, shown to be defendant Caldwell called to him, "Throw up your hands!" and almost immediately fired the pistol, inflicting a mortal wound, from which he died in about 30 minutes after he was shot. Mrs. Jones, wife of the deceased, said that all she heard was, "Throw up your hands!" The colored boy testified the call was, "Throw up your hands or I will kill you!" When the shot fired, Jesse Foster went out and towards the back door, where the party had entered, and they all ran off. The colored boy, the helper, went out that way in the endeavor to see who they were, and the cripple had also fled from the room, probably going out the front door, the theory of the state being that the flight of defendants was caused by the

unexpected appearance of the additional members of the household. Only three of the Jones children were present, the eldest of the three being 8, their oldest child, aged 11, spending the night with his grandparents.

The course and effect of the bullet tended to confirm the state's evidence that the person who did the shooting was standing in the hall at the time, and not very far in the back door.

The defendants were not examined as witnesses in the trial, but without objection their statements, taken at the coroner's inquest, were put in evidence and read to the jury, these statements tending to show that defendants had gone to the house for the purpose of getting whisky, and were in the dining room where Jones had brought the whisky, and while they were in their the defendant Caldwell, who claimed to be a detective, drew his pistol saying, "You are all under arrest;" that all of them threw up their hands except Jones, and, he making some move towards his pocket as if for a weapon, Caldwell fired and killed him. No authority or justification for this claim of being an official on the part of Caldwell was shown in evidence.

Under a clear and comprehensive charge from the court presenting every phase of the case and permissible defenses arising on the testimony the jury rendered a verdict of guilt of murder in the first degree against defendants Caldwell and Foster, and of murder in the second degree against the other three defendants. Judgment in accordance with the verdict, and defendants excepted and appealed.

E. A. Humphrey and Hood & Hood, all of Goldsboro, for appellants Hill and Pearsall.

W. S. O'B. Robinson, of Goldsboro, for appellants Foster and Williams.

N. D. White, of Goldsboro, for appellant Caldwell.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. It is chiefly objected to the validity of this conviction that by reason of the action of a lawless mob, and its hostile demonstrations towards them, the defendants were deprived of that fair and impartial trial guaranteed them by the Constitution and laws of the state, but on the record the exception must be overruled. As this is the principal objection insisted on for the defendants, and the occurrence and attendant circumstances at the time and after aroused very great interest and extended comment, we consider it not amiss to incorporate the findings of the trial judge concerning them, which have been duly stated and made a part of the record, in terms as follows:

"The court, deeming it proper that a more extended record than is shown upon the minutes of the court should be made of the happenings in relation to the trial of the case of

Harry Caldwell and others at the November term of Wayne Superior Court, desires to file the following statement:

"Harry Caldwell and four other prisoners were under indictment for murder in the above-entitled case at said court, and were being held for safe-keeping in the state's prison at Raleigh. The sheriff was ordered to bring these prisoners to Goldsboro on the evening of December 1st for trial, which had been set for the following morning. In attempting to carry out this order, and before he could get them to Goldsboro, the sheriff was prevented by a large mob, who sought to lynch the prisoners, and it was only by the courage and skill of the sheriff and his assistants that he succeeded in eluding the mob and returning his prisoners to Raleigh.

"The matter having been brought to the attention of the judge, after consulting with Solicitor W. D. Siler and members of the bar and representative citizens of the county, and being assured that the citizens of Goldsboro and Wayne county would give the court and the officials all the aid in their power to preserve order and would be willing to render personal service to this end if called upon, the court ordered the prisoners to be at once brought to Goldsboro for trial. Fifty citizens were therefore called upon and sworn in as special officers of the court. This number included every member of the Goldsboro bar, except those engaged in the trial of the case, and many of the most prominent business and professional men of the city. These special officers and the sheriff brought the prisoners into court December 2d, and the trial proceeded orderly in the prescribed form and continued until the usual time for adjournment for the evening was reached, when recess was taken until 9:30 a. m., December 3d.

"During the evening recess of the court, the officers being advised that an effort might be made during the night to take the prisoners from them and lynch them, decided they could be better protected in case of attack in the jury retiring rooms on the third floor of the courthouse, than in jail. The jury had been upon adjournment sent to rooms up town two blocks away. Those special officers then repaired with their prisoners to the third floor of the courthouse, and, being fully armed, so disposed themselves as to effectively cover the only approach to their position. Under the leadership of George C. Freeman (lately Lt. Col. 80th Div. A. E. F.) the special officers were divided into squads, and assigned to various duties within and without the courthouse.

"A large crowd surrounded the court square, and much excitement prevailed. This crowd was composed of some lawless elements, but also of many good citizens, there from curiosity and some to help discourage an attack. About 9:15 p. m. a roughly organized mob of several hundred men, armed and masked, declaring their purpose to lynch the prisoners, made an attack upon the west front of the courthouse, accompanied by a number of pistol and gunshots directed at the building and occupants. The glass in the windows and doors was broken, and the woodwork about the doors on that side injured. The lock of the door was unbroken, however, and those of the special force on that floor refusing to open, the firing from the outside continued until one who

appeared to be the leader of the mob was severely wounded by a pistol shot and fell. After this person was carried away the remainder of the mob retired. There were no casualties among the defenders, and no member of the mob set foot within the courthouse. Thereafter no determined attack was made upon the building, but a large crowd, some angry and threatening, continued to surround the square, and there were occasional firings of pistols during the night.

"The judge, hearing of the attack on the courthouse and its result and being advised of rumors of other mobs forming and of threats that dynamite might be used, deemed it wise to call upon the Governor for military assistance to relieve the defenders of the prisoners and in order to be prepared for possible emergencies. The Governor thereupon ordered out a company of riflemen from Burlington and a machine gun company from Durham under command of Capt. Towler. These, however, did not arrive until about 7 a. m., December 3d. At this time the disorder had entirely ceased, but the military companies were useful in relieving the special officers in charge of the prisoners and in assisting the sheriff in policing the courthouse grounds.

"At 9:30 a. m., December 3d, the jury was brought back to the courthouse, the prisoners brought in, and in the presence of a large orderly crowd, including many ladies, the trial proceeded regularly to its conclusion. The case was fully argued by counsel for the state and for the prisoners, and the jury, after deliberating for more than three hours, at 9:30 p. m. rendered the verdict which appears on record, two of the prisoners being convicted of murder in the first degree and three of murder in the second degree. The prisoners were sentenced and taken at once to the state's prison by the sheriff, accompanied by the military companies. The behavior of the officers and of the military companies was exemplary and their presence reassuring to the people.

"In conclusion I desire to submit these observations:

"Undeniably the action of the mob constituted an attack upon organized society in the administration of public justice, and was entirely without justification or excuse, and was an attempt to violently interfere with the lawful procedure of the court, but its outcome showed unmistakably that the forces for law and order in Wayne county are stronger than the opposing elements, and that the courts have the power to protect themselves by calling to their aid the influence and active support of good citizens. A forward step has been made by the citizens of Wayne county in controlling the mob spirit which constitutes one of the hindrances to the development of our state.

"The trial of those prisoners would never have been attempted had not the judge felt that he could with confidence rely upon the willingness and the ability of the citizens of Goldsboro and Wayne county to prevent a violation of the integrity of a court, and, the trial once begun, it was determined, with this aid, to carry it to a lawful and orderly conclusion in spite of the efforts of the ignorant and the lawless to the contrary. The event shows this confidence was not misplaced. And while I regret the injury and damage to the court-

house building and the wounding of a citizen, I believe the outcome one of distinct value to the county and to the state in its demonstration of the power of the forces in favor of law and order when properly called into action. For this was a case of Wayne county citizens, unaided by outside force, and prompted only by a sense of public duty, standing manfully against, and at the imminent risk of their lives subduing, attacks delivered by unruly elements of Wayne county citizenship, and doing so under circumstances calling forth courage, endurance, and determination. The unselfish public service rendered by those who served as special officers deserves praise, and is to each one an honorable distinction. They do not ask for compensation, but they have an abundant recompense in the approval of their own consciences and in the gratitude of every law-abiding citizen. The court desires to give public and permanent expression to his personal thanks to each one of them.

"I desire to call attention to the names of those who held the third floor of the courthouse during the whole night and kept the prisoners for the court: George K. Freeman, M. H. Allen, M. T. Dickinson, Lewis and Ross Giddens, John R. Edwards, Kirby Boyette, Doc. Dewey, Lawrence Bradsher, Harvey Holmes, Edward R. Michaux, Hugh Dortch, Charles A. Thompson, Jake P. Shrago, George C. Royall, Jr. These men chose their position well, and strengthened it skillfully. Heavily armed and supplied, they awaited attack with calmness. They were determined to maintain their defense at all hazards, in the performance of a public duty as to which they had no personal interest. They were unconquerable and unafraid. Such spirit should be a source of pride to the citizens of Wayne and to every North Carolinian. With such spirit as this our country is safe from attack either from foes without or lawlessness within.

"The following are the names of the sheriff and his assistants who aided the court in these events: William S. Grant, sheriff, Deputies, Paul Best, J. C. Rhodes, Walter Grant, Lester Hunt, Thad Howell, and J. H. Howell. The court desires to commend the high courage and faithfulness of Sheriff Grant and of these assistants who were not only courageous but wholly devoted to obedience to the orders of the court and to the suppression of lawlessness.

"The court desires to call attention to and commend the action of many influential citizens, including Judge W. R. Allen, Judge O. H. Allen, Messrs. George Royall, B. H. Edwards, J. D. Langston, and others, who were active in counseling and advising against violence.

"To these forces is due the victory. They have contributed notably to strengthening the confidence of the people in the power of the courts, and to the discouraging of mob violence and lynch law in North Carolina.

"W. A. Devin, Judge."

[1] From this statement it fully and satisfactorily appears that while the mob at the commencement and just before the trial showed a determination to lynch the defendants, yet by the instant and courageous action of the officials and law-abiding citizens of the community this mob was suppressed

and the influence and effect of its conduct entirely removed and effaced, and the trial proceeded with that calmness and deliberation so essential to the administration of well-ordered justice. And in addition to the commendation deservedly expressed by the presiding judge in reference to the conduct of the good citizens of Goldsboro and Wayne counties we consider it proper that we express like commendation of the upright and able judge who demeaned himself throughout with a firmness, wisdom, and impartiality in every way worthy of the best traditions of his great office.

In the authorities cited and chiefly relied upon by the defendants (State v. Wilcox, 131 N. C. 707, 42 S. E. 536; State v. Weldon, 91 S. C. 29, 74 S. E. 43, 39 L. R. A. [N. S.] 667, Ann. Cas. 1913E, 801; People v. Fleming, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881), the conduct objected to necessarily had direct bearing on the immediate conduct of the trial, and was of a kind and character intended and well calculated to distract the jury from an intelligent, calm, and impartial consideration of the issues involved, but not so here, where the cause was heard in a seemly and well-ordered manner, entirely unaffected by the futile action of the lawless element, and giving every assurance that the rights of defendants, and each of them, were given full consideration, a position that finds full support, if any were needed, in the fact that the jury took time in their deliberations and showed discrimination in their verdict, imposing the supreme penalty only on the two leaders who were most active participants in the offense.

The other exceptions of the defendants are without merit. On the objection that the judge denied defendants' motion for severance, the court has repeatedly held that the question rests on the sound discretion of the trial judge, and will not be reviewed except in case of patent and gross abuse. State v. Southerland, 178 N. C. 676, 100 S. E. 187. And as to the ruling of his honor in permitting the 11 year old son of the deceased to be sworn and testify, on account of his youth, and incapacity, etc., this, too, is in the discretion of the judge (State v. Finger, 131 N. C. 781, 42 S. E. 820), and the answers of the witness on the voir dire and also the directness and intelligence of his testimony show that in this instance the discretion of the court has been providently exercised.

Another exception was to the refusal of the court to permit the sheriff when examined as a witness to make answer to a series of questions propounded by defendants as to whether deceased had the general reputation of being a whisky seller. There is doubt on the facts of the record if an affirmative answer to the proposed question would be of sufficient significance to disturb the results of the trial, but the exception is clearly untenable, for the reason that it does not appear what

answer the witness would have made to the proposed question. The exception therefore must be disallowed.

[2] Defendants except further that the judge on objection declined to allow the jury to take with them to the jury room the statements of defendants, made before the corner, and which had been introduced in evidence, but this ruling also is in accord with our decisions on the subject that, unless by consent and in certain restricted instances allowed by statute, the jury must determine the cause on the evidence as it is heard by them or as presented in open court, and is not allowed to take with them documentary or other evidence for their private inspection. *Nicholson v. Lumber Co.*, 156 N. C. 59-68, 72 S. E. 86, 36 L. R. A. (N. S.) 162, citing *Williams v. Thomas*, 78 N. C. 47; *Watson v. Davis*, 52 N. C. 178-181; *Outlaw v. Hurdle*, 46 N. C. 150.

On careful examination of the entire record we are of opinion that defendants have had the benefit of a fair and impartial trial, in which their every right has been duly considered and respected, and that no error has been made to appear that gives them any just and legal ground of complaint.

No error.

(181 N. C. 56)

SMITH v. ALLEN. (No. 106.)

(Supreme Court of North Carolina. March 9, 1921.)

1. Limitation of actions \S 182(2) — Statute must be pleaded to be available as a defense.

The statute of limitations, to be available as a defense in action for taxes paid, must be pleaded.

2. Limitation of actions \S 46(5) — Statute did not begin to run against agreement to pay for services at death until death.

Where services are rendered under an agreement that compensation is to be made at death, the amount does not become due until death, and the statute of limitations does not begin to run until that time.

3. Appeal and error \S 1050(1) — Admission of testimony harmless, in view of other testimony unobjected to.

The admission of testimony, if erroneous, was harmless, where the same facts were testified to by the same witness without objection.

4. Witnesses \S 176(2) — Plaintiff properly examined as to transaction with deceased, where administrator testified thereto.

Where administrator, being sued for services rendered intestate, testified as to transactions between intestate and plaintiff, it was proper to permit plaintiff to testify as to such transactions as against objection that the testimony involved transactions with the deceased.

Appeal from Superior Court, Warren County; Lyon, Judge.

Action by Dulcedo Smith against Joseph John Allen, administrator. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover for personal services rendered by the plaintiff to the intestate of the defendant, and certain taxes paid by the plaintiff.

There was evidence tending to prove that plaintiff, a nephew of defendant's intestate, lived alone with the intestate for about 15 years until intestate's death, July 25, 1919, at the advanced age of 89 years; that for the last 7 years of this time the intestate was bedridden; and for the last 3 years he was totally helpless, having no control of his body, his limbs, his bladder, or his bowels; that plaintiff waited on him, cleaned him, made his fires, sat up with him, changed his bed, brought his meals, and attended to his business. The intestate was in mature life, a man of business, but came back to his farm near Manson when past 70, and told plaintiff that if plaintiff would stay there with him and take care of him and attend to his business as long as he lived he would give plaintiff the place, about 500 acres of land, uncultivated, growing up in pines. Deceased also stated several times that he had made a will, giving plaintiff the place. It was shown that he refused to pay the taxes, saying it was plaintiff's, and plaintiff must pay them, and that plaintiff paid the taxes from 1906 to his uncle's death. When people would ask leave to hunt or to buy trees deceased would say: "See Dulce; it is his;" or words to that effect. After his death no will was found, and this action was brought to recover the value of plaintiff's services. The timber on the land was sold in the spring of 1920 by the heirs for \$37,000. The land itself was worth \$6,000 or \$7,000 more, and deceased had in bank \$3,000, which was not diminished during his long illness.

Jarvis Allen, a colored man, born on the place, helped to nurse deceased, and, being refused payment, sued for \$2,000, and was paid \$1,250 without a trial.

Plaintiff, a dentist, a man of education, demanded \$5 per day for his services for the 7 years during which the deceased was helpless, alleging the contract, the performance thereof by him, and the breach thereof by the death of the intestate without payment or provision for plaintiff. Plaintiff also added a cause of action for the taxes paid by him and interest thereon. The defendant denied liability, and pleaded the statute as to all but 3 years of the services, but did not plead the statute against the claim for taxes.

The jury returned the following verdict:

"(1) Did O. G. R. Smith agree with plaintiff that if the plaintiff would remain with him at

his home and care for him and look after his business, and that if he, the said plaintiff, would do so, he, the said O. G. R. Smith, would at his death compensate him for his services and attentions? Answer: Yes.

"(2) Did the plaintiff remain with the said O. G. R. Smith at his home and care for him and look after his business as alleged in the complaint? Answer: Yes.

"(3) Did the said O. G. R. Smith at his death compensate the plaintiff for the services and attentions of the said plaintiff to him which were rendered as alleged in the complaint? Answer: No.

"(4) What sum, if any, is the plaintiff entitled to recover for such attention and service? Answer: \$12,783.75.

"(5) What sum, if any, is the plaintiff entitled to recover for the taxes paid by the plaintiff for the said O. G. R. Smith? Answer: \$574.86."

Judgment was entered upon the verdict in favor of the plaintiff and the defendant appealed, assigning the following errors:

"First. Exception is to the court permitting plaintiff to testify what he did for the intestate.

"Second. Exception is to testimony as to taxes paid for deceased for more than 3 years before his death.

"Third. Exception is to the charge of the court on the fourth issue, refusing to hold that the claim of plaintiff is barred as to all arising more than 3 years before intestate's death.

"Fourth. Exception is to refusal to charge that all taxes paid more than 3 years before intestate's death are barred of recovery by the statute of limitations.

"Fifth and Sixth. Exceptions to the verdict and judgment, respectively."

Tasker Polk, of Warrenton, Wm. H. & Thos. W. Ruffin, of Louisburg, and A. C. & J. P. Zollcoffer, of Henderson, for appellant.

Hicks & Son, of Henderson, Daniel & Daniel, B. B. Williams, of Warrenton, and W. F. Harvey, of Littleton, for appellee.

ALLEN, J. The second, third, and fourth exceptions may be considered together, and the fifth and sixth are purely formal.

[1] The second and fourth are to the refusal to hold that the claim for taxes paid more than 3 years prior to the death of the intestate is barred by the statute of limitations, and it is a complete answer to these exceptions that the claim for taxes was alleged as a separate and distinct cause of action, and that the defendant did not plead the statute of limitations to this claim.

[2] The third exception is answered by the finding of the jury upon the first issue; it being well settled in this state:

"Where services are rendered upon an agreement that compensation is to be made at death, that the amount does not become due until death, and that the statute of limitations does not begin until that time." *Helsabeck v. Doub*, 167 N. C. 206, 83 S. E. 241, L. R. A. 1917A, 1.

The evidence is ample to sustain this finding, and there is no exception by the defendant to the contrary.

The defendant did not ask the court to hold, nor did he request a prayer for instruction, that there was no evidence to support the finding upon any of the issues.

The first exception is to permitting the plaintiff to testify that he would have to be up with intestate—

"at night, every night anywhere from 2 to 10 times, to move him, lift him, and change his position. He could not move himself after 1916. Nobody stayed with him at night but me. On August, 1912, to July, 1919, I could have easily earned from \$8 to \$10 per day. I paid taxes on that land from 1906 until the old man died."

This objection to evidence was upon the ground that the plaintiff was a party, and that it involved a transaction with the deceased.

It will be seen, however, that the plaintiff had already testified without objection to all of these facts, and that afterwards on cross-examination the defendant examined him minutely covering every phase of the answer objected to, and, further, that the administrator was examined as a witness, and testified as to these transactions.

[3, 4] If, therefore, the objection could have been sustained, in the first instance, the evidence is harmless, because the same facts were testified to by the same witness without objection, and, the administrator having testified as to the transactions, the plaintiff would be permitted to do so.

We have examined the record carefully, and it appears to us that the verdict is right, and that the claim of the plaintiff is meritorious, and has been established in accordance with law.

No error.

(181 N. C. 46)

PRITCHARD et al. v. WILLIAMS. (No. 16.)

(Supreme Court of North Carolina. March 9, 1921.)

On Plaintiff's Appeal.

1. Ejectment §141—"Permanent Improvements" defined.

"Permanent improvements" to land include all improvements of a permanent nature which substantially enhance the value of the property and, property being a farm, includes putting up dwelling house or tenant houses, barns, and stables and other outbuildings, and any substantial improvements which might be made to those buildings, the necessary ditching and necessary or proper fencing, the digging of a well or planting of orchards and cutting of timber in the course of clearing for cultivation, the grubbing of stumps, bushes, and reed patches necessary to clear and break the land for planting and cultivation, provided that they

enhance the value of the property, but do not include repairs to buildings which should be made by the owner in the ordinary use of the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Permanent Improvement.]

2. Life estates §17—Life tenant held entitled to recover for betterments.

A life tenant, who made permanent improvements under a bona fide belief that he was the owner in fee simple, is entitled to recover for betterments.

3. Ejectment §142(1)—Right to recover for betterments not dependent on wish of owner.

A defendant in ejectment's right to recover for betterments does not depend upon the wish of the actual owner for them or the sufficiency of the buildings already upon the land, the sole question being, the defendant having placed the improvements upon the land under a bona fide belief that he owned the premises in fee simple, whether or not the things which were put thereon as permanent improvements substantially enhanced the value of the premises.

On Defendant's Appeal.

4. Ejectment §148—Whether defendant was entitled to recovery for fertilizing held for jury.

In ejectment, whether fertilization of the soil by defendant in a special way was a permanent improvement, and substantially enhanced the value of the farm, *held* for the jury.

5. Ejectment §141—No recovery for ordinary fertilizing; "improvement."

In an action involving a farm, defendant could not recover for betterments consisting of mere cultivation of the soil in ordinary use of the land and fertilization thereof for the purpose of raising crops in the ordinary course of tillage, under C. S. § 701, an improvement under such statute not meaning a general enhancement in value from the occupant's operation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement.]

6. Ejectment §148—"Permanent Improvements" matter of fact for jury.

It is a matter of fact for the jury, rather than one of law, to estimate from evidence whether claimed permanent improvements have added permanent enhanced value to the realty, under C. S. § 701, a "permanent improvement" meaning such betterment as will add to the intrinsic value of the property at the time it is recovered by the plaintiff.

7. Ejectment §141—Not essential that they be useful to plaintiff.

It is not essential that claimed permanent improvements, for which defendant is claiming recovery in ejectment, be useful to the plaintiff, under C. S. § 701.

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Camden County; Calvert, Judge.

Action by J. A. Pritchard and others against D. E. Williams. From the judgment, both parties appeal. In plaintiff's appeal, no error, and, in defendant's appeal, error.

This was an action in ejectment in which the plaintiff recovered. 175 N. C. 319, 95 S. E. 510. A petition was filed for betterments and in the same case (176 N. C. 108, 96 S. E. 733) the court held (by Brown, J., for a unanimous court) that the petitioner (the defendant) was entitled to recover the same. Upon rehearing (178 N. C. 444, 101 S. E. 85) this judgment was reaffirmed. This is an appeal from the verdict and judgment upon the issues submitted, the only points presented being exceptions to the charge on the third issue as to the value of the betterments. Both parties assigned error and appealed.

Meekins & McMullan, of Elizabeth City, and D. H. Tillitt, of Camden, for plaintiffs.

R. C. Dozier and W. I. Halstead, both of South Mills, and Aydlett & Simpson and Ehringhaus & Small, all of Elizabeth City, for defendant.

Plaintiff's Appeal.

CLARK, C. J. [1] The court charged that the term "permanent improvements" includes "all improvements of a permanent nature, and which substantially enhanced the value of the property in controversy." The court charged further (the property being a farm) that:

"Putting up dwelling house, or tenant houses, barns and stables and other outbuildings, and any substantial improvements which might be made to those buildings, the necessary ditching and necessary or proper fencing, the digging of a well or planting of orchards, and cutting the timber in the course of clearing for cultivation, the grubbing of stumps, bushes, and reed patches necessary to clear and break the land for planting and cultivation, were permanent improvements on such property within the meaning of the statute"

—adding, however:

"That it was for the jury to determine whether or not such improvements, if the jury should find that any were made, enhanced the value of the property, and, if so, how much; and, while the jury should consider substantial additions or improvements to the buildings if made, they should not consider repairs to such buildings which should be made by the owner in the ordinary use of such property."

He further charged that ditching (embraced in the plaintiff's first exception), wire fencing (second exception), lightning rods (third exception), dwelling house, tenant houses, barns and stables, the digging of a well, and the planting of orchards and the like were permanent improvements only if they substantially enhanced the value of the property. In these instructions we find no error.

[2] The plaintiff's fourth and fifth excep-

tions were to the refusal of prayers to instruct the jury, which were based upon the idea that, since under the terms of the trust established in the main cause (175 N. C. 319, 95 S. E. 570), the plaintiff was decreed to be the owner of the life estate, he occupied the position of a life tenant with respect to the improvements made by him. But he was not an ordinary life tenant within the meaning of the principle that life tenants cannot recover for betterments which were placed thereon with the knowledge of that fact. The defendant made the improvements, as the jury find, under a bona fide belief that he was the owner in fee simple, and the court decided that the plaintiff was entitled to have the issue thereon submitted (178 N. C. 108, 96 S. E. 733) by a unanimous court, and this was reaffirmed on rehearing (178 N. C. 444, 101 S. E. 85). The plaintiff's prayers were therefore properly refused.

[3] Exceptions 6 and 7 to the refusal of prayers cannot be sustained. The defendant's right to recover for betterments does not depend upon the wish of plaintiff for them or the sufficiency of the buildings already upon the land. *Railroad v. McCaskill*, 98 N. C. 526, 4 S. E. 468. The sole question, the defendant having placed these improvements upon the land under a bona fide belief that he owned the premises in fee simple, is whether or not the things which were put thereon as permanent improvements "substantially enhanced the value of the premises." If so, the defendant was entitled to recover to the extent of such enhancement in value of the property caused thereby not exceeding the cost. In the plaintiff's appeal there is no error.

Defendant's Appeal.

[4] The exceptions on the defendant's appeal present but a single question, and that is whether the evidence therein offered, tending to show a large outlay and labor in preparing the soil to put it in condition for cultivation and improving the fertility permanently by the use of a judicious system of tillage and high-grade fertilization over and above the ordinary fertilization of the property from year to year, should be submitted to the jury.

The defendant offered to show as follows:

"That the defendant had also adopted and used a system of tillage with an idea of improving permanently the character of the soil and increasing its fertility, and that he had judiciously applied this system to the cultivation of this land; that he had burned and placed upon the land 8,000 bushels of oyster shells burned into lime; that he had placed 20 loads of manure upon the lands the first year besides that which came from the place; that he had placed upon these reclaimed acres 200 loads of manure a year in addition to the ordinary accumulation on the farm; that he had purchased and placed on it in addition to this an entire barge load of manure; that he had also placed upon the land 1,000 bushels of hard wood ashes each year, for nine years, same

having been taken from his mill, which was located in the neighborhood; that he had sowed the land with peas and clover and plowed them in for the purpose of increasing its fertility; that he had in his system of tillage adopted a judicious system in the rotation of crops and deep plowing peculiarly adapted to this soil, for the purpose of increasing its fertility; that in addition to the 8,000 bushels of oyster shells burned into lime the defendant had placed on the land two carloads of agricultural lime of about 100 tons; that this was all in addition to the fertilizers used each year for the tillage of the crops and for which no claim is made; that in following this line of effort to improve the soil the defendant had made a cash outlay in excess of \$4,230.18, and that in his opinion such efforts had enhanced the value of the property to this amount."

Whether the above were applied, and whether they substantially enhanced the value of the farm, was fit for the jury to consider, and we think it was error to exclude the testimony offered.

This evidence tends to show an unusual and successful effort by which a run-down farm of about 143 acres, which had lain idle for almost a generation, had been brought into a high state of cultivation and made, as the defendant contends upon the evidence, to "blossom like a rose." The mere cultivation of the soil in the ordinary use of the land and fertilization thereof for the purpose of raising crops in the ordinary course of tillage certainly would not constitute betterments. Only those things which substantially enhance the value of the premises permanently should be estimated by the jury and allowed to the defendant as compensation.

[5] The statute does not permit a recovery except for improvements that are permanent and valuable. The word "permanent" is defined in the *Century Dictionary* as "lasting or intended to last indefinitely," "fixed or enduring," "abiding," and the like, and it was held in *Simpson v. Robinson*, 37 Ark. 132, that an improvement does not mean a general enhancement in value from the occupant's operations.

It is elemental justice, as well as public policy, when a man occupies premises "having reason to believe" (C. S. 701) that he is owner thereof in fee simple, that to whatever extent he has increased the value of the property by permanent improvements thereon he should receive compensation from the party who recovers the premises.

The cultivation of the soil in a good and proper manner and the keeping of the buildings in repair and the land in good condition does not entitle the defendant to recover compensation, but permanent improvements by clearing the land, ditching, fencing, and likewise high fertilization of permanent effect (over and above the ordinary fertilization for the purpose of making the crops) causing enhancement in the value of the farm—all these things are properly for the consideration of

the jury, who should find what is a fair allowance for the permanent enhancement in value of the property thereby at the time of the recovery of the premises by the plaintiff.

[6, 7] But it is matter of fact for the jury rather than one of law, to estimate upon the evidence whether any of these things have added permanent enhanced value to the realty. If a building is placed upon the premises, it will gradually decay, if ditches, fencing, or other betterments are made they will gradually deteriorate, if not kept up. "Permanent" improvements mean such betterments as will add to the intrinsic value of the property at the time it was recovered by the plaintiff. Whether there has been, in this case, unusually high fertilization of the land or the addition to the soil of vegetable or mineral matter whereby the property has been permanently enhanced in value, when there is evidence offered to that effect, is for the jury to determine in estimating the benefit which the plaintiff derived therefrom. In the course of time, by negligence, the buildings may deteriorate, and the enhanced production of the land may grow less, but the jury is to estimate what is the permanent added value to the premises at the time the plaintiff recovered the property. The difficulty is not in the principles of law applicable, but as to matters of fact arising upon the evidence, and which were for the jury to weigh and determine, and which can never be exactly the same in any two cases. If unsuitable buildings are put upon the premises, no matter what the cost, the jury can find that it was no enhancement to the property thereby, so if the ditching and fencing were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff. *Railroad v. McCaskill*, 98 N. C. 526, 4 S. E. 468.

The sole matter for consideration is embraced in one proposition and that is:

"How much was the value of the property permanently enhanced estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same?"

The matter is fully discussed and clearly set out in *Gibson v. Fields*, 79 Kan. 38, 98 Pac. 1112, 20 L. R. A. (N. S.) 378, 131 Am. St. Rep. 278, 17 Ann. Cas. 406, in the elaborate notes thereto appended.

Certain acts which amidst certain surroundings and conditions might enhance the property permanently, in other surroundings and conditions would add nothing to its permanent value. These are ordinarily matters for the jury, and no general rule can be laid down more definite than that above stated. In the defendant's appeal there was error.

STACY, J., concurs in result.

WALKER, J., dissenting, and Allen, J., concurring in the dissent. In 1907, defend-

ant, Williams, received a deed for the lands in controversy from Mrs. Mary and Miss Mary Elizabeth Hughes, purporting to convey a fee simple. Defendant thereupon entered into possession of the lands, which he still occupies. In the main action, this court held that the plaintiff was entitled to recover the lands under the parol trust established. Under this trust, it is admitted that the defendant took from the Hugheses a life estate, and the plaintiffs in consequence were not entitled to offset rents for the period running from 1907 to the 15th day of May, 1915 inclusive, as against defendant's claim for betterments. At the time of the execution of the deed from the Hugheses to the defendant, Miss Mary Elizabeth Hughes was 44 years of age, having an expectancy of 25 years. Upon rendition of the judgment in the main action, defendant filed this petition, claiming compensation for alleged permanent improvements made from 1907 to 1918, inclusive; defendant being still in the possession of the land by the order of the court. At the trial it was admitted that the enhanced value of the land should be estimated as of the 15th day of May, 1915, the date of Miss Mary Elizabeth Hughes' death.

Defendant upon the trial offered to show the expense incurred in breaking soil preparatory to putting the land in cultivation, and that it was necessary to put it in cultivation. This testimony was excluded, and defendant excepted. In this connection, it is to be observed that at the time the defendant took possession of this land, it was all open land, which had theretofore been in cultivation, and which had only been permitted to "lie out" for a number of years in accordance with the well known practice of farmers, in order to restore fertility. In no view of the evidence was it wild land or prairie land which had never before been subject to cultivation.

The court permitted the defendant to offer evidence to show the cost of clearing this land—that is to say, the cost of cutting the trees upon the hedgerows, clearing hedges, the grubbing of stumps, and the taking out of reed patches—and further to show the enhanced value resulting from such improvements to the land and that the only testimony rejected was that to show the alleged cost of breaking the land; that is to say, when regarded in connection with the evidence received, the doing of necessary plowing to enable the land to be planted and cultivated.

The law which is, perhaps, applicable to wild or prairie lands, has no relevancy here. These lands had been in cultivation, but their fertility, perhaps had at one time been exhausted, and they had been permitted to "lie out," or remain fallow or uncultivated for one or more years, until they could by prop-

er tillage and fertilization be made to yield a remunerative crop.

The doctrine of permanent improvements in cases of this kind is based upon the theory that one acting under a bona fide belief that he has the true title has done something the main purpose of which is to render the land more valuable, and does not include those things which, while they may have an incidental tendency to increase the value of the freehold, are yet done with the main purpose of increasing the current years revenue by producing a larger crop.

The defendant in this case was a life tenant, and he enriched the land, primarily at least, for his own benefit, that is, for the better enjoyment of the land by himself, and, even if there was a temporary enhancement of its value, it was purely incidental, and was not permanent in any correct sense of that word, as will presently be seen.

In any event, defendant, by the restriction of the statute, could not recover more than the amount actually expended by him in making the improvements, and plaintiffs asked for an instruction to this effect which was refused. *Consol. Statutes of 1919, § 701.*

The second exception is based upon his honor's exclusion of testimony tending to support the item in defendant's bill of particulars, entitled "Improvement to Soil, 1907 to 1918." In support of this claim, defendant offered to show that by a system of rotating crops and of plowing, and by the use upon this land of large quantities of stable manure, ashes, and lime, he had permanently improved it. The testimony was properly excluded as the law does not consider fertilization of the soil as constituting a permanent improvement. *Crummey v. Bentley*, 114 Ga. 746, 40 S. E. 765; *Effinger v. Kenney*, 92 Va. 245, 23 S. E. 742; *Wright v. Johnson*, 108 Va. 855, 62 S. E. 948. It may be admitted, for sake of argument, that where lands are judiciously cultivated and properly fertilized by a tenant for life or years, they may be more valuable at the end of the tenancy than if they had been subjected to a haphazard or injurious use, but the improvement is not of that lasting character as is contemplated by the betterment statute. It is further true, however, that it is the duty which such a tenant owes, either to his landlord or to the reversioner, to cultivate the lands judiciously, and that the main purpose of such method of cultivation and of proper fertilization also is to increase the present tenant's revenues by the greater crop yield during his term. It may be, and perhaps is, quite true that the effect of manure and lime upon land is more enduring than that of the ordinary commercial fertilizer, the latter

being used mainly because the former is not readily obtainable; but the effect of all these is nevertheless temporary, lasting by common knowledge not more than 2 or 3 years, the ordinary commercial fertilizer being supposed to exhaust itself in about 1 year's time. The use of manure and lime is, in a word, fertilization—a better class of fertilization it may be, but nevertheless only fertilization. It is to be remembered also in this connection that at the time this land was fertilized by the defendant he owned a life estate, the expectancy whereof was 25 years, and which in fact endured for 9 years, during all of which the defendant occupied the land rent free, and it would be strange justice if the defendant, who has so occupied the land during this period, could recover for fertilization and judicious tillage during the period of his own life tenancy, when he was holding the lands for his own exclusive benefit.

Another reason why the testimony was properly excluded is that the defendant offered to show such fertilization and such tillage from 1907 to 1918, inclusive, together with the added value thereof to the land. Even assuming that these acts of defendant constituted permanent improvements, the defendant still could not recover for such improvements after the institution of this action in November, 1916, when he acquired full knowledge of the facts. It was the duty of the defendant, therefore, in offering this testimony, to restrict the same to the improvements claimed and the enhanced value of the land therefrom to the period for which defendant was entitled to recover for such enhancement. And, the defendant having failed to do so, and having included in his offered testimony as well the claim for improvements made after suit brought as those made before suit was brought, the testimony was properly rejected.

Reverting to the principal question, as to whether defendant could be allowed anything for cultivation, fertilization, tillage, etc., we find that the authorities are to the effect that he cannot have such remuneration, because these improvements are not of a permanent character. The court said in *Crummey v. Bentley*, *supra*:

"Another item consisted of a claim for improvement to the land by reason of fertilization. The court held that the defendants were not entitled to any allowance upon these claims; and we are of the opinion that, even giving to the act in question its widest possible scope and operation, the views entertained by the trial judge were undoubtedly sound."

See, also, *Effinger v. Kenney*, *supra*, and *Wright v. Johnson*, *supra*.

(151 N. C. 66)

CROWELL v. CROWELL (No. 442.)

(Supreme Court of North Carolina. March 9, 1921.)

Husband and wife \S 205(2)—Wife can recover from husband for infecting her with venereal disease.

Under C. S. \S 2513, allowing a married woman to recover for personal injuries in an action by her alone, and section 454, allowing an action without joinder of her husband when it concerns her separate estate or is between herself and her husband, the wife can recover from her husband in an action of tort for his willful and deliberate act in infecting her with a venereal disease. (Per Stacy, J.)

On petition for rehearing. Petition dismissed.

For former opinion, see 180 N. C. 516, 105 S. E. 206.

T. A. Adams, of Charlotte, for petitioner.

STACY, J. Defendant's petition to rehear, filed in this cause, was referred to the writer, under rule 53 of the court (95 S. E. vii). It is not customary to assign any reasons for denying a petition to rehear; but, on account of the mooted questions involved and the wide difference of opinion among members of the bench and bar, I deem it not amiss to insert this memorandum in the record as an expression of my individual views.

It will be remembered that plaintiff, a married woman, brings this action against her husband, alleging that he wrongfully and recklessly infected her with a loathsome disease. It is conceded that prior to the enactment of chapter 13, Public Laws 1913, now C. S. 2513, this suit was not maintainable, but the act of 1913 provides:

"The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

The burden of petitioner's brief is that this statute creates no substantive right, that it merely changes the rule of procedure, and that it applies only to such causes of action as could be maintained by the husband and wife as coplaintiffs before the law took effect. This position is supported by eminent authorities; but to my mind the reasons are not conclusive.

At common law the defendant's demurrer would have been sustained, because his wife could not maintain such an action suing alone; but his conduct would have been no less hurtful and injurious to her. His only defense now is that he and the plaintiff are one by reason of the marriage tie. Shylock

in Shakespeare's Merchant of Venice, as he stood in court, insisting upon the terms of his bond, was in a better position than the defendant in this case. There nothing had been done to increase the burdens and hazards of the party obligated, but not so here. In the case at bar the strenuous demand for what is called the defendant's legal right forces plaintiff's counsel to play the role of Portia. A mere rule of procedure, based upon the unity of husband and wife, ought not to prevail over plaintiff's claim founded on a willful and deliberate wrong, especially in the face of a statute changing such rule. Surely the plaintiff with propriety can say to the defendant:

"If you claim immunity from suit under the common law by reason of our unity as husband and wife, you must not wrongfully and recklessly commit a tort upon my person, for I can now maintain an action for such a tort—our unity no longer being a bar to my suing alone—and your protection in such instance is taken away by the statute."

To hold otherwise would seem to forsake the substance for the shadow. Defendant forgets that his rights in the premises are relative, and not absolute.

Again, C. S. 454, provides that a wife may maintain an action without the joinder of her husband: (1) When the action concerns her separate property; (2) when the action is between herself and her husband. And it has been held with us that a wife may maintain an action against her husband to recover possession of her lands and damages for withholding the same, allowing the husband the right of ingress, egress, and regress only (Manning v. Manning, 79 N. C. 293, 28 Am. Rep. 324), and to enjoin her husband from interfering with her separate property or from collecting her rents (Robinson v. Robinson, 123 N. C. 137, 31 S. E. 371). See, also, Graves v. Howard, 159 N. C. 504, 75 S. E. 998, Ann. Cas. 1914C, 565. These authorities are decisive of the question so far as property rights are concerned.

But defendant contends that the act of 1913 above set out is not sufficiently inclusive in its terms to extend to a personal injury or tort sustained by one spouse from the other. In reply to this it may be observed that the right of a wife to sue her husband, under C. S. 454, is not limited by any provision of the statute to actions involving the rights of property only. Hence, considering the two sections together, I have no difficulty in arriving at the conclusion that the plaintiff's right to maintain this action is an entirely permissible construction.

Furthermore, I hold it to be a sound principle of law, and certainly approved in morals, that, although a man may have a legal right to do a given thing, yet he forfeits

that right when he voluntarily and deliberately places himself in a position where it becomes impossible for him to exercise it without hurt or injury to another.

But it is not conceded that the position here taken denies to the defendant any protection which the law affords him. The gravamen of plaintiff's complaint is that the defendant, with knowledge of his diseased condition, willfully, deliberately, and recklessly communicated said vile and loathsome malady to his wife in total disregard for her health and safety. This, he never had a right to do. No such right ever existed. Petitioner apparently is confusing conjugal privileges and immunities, which had been forfeited in the instant case, with the personal rights of another.

The plaintiff having the right to sue alone under the statute, all other questions in the case are collateral to this one issue. Defendant's conduct was a willful and deliberate wrong committed without excuse or justification. The foundation of the plaintiff's cause of action is not a new tort, created by the statute, but an old principle newly applied.

I think the case was correctly decided in the first instance, and that the defendant's petition should be denied.

Petition dismissed.

(181 N. C. 53)

HUTCHINSON et al. v. LUCAS et al.
(No. 57.)

(Supreme Court of North Carolina. March 9, 1921.)

Wills ¶602, 603(6)—Defeasible fee held not made indefeasible.

Where testator devised land to named son and directed that on son's death without issue the land should go to testator's other children "or their issue living at his death and to their heirs forever," the execution of quitclaim deed by the other children during named son's lifetime to purchaser of son's interest did not give purchaser an indefeasible fee, since, on death of any of such other children prior to son's death without issue, the issue of such other children would take notwithstanding parent's deed; the issue not being estopped by such deed, they taking under testator and not as heirs of the parents.

Appeal from Superior Court, Wilson County; Cranmer, Judge.

Action by John Hutchinson and others against W. A. Lucas and others. Judgment of dismissal, and plaintiffs appeal. Affirmed.

Iredell Farmer devised the lands in controversy to his youngest son, Arthur D. Farmer, with the following condition:

"If my said son, Arthur D. Farmer, shall die without leaving issue, on his death it is my will and desire that all the lands devised in this will shall go to and be equally divided among my children or their issue living at his death and to their heirs forever."

It is not alleged that Arthur is dead, and the answer avers that he was in Wilson in 1918. The estate devised to Arthur was conveyed by an order of court, and thereafter in 1900 W. T. Farmer, Joshua L. Farmer, and Mary J. Farmer, the brothers and sister of Arthur, and the only other children of the testator, Iredell Farmer, executed a deed and quitclaim for all their right, title, and interest in the lands in controversy. Joshua L. Farmer, one of the brothers of Arthur, is dead, leaving a widow and five children.

The plaintiffs moved for judgment on the pleadings, but the court refused on the ground that they could not convey an indefeasible title and dismissed this action which was brought to compel the defendants to pay the purchase money upon the tendering of a deed therefor upon a contract of sale. The plaintiffs appealed.

Jas. S. Manning, of Raleigh, for appellants.
J. C. Biggs, of Raleigh, for appellees.

CLARK, C. J. The plaintiffs concede that the estate devised to Arthur is a defeasible fee, but they contend that the quitclaim executed by the brothers and sister of Arthur estopped their issue, and they rely upon *Cherry v. Cherry*, 179 N. C. 4, 101 S. E. 504. The devise in that case is different from that in this.

In the present case it is provided that upon the death of Arthur Farmer without leaving issue the land shall go to and be equally divided among the testator's children, "or their issue living at Arthur's death" and their heirs forever. If one or more of the children of the testator should not be living at Arthur's death, then "their issue," that is, the children or grandchildren of the testator's deceased children, living at that time, would take the share that otherwise would have gone to their deceased parent; for it cannot be known until the death of Arthur who will be living at his death. It does not appear that he is dead, and the presumption is that he is still living. One of his brothers is already dead, and, if Arthur should die without leaving issue, at his death any children of the deceased brother who may be living at that time would take an interest under the will, and the deed of their father would not estop them because they do not claim under him, but the title passes to his issue directly from the testator to them. *Benson v. Benson*, 180 N. C. 106, 104 S. E. 68; *Burden v. Lipsitz*, 166 N. C. 523, 82 S. E. 863; *Whitfield v. Garria*, 134 N. C. 24, 45 S. E. 904.

Though when the holders of a contingent estate are specified and known they may assign and convey it and can make a deed which will conclude all claiming under them, *Hobgood v. Hobgood*, 169 N. C. 485, 86 S. E. 189, yet "where the heirs, issue, or children are so designated as to take by purchase, under the terms of the will, there is no estoppel or rebuttal as they do not take from their ancestor by descent, but directly from the deviser as purchasers," *Malloy v. Acheson*, 179 N. C. 95, 101 S. E. 606. This was fully discussed and is so held in *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295, which has been repeatedly cited since. See citations in *Anno. Ed.*

The plaintiffs rely upon *Cherry v. Cherry*, 179 N. C. 4, 101 S. E. 504, but in that case the provision was that upon failure of the first takers the land should go to the testator's three sons absolutely, and the court held that the additional words in that devise "to be equally divided between them or among their heirs per stirpes and not per capita" did not prevent the estate from vesting absolutely in the sons, and hence they would be estopped, and their heirs also, by any conveyance of their vested contingent interest. In the present case, the words "or their issue living at their death" can be construed only as meaning that the testator intended that upon the death of Arthur, without leaving issue, the land should go to and be equally divided between his other children if living, or, if they were not living, then their issue living at that time should take. The added words at the end, "and their heirs forever," show that the testator intended to give the remainder in fee to his other children, or the issue of any deceased children who might be living at the time of the death of Arthur, if he died without leaving issue. The intent of the testator was that if his other children were living at Arthur's death, he leaving no issue, they should get the remainder, but that, if any of his children were dead at that time, their issue, if living at that time, would get the share of the deceased child.

The plaintiffs rely upon *Hobgood v. Hobgood*, 169 N. C. 489, 86 S. E. 189, and *Bourne v. Farrar*, 180 N. C. 135, 104 S. E. 170, which hold that when those who shall take a contingent interest are certain, by uniting with the owners of the preceding estate, they can pass a good title, but when "the owners of the contingent interest cannot be ascertained until the determination of the preceding estate, an indefeasible title cannot be made until then." *Wichard v. Craft*, 175 N. C. 128, 95 S. E. 94, in which case *Allen, J.*, in a very brief opinion, points out tersely but clearly the distinction between the two classes of cases.

The words in this devise "or to their issue living at his (Arthur's) death" brings this

case under the ruling of *Burden v. Lipsitz*, supra, and that class of cases. In *Smith v. Lumber Co.*, 155 N. C. 389, 71 S. E. 445, which is very much in point, the court held that, where the vesting of the contingent interest is determined by the death of the children named and not upon the death of the testator, each of the children takes a contingent remainder; but, if they die before the death of the owner of the defeasible fee (leaving no issue), then the grandchildren, or issue of the children, take as purchasers under the will and not under the children of the testator, and hence will not be estopped by any conveyance or quitclaim of their ancestor.

The doctrine so clearly stated in *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295, has been often approved, among other cases by *Thompson v. Humphrey*, 179 N. C. 52, 101 S. E. 738; *Williams v. Biggs*, 176 N. C. 50, 96 S. E. 643.

Affirmed.

(191 N. C. 59)

ROBERSON v. STOKES et al. (No. 172.)

(Supreme Court of North Carolina. March 9, 1921.)

1. Trial \S 203(3)—Charge as to phase of evidence must state contentions of both parties.

Where the trial court undertakes to charge the jury on a particular phase of the evidence, he must state the law as applicable to the respective contentions of each party upon such phase of the evidence.

2. Trial \S 191(7)—Charge on defense of father held erroneous as assuming attack by plaintiff.

In a civil action for assault and battery against a father and son, where the plaintiff testified that the defendant father was the aggressor, an instruction that, if one attacks a father without cause, the son has a right to protect the father from serious bodily harm, was erroneous for assuming the truth of defendant's testimony as to the affray and omitting to state the law applicable to plaintiff's version.

3. Assault and battery \S 14—Defense of father must be necessary, and not excessive.

The right of a son to defend his father against an attack is no broader than the right of the father to defend himself, so that in civil action for assault and battery an instruction that the son had the right to protect his father from serious bodily harm was too broad as not limiting the right to cases of necessity and to the use of only sufficient force for the purpose.

4. Trial \S 191(7)—Hypothetical instructions forbidden.

In civil action for assault and battery, an instruction that, "If I attack one of you without cause, your son has the right to protect you from serious bodily harm," stated the ques-

tion hypothetically, which is forbidden, because proceeding on an assumption of facts.

5. Trial ¶86, 255(4)—Special objection must be made to evidence competent for particular purpose or limiting instruction asked.

Where evidence was offered which was competent for one purpose but not for another, the party objecting thereto is required by Supreme Court rule 27 (164 N. C. 548, 81 S. E. xi) to specify the ground of his objection, or to ask the judge to restrict it within proper limits.

6. Assault and battery ¶26—Burden of justifying admitted assault is on defendant in civil action.

In a civil action for assault and battery, where the defendant admitted making the assault and battery, the burden of proof is on him to prove the justification.

Appeal from Superior Court, Pitt County; Bond, Judge.

Civil action for assault and battery by L. H. Roberson against W. G. Stokes and another. Judgment for defendants, and plaintiff appeals. New trial.

Plaintiff alleged that he and W. G. Stokes, father of the other defendant, had some disagreement about a telephone. W. G. Stokes seeming to be very much "wrought up" about it. That they got into a heated controversy. Plaintiff testified:

"I told him to keep his mouth out of my business. He then stepped over to a pile of bricks, and I shoved him on them. About that time I saw his son, W. F. Stokes, coming with a brick in each hand, and I knew they had me foul. The boy threw one brick at me, which went over my head, but the next one hit me, and I spinned around, wrenched my ankle, and fell. Before I could recover and get up, W. G. Stokes jumped astraddle of me and hit me with a brick. I did not know anything else. Some boys took me up. When I recovered I found W. G. Stokes standing over me. As a result of the wound I went to the hospital; Dr. Basnight phoned Dr. Taylor and he took me to the hospital. I think I was in the hospital about 10 days. I was totally unable to do anything for about 30 days."

Plaintiff further testified that afterwards his ability to labor was considerably impaired, and that he suffered pains in his head, whereas before he received the blow he could do any kind of hard work. This testimony is stated: First, to show the serious character of the assault upon him; and, secondly, the wide difference between the parties in their several versions of the facts.

The defendants denied the truth of plaintiff's testimony, and W. G. Stokes stated, on the contrary, that he and plaintiff had an altercation, and plaintiff cursed him. He then said:

"I had nothing to defend myself with, and I knew he was dangerous. I walked to a pile of brick and he jumped on me. It was all so

quick I hardly knew what had happened, but I heard my son say, 'Get off of Papa.' I did not touch him a lick. I was as far as from here to Col. James from the brick and had no brick. At the time he jumped on me I was not trying to strike him. He jumped on me and threw me down. I turned him over, but did not hit him. In the trial before I understood that William hit him. * * * The scuffle lasted about one minute and a half. I won't tell the jury whether he was struck in the face while he was standing up or while he was on me. I was able to turn him over. I am sure he was hit while he was on me, because I was able to turn him over. I stood over him until the people came there and took him away. They all came right over there. I was straddle of him, but I did not offer to hit him; I had nothing to hit him with. I never had a fight in my life; have never been in court. He did not hit me with a brick. He would have killed me if William had not come to me in time. My son saved my life. He is a heavy man. I am no fighter myself."

W. F. Stokes testified:

"I noticed Roberson coming toward my father. He was cursing, and I realized that my father was in danger, and I thought it was my duty to protect him. Roberson had my father down, and, running toward him, I picked up a brick and threw it at him as a warning, but he did not get off. By that time Roberson was on the bottom and my father was on top. I had two bricks in my hand, and I threw both of them. Roberson was on my father when I threw the first and second brick. They were about 10 or 15 feet from the pile of brick. I did not see my father have any brick in his hand. There was no brick within his reach. I threw the first brick as a warning, and it went over his head. I knew that the second brick that I threw hit him. It hit him on the head. Then my father turned him over. At the time I threw the second brick, I thought it was necessary to save my father's life. I knew it was a matter of life and death. I have known Mr. Roberson all of his life."

The court gave the jury this instruction, to which the plaintiff excepted:

"If I go out there to-day when one of you has done nothing to cause trouble and knock you down, and your son sees me with you down, the law says your son has a right to protect you from serious bodily harm at my hands."

This instruction was given after his honor had read from Wharton on Homicide (3d Ed.) at bottom of page 775, on the right of a son to defend his father.

The judge also charged that the burden as to both issues was upon the plaintiff, when the defendant W. F. Stokes admitted that he had struck the plaintiff with the brick, or that he had hurled the brick at him, "hitting the mark exactly."

The verdict was against the plaintiff as to all the issues, and from the judgment thereon he appealed.

Julius Brown, of Greenville, for appellant.
F. G. James & Son, of Greenville, for appellees.

WALKER, J. (after stating the facts as above). There are 27 assignments of error, but we need refer to only 2 of them, though there may be others worthy of serious consideration, as strongly contended by the plaintiff's counsel; but we must not be taken as intimating that there was any error except in the respect now indicated by us.

[1] It was erroneous to charge the jury as set forth in the above statement of the case for two reasons: (1) It was based upon the assumption that defendants' version of the assault was the correct one, whereas there was evidence that defendants were in the wrong throughout, and the jury therefore had the law stated to them with only a partial and contracted view of the evidence. This method of charging a jury has been disapproved by us. Where a phase of the evidence is presented to the jury, both contentions in regard to it should be given; otherwise it might cause the jury to give undue weight and significance to the one stated. The very question was discussed in *Jarrett v. Trunk Co.*, 144 N. C. 299, 56 S. E. 937, where it was said that, although it be not error generally to refrain from giving instructions unless asked to do so, yet care must be taken when the judge thinks proper to instruct the jury upon a phase of the evidence and to expound the law in relation thereto, not only to state it correctly, but to state the law as applicable to the respective contentions of each party upon such phase of the evidence. Having undertaken to tell the jury how they should answer that issue if they found such facts according to plaintiff's contention, it was manifestly incumbent upon the court to state the defendant's contentions in respect to such phase of the evidence and to instruct the jury how to answer the issue should they sustain such contention. *State v. Austin*, 79 N. C. 626; *Burton v. Railroad*, 84 N. C. 197; *Bynum v. Bynum*, 83 N. C. 636; *State v. Wolf*, 122 N. C. 1081, 29 S. E. 841.

[2] The phase mentioned by his honor was flatly denied by the plaintiff, and a very different complexion given to it by him. The judge's illustration, based, as it was, on the assumption that plaintiff was the sole aggressor, and that W. G. Stokes did nothing to bring on the fight, but was illegally assaulted by the plaintiff and knocked down, was not justified by the evidence, as there was plenty of evidence to show that it was not true, but that the defendants were the aggressors, W. G. Stokes having attempted to attack the plaintiff with a brick, and that the latter acted in self-defense, and that the other defendant wrongfully and unlawfully joined in the attack upon him, having no just or legal ground for his intervention, which was simply voluntary and gratuitous on his part. It was therefore required, under the

principle stated in *Jarrett v. Trunk Co.*, supra, and the cases therein cited, that the judge should have stated both sides of the evidence bearing on that particular phase. Such an instruction was peculiarly required, under the circumstances of this case, and the incompleteness of the one given, in the respect indicated, may have turned the scales against the plaintiff, and probably did. What the judge did say afterwards was not sufficient to cure the error.

[3] The instruction also was too broad, because it leaves out of consideration the necessity for the interference of the son, which is a question for the jury, and apparently omits any reference to excessive force. It was held in *State v. Johnson*, 75 N. C. 174:

"The proposition is true that the wife has the right to fight in the necessary defense of the husband, the child in defense of his parent, the servant in defense of the master, and reciprocally; but the act of the assistant must have the same construction in such cases as the act of the assisted party should have had if it had been done by himself; for they are in a mutual relation one to another. Although the law respects the human passions, yet it does not allow this interference as an indulgence of revenge, but merely to prevent injury. The son, therefore, is allowed to fight only in the necessary defense of the father; and to excuse himself he must plead and show that Shipwash would have beaten his father had the son not interfered. 3 Bl. 3, and note; 1 Hale Pl. Cr. 484; Bac. Ab. "Master and Servant," P. There was evidence in the case that the father and Shipwash were engaged in a fight upon equal terms, and, it not appearing which was the aggressor, the law presumes that they were fighting by mutual consent, and were both guilty. The son therefore had no right to make the assault."

This question is fully discussed by Justice Allen, in *State v. Greer*, 162 N. C. at page 649, 78 S. E. at page 313, and, quoting from Wharton on Homicide, § 521, he says:

"The general rule, as ordinarily stated, is that a brother or other relative assisting another in resisting a wrongful act directed against the latter can use no more force than the person he assists would be entitled to use, and that interference to protect a relative is not justified where the relative was the aggressor in the original difficulty. A person has a right to use violence in defense of another only when the imperiled person would have been justified in using it in his own defense. Both must have been free from fault in bringing on the difficulty."

And further *Stanley v. Com.*, 86 Ky. 443, 6 S. W. 156, 9 Am. St. Rep. 306, is quoted, as follows:

"Not only, however, may he do this, but another may do it for him. This other person, in such a case, steps into the place of the assailed; and there attaches to him not only the rights, but also the responsibilities, of the one whose cause he espouses. If the life of such person be in immediate danger and its protec-

tion requires life for life, or if such danger and necessity be reasonably apparent, then the volunteer may defend against it, even to the extent of taking life, provided the party in whose defense he acts was not in fault."

The son could do only what his father could rightfully do, and must be judged by his rights and responsibilities, "because," as Hale said, "they are in a mutual relation one to another." The jury must find the facts, including the necessity of intervention by the son, and whether he kept within his privilege.

[4] This instruction stated the question hypothetically, which is forbidden. There was evidence that the father not only entered into the fight willingly, which made it an affray in the best view for him and the son, but that he started the fight and was the aggressor. It has been said by us that hypothetical instructions should not be indulged in as they proceeded upon the assumption of facts. *State v. Collins*, 30 N. C. 407; *State v. Benton*, 19 N. C. 196; *Johnson v. Bell*, 74 N. C. 355.

[5] As to the defendant W. G. Stokes, we need not discuss any of the other exceptions, but we will briefly refer to one piece of evidence. W. F. Stokes was permitted to testify that he went to assist his father because he heard of threats made by plaintiff, and also knew of them. The testimony was competent to show his motive or reason for going to the place when the affray occurred, but it should have been confined within its proper limits, and to the only purpose for which it was evidently offered, as otherwise it may have prejudiced the plaintiff upon the defendant's pleas of self-defense. Ordinarily, when evidence is competent for one purpose, but not for another, the party objecting should make his objection special, directing it to the incompetent part of the question, or of the answer, as the case may be. It seems here to have been offered only for a competent purpose, and it does not appear that it was otherwise used. We will have to apply rule 27 of this court (164 N. C. 548, 81 S. E. xi) requiring counsel, who objects to evidence which is competent for one purpose, but not for another, to specify the ground of his objection, or to ask the judge to restrict it within its proper limits.

[6] As to the defendant W. F. Stokes, we are of the opinion that the judge erred in stating that the burden of proof was upon the plaintiff, as W. F. Stokes admitted that he assaulted the plaintiff, and this admission shifted the burden to him.

We therefore conclude that there should be a new trial as to both defendants for the errors stated by us, and for that reason the verdict will be set aside, and the case will proceed further in the court below according to law.

New trial.

(181 N. C. 64)

HAGOOD V. HOLLAND et al. (No. 174.)

(Supreme Court of North Carolina. March 9, 1921.)

1. Brokers ~~€~~44—Naked power to sell at net price may be revoked.

A naked power given a broker to sell property, with a commission for selling payable out of the proceeds of sale over and above a certain amount, may be revoked by the owner.

2. Brokers ~~€~~11—Amount paid by broker to copartner for interest in broker's contract not recoverable as damages on revocation.

In a broker's action for revocation of a contract with him and a copartner, the amount paid by him to his copartner for his interest in the contract held not a proper item of damages, not being within the contemplation of the parties at time of its execution.

Appeal from Superior Court, Craven County; Bond, Judge.

Action by B. E. Hagood against J. C. Holland and others. Judgment for plaintiff, and defendants appeal. New trial.

Civil action brought to recover damages for an alleged breach of contract, the material parts of which were as follows:

"Aug. 26, 1919.

"I have employed Hagood-Grantham Real Estate Company to sell for us our farm situate in the county of Jones, state of North Carolina, to wit (here appeared description of property), at the price of \$20,000.00 net on the following terms: One third cash, balance three years, 6% interest, if the same is sold by January 1, 1920. Said Hagood-Grantham Real Estate Company to pay all costs of advertising they may choose to do.

"This 26th day of August, 1919.

"[Signed] Mrs. L. E. Holland.

"[Signed] J. C. Holland.

"Witness: J. C. Singleton, 217 Castle Street, Wilmington, N. C."

On the back of this agreement is the following indorsement:

"Mr. Hagood & Grantham we must have \$500.00 by the first of November to confirm the trade, if not, the within agreement is null and void. We have to do this in case you do not sell, so as to give us time to rent out for another year 1920.

"J. O. Holland."

Defendants admitted the execution of said contract; but contended, and offered evidence tending to show, that the same was revoked on October 3, 1919. The defendants tendered an issue upon the question of revocation, which the court declined to submit. Exception duly noted.

On the issue of damages, plaintiff was permitted to testify, over objection, that when the partnership firm of Hagood-Grantham Real Estate Company, composed of B. E.

Hagood and L. T. Grantham, was dissolved, plaintiff paid his copartner \$1,000 for his interest in the contract sued on in this action.

Upon issues joined, there was a verdict and judgment in favor of the plaintiff. Defendants appealed.

L. Clayton Grant, of Wilmington, and Ward & Ward, of New Bern, for appellants.
Moore & Dunn, of New Bern, for appellee.

STACY, J. [1] Under authority of *Abbott v. Hunt*, 129 N. C. 403, 40 S. E. 119, and *Real Estate Co. v. Sasser*, 179 N. C. 497, 103 S. E. 73, we think his honor should have submitted to the jury an issue on the defendants' alleged revocation of the contract. The *Sasser Case* is on all fours with the case at bar—the two being identical in principle—and what is said there need not be repeated here. We consider the above cases controlling authorities.

[2] We think the court also erred in permitting the plaintiff to testify to the effect that he had paid his copartner the sum of \$1,000 for his interest in the contract. In no event could this be considered as a proper item in assessing the plaintiff's damages. It was not money expended in an effort to secure a purchaser, nor was it any loss of profits within the rule applicable to such loss. Plaintiff purchased the entire contract subject to the defendants' right of revocation, and such a purchase was not within the contemplation of the parties at the time of its execution. This would take the amount, thus expended, out of the category of recoverable damages.

The remaining exceptions need not be considered, as the questions presented by them may not arise upon another hearing.

New trial.

(181 N. C. 516)

STATE v. ROBINSON. (No. 161.)

(Supreme Court of North Carolina. March 9, 1921.)

1. Criminal law §386—Action of bloodhounds held admissible to connect defendant with crime.

The action of English bloodhounds in following the trail from point of commission of crime to the defendant is properly receivable in evidence where it is shown that they were accustomed to pursue the human track and had been found reliable in such cases theretofore.

2. Assault and battery §95—Evidence held sufficient to justify submission of case to jury.

In a prosecution for secret assault by shooting, evidence including the tracing of tracks to defendant's place by English bloodhounds and the action of the dogs in relation to defendant, the fact that he made no com-

ment as to the dogs or the presence of the crowd at his house, together with other evidence, including that of his procuring a gun and existence of a grudge, held sufficient to justify the submission of the case to the jury.

3. Criminal law §752½—On defendant's motion for nonsuit state's testimony is to be taken as true.

In a prosecution for secret assault, the testimony of defendant and his wife that he was at home on the occasion of the shooting at another place and other evidence in support of such claim cannot be considered as bearing on the legal proposition involved in defendant's motion for nonsuit, which must be decided on the state's testimony and on the supposition that it is true.

4. Criminal law §822(16)—Instruction as to reasonable doubt held harmless in view of instructions as a whole.

In a criminal prosecution an excerpt from the instructions that, "if the state by the greater weight or preponderance of the evidence has shown to you the guilt of the defendant, you should find him guilty beyond a reasonable doubt," is ambiguous, and, if not the mistake of the stenographer, is clearly an inadvertence which could not possibly have misled the jury as to the degree of proof in view of a consideration of the whole charge, which in several places correctly required the jury to find the defendant guilty beyond a reasonable doubt.

Appeal from Superior Court, Pamlico County; Bond, Judge.

C. E. Robinson charged with secret assault, was convicted of an assault with a deadly weapon, and he appeals. No error.

O. L. Abernethy, H. A. Tolson, Jesse Davis, and George Willis, all of New Bern, F. C. Brinson and Z. V. Rawls, both of Bayboro, and Ward & Ward, of New Bern, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. [1] It is chiefly urged for error by appellant that the court refused to enter judgment of nonsuit, but on the record the objection cannot be sustained. Accepting the testimony tending to establish defendant's guilt as true, the established rule on motions of this character, it appears that on the evening of November 14, 1918, at 7:30 p. m., the prosecutor, L. T. Daniels, was sitting at a table in a front room of his house, when he was shot through the window by some person then unknown and unobserved standing in front of the house, the charge being No. 6 and 8 bird shot, 19 of the shot taking effect in his head; that next morning about 6:30 a. m. two English bloodhounds were brought to the place by the owner, W. A. Harmon, and put on the apparent track of the person who did the shooting, and followed the trail down the intervening roads to

defendant's house, one of the dogs whining up at the cart where defendant was then sitting just about to leave on some business, one witness saying that one of the dogs reared up on the cart and another that they followed same to the gate as defendant drove off, and being then stopped, and after defendant left the house the dogs went through the yard and up to a hog pen where it was shown defendant had been that morning; that defendant made no protest or comment on the presence of the crowd who had come to his house or to the action of the dogs, but, after taking \$1.50 paid him by one of the crowd, he drove off without further remark. It was shown that as the dogs pursued the trail they once or twice left the trail to go into a nearby yard, but always returned to it till they carried it to the yard of defendant as stated. There was evidence to the effect that the dogs were English bloodhounds who were trained and accustomed to follow the human track and had been found reliable in their work; that out in the yard or near it and not far from the window at a point or in the direction where one must have stood to shoot into the house the grass appeared to be trodden down, and near it were some gun shells, and just over the fence and in a line towards the window was a wad from a gun discharge. There was also evidence of the state tending to show that the year before defendant had paid plaintiff \$500 to be relieved from a land trade in which they had entered, and when prosecutor afterwards sold the land for same price to others, defendant had made demand for a return of the \$500 or part of it, and from time to time had persisted in this demand on plaintiff. It was shown further that the gun of defendant when examined on the morning the dogs went to the house showed that one barrel had been recently fired, and that on Saturday before the shooting defendant had endeavored to procure the gun of a neighbor, but failed. It appeared also that the owner of the dogs, who had charge of them on the occasion, was not aware that defendant was in any way suspected or of the existence of any grudge between them. Defendant on the witness stand testified and claimed that the effort to procure the gun of a neighbor was because he desired a gun of smaller barrel to hunt birds with; also that he had been hunting birds the Saturday before and had left two dead birds in his bag which had spoiled, causing an odor when he threw them out; the state contending that this was an effort to weaken the impression caused by the action of the dogs in his yard and was a circumstance in support of its claim of guilt.

In *State v. McIver*, 176 N. C. 718, 96 S. E. 902, it was stated as the correct summary of our decisions on the admission in

evidence of the action of bloodhounds that their action constitutes and is properly receivable in evidence when it is shown that they have been accustomed and trained to pursue the human track, have been found by experience reliable in such cases, and further that in the particular instance they were put on the trail of the guilty party and have pursued and followed it under such circumstances and in such a way as to afford substantial assurance or permit a reasonable inference of identification, citing, among other authorities, *State v. Wiggins*, 171 N. C. 814, 89 S. E. 58, *State v. Norman*, 153 N. C. 591, 68 S. E. 917, *State v. Freeman*, 146 N. C. 615, 60 S. E. 986, *State v. Moore*, 129 N. C. 501, 39 S. E. 626, 55 L. R. A. 96, and *State v. Dickinson*, 77 Ohio St. 34, and, so stated, the position has been fully approved in the later case of *State v. Yearwood*, 178 N. C. 813, 101 S. E. 513.

[2] In the present instance these dogs and their action in the premises seem to meet every requirement embodied and approved in these and other cases on the subject, and, supported as it is by the existence of a grudge between the parties, the condition of defendant's gun the morning after the shooting, and his unusual conduct in leaving his home the morning after with the dogs and crowd there in his yard, without comment or protest, and his evident effort to account for the action of the dogs in whining up at him in his wagon, affords sufficient evidence of guilt and fully upholds the action of the court in submitting the issue to the jury.

[3] True, defendant, a witness in his own behalf, denies absolutely that he shot the prosecutor, and both he and his wife testify that he was at home on the occasion, some distance away, and there is some evidence ultra in support of their statement and claim, but this testimony, coming from defendant, may not be considered, and has no bearing on the legal proposition involved in defendant's motion to nonsuit, and which, as stated, must be decided on the state's testimony and on the supposition that same is true.

[4] Defendant excepts further to a portion of the charge in which his honor said to the jury:

"If the state by the greater weight or preponderance of the evidence has shown to you the guilt of the defendant, you should find him guilty beyond a reasonable doubt."

In reference to the trial of causes before the jury, this court has repeatedly given approval to the position that—

The charge of a trial judge "must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the

expressions, when standing alone, might be regarded as erroneous." State v. Exum, 138 N. C. 599-602 (50 S. E. 283).

While this excerpt, if it stood alone, might be objectionable, it does not stand alone. Immediately before and as a part of the same clause, the court had instructed the jury in definite terms that "the burden is on the state to show beyond a reasonable doubt the guilt of the defendant." And in 12 or 14 other parts of the charge the court in direct terms or by express recognition instructed the jury that "in order to a conviction the guilt of defendant must be established beyond a reasonable doubt." The excerpt objected to is in itself ambiguous, and, if not a mistake of the stenographer, is so clearly an inadvertence on the part of his honor that the jury could not possibly have been misled as to the degree of proof required, and applying the wholesome principle to which we have adverted, and considering the charge as a whole, we are well assured that the guilt of defendant has been established under correct principles of law, and on authority the exception should be disallowed. State v. Baldwin, 178 N. C. 693, 100 S. E. 345.

The remaining exceptions are without merit, and on careful consideration of the entire record we are of opinion that the trial is free from reversible error, and the judgment of the court should be affirmed.

No error.

(115 S. C. 428)

OXWELD ACETYLENE CO. v. DAVIS.
(No. 10578.)

(Supreme Court of South Carolina. Feb. 28, 1921.)

1. Sales §23(3)—Order for goods is a proposal and becomes executory contract upon acceptance and executed upon delivery.

An order for goods is but a proposal, and is not a contract until accepted by the seller, and upon written acceptance it becomes an executory contract, and when the seller delivers the goods it becomes executed.

2. Sales §23(2) — Buyer may countermand before seller's acceptance in absence of contrary agreement.

A mere proposal to purchase goods may be countermanded by the buyer without liability at any time before seller's acceptance, unless there be an agreement founded upon a consideration that there shall be no countermand.

3. Sales §23(2)—Buyer may not countermand where contract forbids cancellation without written agreement.

After seller's acceptance of buyer's order, the contract becomes executory in the absence of an express contrary stipulation, and the buyer may before delivery stop performance

by explicit direction, though he subjects himself to payment of damages, but such right does not exist where the contract provided that it could not be canceled or revoked by either party after acceptance of order except by agreement in writing.

4. Sales §340—Seller's remedy for buyer's countermand after delivery of goods is by action for price.

Where an executory sales contract has become executed by delivery of the goods according to the contract's terms, the buyer's right to countermand is gone, and the seller's remedy is an action for the purchase price.

5. Sales §161—Delivery to carrier in accordance with contract is delivery to buyer.

Delivery of goods to a carrier according to the contract was delivery to buyer.

6. Sales §81(2)—Seller may deliver within reasonable time where contract fixes no date.

Where a written sales contract specified no time for delivery, seller was authorized to ship goods within a reasonable time.

7. Principal and agent §103(12)—Provision that verbal agreement shall not affect written conditions estops party from claiming otherwise.

Where buyer signed an order for goods on a paper furnished by seller's agent providing that no verbal statements of the agent or representative of seller should modify the terms of the writing, buyer is estopped to defend an action for his failure to accept the goods on the ground of an oral agreement with the agent for a later delivery.

Appeal from Common Pleas Circuit Court of Laurens County; T. S. Sease, Judge.

Action by the Oxweld Acetylene Company against S. J. Davis. Judgment for plaintiff, and the defendant appeals. Affirmed.

F. P. McGowan, of Laurens, for appellant.
Dial & Todd, of Laurens, for respondent.

COTHRAN, J. Action upon a written contract for the sale of a gas-lighting outfit, to recover the agreed purchase price; the plaintiff alleging delivery in accordance with the contract and nonpayment by the defendant.

On March 26, 1918, the defendant signed a written order for a lighting outfit to be furnished by the plaintiff f. o. b. at its factory, for which he agreed to pay \$243.75. The order was obtained by an agent of the plaintiff. He promptly forwarded it to the home office, where it was duly accepted by the plaintiff on March 30th. On April 3d the outfit was delivered to a common carrier at Chicago, consigned open to the defendant at Laurens, S. C. The shipment arrived at Laurens on April 22d. The defendant was promptly notified of its arrival, but declined to accept it. The goods remained in the

hands of the terminal carrier for the time required by law, at the expiration of which they were sold by the carrier for charges as unclaimed freight, at what is commonly known as an "old boss" sale, and we assume have become practically a total loss to both parties to this controversy.

On the 8th of April, five days after the goods were delivered by the plaintiff to the common carrier for transportation, the defendant wrote to the plaintiff, asking them to cancel his order for the lighting plant. This letter was received by the plaintiff on April 11th and was answered on the 12th, the plaintiff declining to accede to the request, and stating, "Your contract was accepted by this company on March 30th and is not subject to countermand." The defendant replied to this letter on April 16th, reiterating his countermand, and declaring that he would not take the outfit at any price, as he had learned "they are dangerous."

The defendant interposed several defenses to the action: (1) That the agreement was that the outfit should not be shipped until August 1st; that the shipment on April 3d was therefore premature; (2) that the contract was induced by the fraudulent misrepresentations of plaintiff in reference to the quality and adaptability of the machine to domestic uses; (3) that the order had been countermanded soon after it was given; (4) that the plaintiff by its negligence had brought upon itself the loss occasioned by the defendant's countermand and refusal to accept the outfit. At the conclusion of all of the testimony each party moved for a directed verdict; the issue being dependent upon the efficacy of the foregoing defenses. The circuit judge granted the motion of the plaintiff, and a verdict in its favor was returned for \$260.81.

The main question in this case is the right of the defendant to countermand the written order for the lighting outfit signed by him on March 26, 1918.

[1] An order for goods is but a proposal; it is not a contract until it has been accepted by the seller. Upon written acceptance, it becomes a contract executory, although in a sense executed, just as the formal execution of a note or mortgage or other contract by which for a valuable consideration one agrees to do or not to do a particular thing does not alter the executory character of such engagement. When the seller acts upon the accepted order by delivering the goods, the engagement assumes the character of an executed contract.

[2] While the written order for the goods remains unaccepted by the seller, being a mere proposal, it may at any time be countermanded by the buyer, without any legal liability on his part to the seller, unless, as suggested by the court in *Moneyweight Scale Co. v. Gordon Mercantile Co.*, 102 S. C. 419,

86 S. E. 1060, there be an agreement founded upon consideration that there shall be no countermand.

[3] After the order has been accepted by the seller and the proposal thereby becomes an executory contract, in the absence of an express stipulation in the contract to the contrary, the buyer may before delivery recall the order and stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other party for the loss he may have sustained by reason of having his performance of the contract checked. This right, however, does not exist where it is expressly denied by the terms of the contract, as in this case, the contract providing:

"Upon the acceptance of this order the contract so made cannot be canceled or revoked by either party * * * except by agreement in writing."

The defendant's right to countermand the order therefore expired with the acceptance of the order by the plaintiff on March 30th.

[4] There is great contrariety of opinion upon the question of the seller's appropriate remedy where the buyer has repudiated such executory contract or refuses to comply; that is, after acceptance of the order by the seller and before the delivery of the goods. It is not necessary now to decide that question, and we are not to be understood as doing so, but we may say that the latest deliverance of this court on the subject, in the case last cited, indicates very strongly, if it does not decide, that the remedy is an action for damages on account of the breach of the contract, and not an action for the purchase price of the goods. See particularly the concurring opinion of Mr. Justice Hydrick.

But the situation is very different where the executory contract has become an executed contract by the delivery of the goods according to the terms of the contract. Then the right to countermand is gone, and the remedy of the seller is an action for the purchase price. As to this there is absolute unanimity. *Seneca Co. v. Crenshaw*, 89 S. C. 471, 71 S. E. 1081; *Burwell v. Chapman*, 59 S. C. 581, 38 S. E. 222; *Coates v. Early*, 46 S. C. 223, 24 S. E. 305.

[5] This leads naturally to the further inquiry, the turning point in the case: Was delivery of the goods made by the plaintiff according to the terms of the contract prior to the attempted repudiation of the contract by the defendant?

It is not disputed that the plaintiff, in compliance with the terms of the written contract, delivered the outfit to a common carrier at Chicago for transportation to the defendant at Laurens, S. C., on April 3, 1918; that it was duly transported and arrived at

(106 S.E.)

destination on April 22d; that the defendant received timely notice of its arrival and refused to take it out of the depot. If this delivery was according to the terms of the contract between the seller and the buyer, the delivery to the carrier was a delivery to the buyer. 24 R. C. L. 40, 45; Burwell v. Chapman, 59 S. C. 581, 38 S. E. 222; Coates v. Early, 46 S. E. 220, 24 S. E. 305.

[8] The defendant, however, contends that there was an oral agreement between himself and the plaintiff's agent at the time the contract was signed that delivery should not be made before August 1st.

The contract is silent so far as a specific time for the delivery is concerned, and possibly under the authority of Chemical Co. v. Moore, 61 S. C. 168, 39 S. E. 346, the parol evidence referred to would be admissible, if the contract itself does not forbid it; and, if admissible, there was error in directing the verdict for the plaintiff, for the premature delivery would be no delivery, and the fact upon which the plaintiff relies to convert the executory contract into an executed contract would fade from his case; the goods remain at his risk. 24 R. C. L. 94.

[7] The contract, while fixing no time for delivery, certainly authorized the plaintiff to ship within a reasonable time. That was a right which the plaintiff had under the written contract. To require the plaintiff to forego that right and delay the shipment until August 1st would certainly modify that existing right, possibly to its prejudice. At any rate the terms of the contract would be changed to that extent. The contract provides:

"This instrument, upon such acceptance, covers all the agreements between the purchaser and the company, and that no agent or representative of the company has made any statements of verbal agreements modifying or adding to the terms and conditions herein set forth."

When that paper, a proposal for a contract, was presented to the plaintiff for its acceptance, this positive statement, over the signature of the defendant, appeared therein, and it must be assumed that the plaintiff acted upon it when its acceptance was affixed to it. The defendant is estopped from disputing the contents of his proposal. It is doubtless true that the form of this order was prepared and printed and furnished by the plaintiff, but that is not more than it had the right to do; and, if the public continues to sign papers without reading them and fails to incorporate in them the terms of their oral agreement, they have only themselves to blame.

Several questions raised by the exceptions have not been considered for the reason that the appellant's attorney has not discussed them in his brief.

The judgment of the court is that the judgment of the circuit court be affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(115 S. C. 433)

BUCHANAN v. WESTERN UNION TELEGRAPH CO. (No. 10513.)

(Supreme Court of South Carolina. Oct. 12, 1920.)

Telegraphs and telephones — 48 — Telegraph company liable for messenger's indecent proposal.

A telegraph company through which plaintiff's husband sent money to plaintiff was liable for the act of its messenger, delivering the money, in making an indecent proposal to plaintiff.

Hydrick, J., and Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Greenwood County; George E. Prince, Judge.

Action by Mrs. Lula Buchanan against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Reversed.

Tillman & Mays, of Greenwood, and J. Wm. Thurmond, of Edgefield, for appellant.

John Gary Evans, of Spartanburg, and Grier, Park & Nicholson, of Greenwood, for respondent.

FRASER, J. This is an action for damages. The plaintiff lived, at the time set up in the complaint, in Greenwood, in this state. The plaintiff's husband was working in Columbia, and sent to his wife, through the defendant company, \$11.50. The agent of the defendant sent a check for the money to the plaintiff by one of its regular messengers. The messenger found the plaintiff at home alone. While the plaintiff was in the act of signing the receipt the messenger is alleged to have made an indecent proposal to her. There is also evidence that the plaintiff offered to strike the messenger, but the messenger at first advanced towards the plaintiff, and then seized the receipt and ran away. The question is the liability of the defendant for the conduct of its messenger.

At the close of the testimony, the defendant moved for a direction of a verdict in its favor. The presiding judge directed the verdict for the defendant, but said, "I am rather disposed to think that it is a step that the law ought to take, but it hasn't taken yet." The majority of this court think that the principle has been settled.

We are unable to differentiate this case, in principle, from the case of Jones v. Railroad Company, 108 S. C. 217, 94 S. E. 490. The fact that the defendant undertook to

transact its business in the home of the plaintiff, instead of in its own office, makes no difference. Certainly none in favor of the defendant. It is more in keeping with the spirit of the law to protect the homes of the people than railway, express, and telegraph offices. A consignee may send another to get his freight as Jones did. The communication of the telegraph company is with the person to whom the message is sent. The appearance of their messenger to most people is startling. It indicated an urgent necessity for immediate action; otherwise, the mail will do. The appearance of their messenger throws caution to the winds and opens almost every door. May it admit, with impunity, a thief, a murderer, a rapist? It seems to us that it is going to the extreme limit to say that if the messenger is sent to the house of A., and he turns aside and enters the house of B., then the telegraph company is not responsible, because the transaction with B. was not within the scope of his employment. The transaction with A. is certainly within the scope of his employment, or there is no ground for responsibility for any delict. The servant in Jones' Case was writing a card to his wife, which was purely private matter. The interruption of that private matter caused the difficulty. It was not within a scope of the servant's employment to write to his wife or to abuse and threaten those who came for their freight, and yet the employer was held responsible. Here the injury was inflicted while the business for which the messenger was sent was being transacted. The injury was committed in the home of the plaintiff, to which the servant of the defendant had gained admission, by reason of this very business, and inflicted in its performance.

The judgment appealed from is reversed.

WATTS and GAGE, JJ., concur.

HYDRICK, J. (dissenting). We think the ruling was right. The law is well settled that the master is liable for the wrongful acts of his servant within the scope of his employment. The converse of the proposition is equally well settled—that the master is not liable for the conduct of his servant which is not within the scope of his employment; that is, for his servant's acts which are not done about or in furtherance of the master's business.

The conduct here complained of was entirely foreign to the master's business, or the purpose for which the boy was employed. It had no connection with or relation to the master's business, but was the boy's own personal escapade, wholly unconnected with the duty for which he was employed; and therefore as to that act he was not defendant's servant. *McClenaghan v. Brock*, 5 Rich. 17; *Simmons v. Okeetee Club*, 86 S. C. 73, 68 S. E. 131; *Knight v. Laurens Motor Car Co.*, 108 S. C. 179, 93 S. E. 869, L. R. A. 1918B, 151; *Thompson on Negligence*, § 525; *Savannah Electric Co. v. Hodges*, 6 Ga. App. 470, 65 S. E. 322, and authorities cited by the court in a clear and well-reasoned opinion.

The fact that the boy was admitted to plaintiff's house because he was defendant's servant, and the fact that at that place and time he was about his master's business in delivering the money and getting a receipt for it are not determinative of the question whether his wrongful conduct was within the scope of his employment. In some circumstances, time and place may be elements to be considered in determining that question, but here they are mere incidents, and the nature of the wrong complained of is the prime factor to be considered in solving the question.

GARY, C. J., concurs.

(151 Ga. 281)

BROWN-RANDOLPH CO. v. GUDE et al.
(No. 2032.)(Supreme Court of Georgia. Jan. 18, 1921.
Judgment Adhered to on Rehearing
March 5, 1921.)*(Syllabus by the Court.)*

1. Contracts \S 9(1)—Building contract must be certain; may be made certain by reference to documents, or plans and specifications, but reference must identify documents.

A building contract, to be valid, must have the necessary element of certainty, just as other contracts. Such a contract may be made sufficiently certain by reference to other documents, or to plans and specifications. But each reference must be sufficient to identify the documents or plans to which reference is made.

2. Contracts \S 164—Letter containing estimate of cost, not made part of contract or referred to, could not be considered in determining whether contractor was overpaid.

Where a building contract provided for the construction of a building upon a consideration of "actual cost plus a commission of 10 per cent.," and "the estimates of the contractors, made in writing from completed drawings and specifications and full information, will be correct to the extent that the cost will not exceed the estimate more than 5 per cent.," and where, before the above contract was executed, a letter was written by a contractor to an architect, in which the contractor gave an estimate of the cost of the building, much lower than it was built for, but the letter was not made a part of the executed contract, nor was it expressly referred to therein, such letter cannot serve as a basis in determining the rights of the owner of the building, in a suit seeking recovery against the contractor, who, it is alleged, was overpaid on the basis of the estimate contained in the letter. The contract did not identify the letter, so as to make it a basis of recovery.

3. Contracts \S 99(1), 245(2)—Evidence \S 441(7)—Pleading \S 8(7), 214(2)—Reformation of Instruments \S 21—Allegation that letter was part of contract held conclusion, or effort to vary contract; negotiations prior to contract are merged or eliminated; demurrer admits only facts well pleaded; parties supposed to know what contract contains; petition insufficient to justify reformation of building contract.

The petition did not set forth a cause of action, and the court did not err in dismissing it on demurrer.

Fish, C. J., and Beck, P. J., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by the Brown-Randolph Company against A. V. Gude, Jr., survivor, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Brown-Randolph Company brought its petition in Fulton superior court against A. V. Gude, Sr., A. V. Gude, Jr., Trust Company of Georgia, and A. Ten Eyck Brown, alleging in substance as follows:

On July 30, 1917, petitioner determined to erect an eight-story building on its property at the southwest corner of Marietta and Forsyth streets in the city of Atlanta, Ga., employing Brown as architect and the Gudes (then partners under the name of Gude & Co.) as contractor. The contractor, in a letter to the architect on June 28, 1917, stated that the building would cost \$375,000, including the commissions of Gude & Co. Following said estimate, on July 30, 1917, petitioner entered into a written contract with the contractor relative to the construction of said building. Under the terms of the contract the building was to be erected complete in every detail and delivered to petitioner, free of all liens, at and for the sum of not to exceed \$375,000, to which sum was to be added the 10 per cent. profit to the contractor called for by said contract, and the commissions of the architect, and to be completed in 10 months after the contractor was furnished with the possession of the property and the completed plans and specifications. Possession of the property was given immediately to the contractor, who, prior to the execution of the contract, had been in possession of the completed plans and specifications. The work of constructing the building was begun, but was not completed within the 10 months stipulated, and was not finally completed until March, 1919. After the building had been partially constructed, petitioner determined to increase its height by two additional stories, and on or about July 17, 1918, procured an estimate of \$161,601.88 from the same contractor, for the construction of the two additional stories, the estimate being adopted and covered by written agreement on May 9, 1918.

During the construction of the building petitioner paid to the contractor the sum of \$358,624.51. It also gave to the contractor notes aggregating \$285,047.23, making a total of over \$643,000, paid either in cash or represented by negotiable instruments delivered to the contractor. These payments were made by different officers of the petitioner company independently of each other, one of whom was absent in another city most of the time during the construction of the building, and they were made without exact knowledge of the total amount of cash and notes paid to the contractor, and with the belief that the work of erecting the building was being competently, skillfully, and intelligently done by the contractor, and that the cost of erection would not exceed the estimate and the contract price mentioned. Petitioner was not aware that the payments ex-

ceeded the sums actually specified in the contracts; the contracting partners positively stating to the contrary, and petitioner having confidence in them at that time. In addition to the total maximum contract price of \$486,000, petitioner was to pay to the contractor 10 per cent. thereof, and to the architect an additional per cent. as commission. At that time petitioner believed that Brown was competent, that as supervising architect he was discharging faithfully and competently his duties, and that the contractor was exercising due diligence in the erection of the building, in the purchase of materials therefor, in the employment of labor, and in other matters essential to the construction of the building; but petitioner alleges that neither the architect nor the contractor was competent, that neither of them discharged the duties imposed upon them by the contract for the construction and the supervision of the building, and that as a result the building was extravagantly and wastefully erected, at a cost claimed by the contractor and the architect far greater than the total aggregate maximum contractual price for said work.

On July 3, 1919, after the commencement of the present suit, A. V. Gude, Jr., as surviving partner of Gude & Co., the contractor, filed a claim of lien against the property of petitioner, aggregating the total sum of \$403,225.30. Had the contract been faithfully, diligently, and competently carried out, petitioner would have owed the contractor, for the erection of the building complete, a sum less than \$486,000, plus the 10 per cent. upon the cost stipulated under the contract, and an additional 10 per cent. to Brown as supervising architect. The total payments heretofore made, cash and notes, aggregate \$643,000. The contractor is now asserting, through the claim of lien, an indebtedness of the additional sum of \$403,000. In fact petitioner, in the payments made, has overpaid the contractor by more than \$157,000. Petitioner is informed and believes that either all or the greater part of its notes so given have been transferred to banks and others; but just how many of said notes are still in the possession of Gude, petitioner, is not definitely informed. Had the contractor complied with the contract, and skillfully and faithfully erected the building, the total amount which would have been due thereunder would have aggregated less than \$534,000, and it has in fact been overpaid to the extent of \$157,000. The claim of lien so filed is in willful and flagrant violation of the contract. Petitioner is not so indebted; but the contractor is indebted to petitioner in the excess sum of more than \$157,000, in the event the negotiable instruments issued by petitioner have been so transferred as to be binding obligations upon it. If said notes have not been transferred, and are still in the possession of either the Trust Company

of Georgia, as executor of the estate of A. V. Gude, Sr., deceased, or in the possession of A. V. Gude, Jr., surviving partner, then petitioner is entitled to have said notes surrendered, delivered up, and canceled.

Said claim of lien was filed for the purpose of embarrassing petitioner and attempting to force further payments of moneys which it does not owe, and of creating a cloud upon the title of the property and preventing petitioner from dealing therewith as it was legally entitled to do. Brown, the architect, has been actively assisting and co-operating with the contractor and its surviving partner in the erection of said building and in the gross violation of the contracts with reference to the completed cost thereof. He has asserted a claim for a large amount against petitioner; he has threatened to enter and take possession of the building, and to control the renting thereof; and he has asserted the right to collect the moneys due by the tenants of the building. Petitioner has entered into no contract giving him any of said rights, nor does the law confer upon him any such rights; and to permit him to carry these threats into execution may involve petitioner in a hopeless wrangle with its tenants, and may cause it great and irreparable loss in dealing with its tenants, and in conducting and operating the building. The building is completely occupied with a high class of tenants. Brown has recently, with one of these, undertaken to enter into a long-time lease, contrary to the express directions of petitioner and without its consent. No authority whatever has been granted by petitioner to Brown to take possession of the building, to conduct it, or otherwise to interfere with it.

Petitioner is not informed as to the nature or value of the estate left by A. V. Gude, Sr., but is informed and believes that A. V. Gude, Jr., is of doubtful financial responsibility, is in great financial straits, and has recently mortgaged all or practically all of the real estate owned by him or in which he has an interest; and it is necessary, under the circumstances, that the executor and surviving partner of the contractor firm be enjoined from selling, transferring, or disposing of any of the notes so given. Petitioner is entitled to have the notes in excess of the contract price delivered up and canceled, and to have the claim of lien canceled and removed as void and a cloud upon the title. Petitioner is ready and willing to pay any sum that may be still due upon the contract, upon having it ascertained who are the present owners and holders of the notes. Upon this ascertainment, and upon the discharge by petitioner of such notes so outstanding, aggregating with the cash payments the total maximum contract price for the building, petitioner is entitled to be discharged from any and all claims in behalf of the contrac-

tor. The building was to be completed within 10 months from the date of the contract; in fact it was not completed until March, 1919, delivery being delayed 10 months beyond the contract period. It had been fully rented before it was ever completed, except certain of the stores, and such rental, during the period of time of incompleteness, aggregated for the 10 months about \$80,000; and for this sum, in addition to the excess payments and notes, the estate of A. V. Gude, Sr., and A. V. Gude, Jr., the survivor, are liable. Petitioner is remediless at law. It is necessary for an accounting to be had, showing the real and true cost of said building; what, with proper exercise of due skill and diligence, would have been the cost of the building, and how much less than the maximum contract price this would have been; the amount of loss which petitioner sustained by a failure to deliver the building when the contract called for delivery; and the total amounts of cash paid and of notes given by petitioner; who now hold the notes, and how and when and for what consideration any of these notes were transferred.

The prayers were for such accounting; for judgment canceling the claim of lien and all notes given by petitioner and in the hands of any of the defendants, and which represent any sum in excess of the sum which may be found to be due upon an accounting; that the Trust Company of Georgia, as executor, and A. V. Gude, Jr., be enjoined from assigning, transferring, or pledging as security any of the notes given by petitioner and now in their possession, custody, or control; that Brown, be enjoined from directly or indirectly interfering with the possession of the property, or with any tenant in the building, or with its operation, and from asserting any claim against petitioner in any proceeding other than in this cause; and for general relief.

The material parts of the contract referred to in the petition are as follows:

"Article I. The contractors, for the consideration of actual cost plus a commission of ten per cent. (10%), will furnish all labor and material and all necessary estimates of cost, and will construct the owner's proposed building at the southwest corner of Marietta and Forsyth streets in the city of Atlanta, Ga. It is agreed and understood that 'actual cost' includes all expenses incurred by the construction of the building, except the expenses of the contractor's office and except architect's fees.

"Article II. It is agreed and understood that the building will be constructed and completed according to the plans and specifications and under the directions of A. Ten Eyck Brown, architect. In all cases of doubt or dispute as to the meaning of the plans and specifications, the architect's decision shall be final.

"Article III. It is agreed and understood that the estimates of the contractors made in writing from completed drawings and specifications and full information will be correct to

the extent that the cost will not exceed the estimate more than five per cent. (5%)."

"Article VIII. It is mutually agreed and understood that the contractors will complete the building within ten (10) months after they are given possession of the property and are furnished with complete plans and specifications and all other necessary information. However, should the contractors be delayed in the prosecution or completion of the work by the act or neglect or default of the owners, or the architect, or any other contractors employed by the owners upon the work, or by any damage caused by fire, or delays in transportation, or due to the existence of war, or other casualty or calamity for which the contractors are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractors, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined by the usual form of arbitration, provided the contractors and owners cannot agree."

General and special demurrers to the petition were filed. Petitioner filed an amendment, amplifying the original petition and adding the following:

Since the filing of the original petition A. V. Gude, as surviving partner of Gude & Co., has filed in the city court of Atlanta a petition to foreclose its alleged claim of lien. The city court of Atlanta possesses common-law jurisdiction alone, has no equitable jurisdiction, and cannot grant equitable relief. In the city court suit Gude has added to his alleged claim of lien certain notes which were discounted by Gude & Co., aggregating \$85,625.45, some of which have been paid. Gude has no interest in these notes, and this suit is an attempt to pay the alleged claim of lien to that extent. After the institution of the city court suit Gude filed a cross-petition in the present cause, in which he asserts the right to recover of this plaintiff the same alleged indebtedness covered by the city court suit, and to enforce the same alleged claim of lien which is asserted in the city court suit. Thus within this jurisdiction Gude has asserted two separate and distinct suits in two separate and distinct courts, for the same alleged cause of action. The controversy cannot be disposed of by the city court, either in whole or in part, for want of jurisdiction to grant the affirmative equitable relief to which plaintiff is entitled. It is entitled, not only to the accounting before mentioned, but to have the contract with reference to the construction of the two additional stories of the building reformed, for fraud of Gude in illegally inserting two items in the contract for the two additional stories.

The prayers are that Gude be enjoined from prosecuting or taking any other steps in the city court suit, and be required to assert in the present cause, as he has done,

the matters covered by said suit; that the contract representing the cost of the two additional stories be so reformed as to strike therefrom the two items so inserted; that it be decreed that the contract price for the two additional stories is the sum of \$123,596.88; and for accounting, and for all the relief prayed for in the original petition. By further amendment it is alleged that the contract of July 30, 1917, was based upon the estimate of June 28, 1917, of \$375,000, and but for this estimate petitioner would never have entered into said contract; that said estimate was based upon drawings and specifications furnished by the architect to the contractor, and Gude had in his possession all of the information from the architect which said Gude & Co. thought would be needed; that the plans and specifications were altered from time to time by the architect, without the knowledge or consent of petitioner; that Gude & Co. knew of these alterations and that they were made without authority; and that these alterations and changes materially increased the cost of the building.

The petition as amended was demurred to on general and special grounds. The judge sustained the general demurrer and dismissed the suit, on the ground that the petition as amended set forth no equitable cause of action, and that the plaintiff was not entitled to the relief prayed for. Other material facts are stated in the opinion.

Chas. T. & John L. Hopkins, of Atlanta, for plaintiff in error.

Smith, Hammond & Smith and Rosser, Slaton, Phillips & Hopkins, all of Atlanta, for defendants in error.

HILL, J. (after stating the facts as above). Brown-Randolph Company owned a city lot on the southwest corner of Marietta and Forsyth streets in the city of Atlanta, on which it decided to construct a building. Before the written contract for the construction was entered into, Gude & Co. addressed the following letter:

"Atlanta, Ga., June 28, 1917. Mr. A. Ten Eyck Brown, Architect, Forsyth Building, City—Dear Sir: In regard to the building you propose to have erected on the southwest corner of Forsyth and Marietta streets, this city. We have made a careful estimate of the cost from your plans and outlined specifications, and we find that the building will cost completed, including all mechanical equipment, elevators, electric fixtures, etc., \$375,000 including our commission, but not including the architect's commission. Very truly yours, Gude & Company."

On July 30, 1917, a contract was entered into between Gude & Co. and Brown-Randolph Company, the material portions of which are given in the foregoing statement of facts. In this contract no express refer-

ence is made to the letter from Gude & Co. to A. Ten Eyck Brown, just set out. The present equitable petition was filed by Brown-Randolph Company against A. V. Gude, as surviving partner of Gude & Co., the Trust Company of Georgia, as executor of A. V. Gude, Sr., and A. Ten Eyck Brown, praying for an accounting, for cancellation of the alleged claim of lien and all notes in the hands of the defendants, given by the plaintiff, which represented any sum in excess of the amount that might be found to be due by plaintiff to Gude & Co., and for injunction against assigning or transferring as security any of the notes given by plaintiff, in the possession, custody or control of defendants, and against interfering with the plaintiff's possession of the property, or asserting against plaintiff any claim in any proceeding other than the present cause. The petition was demurred to on general and special grounds. The court sustained the general demurrer and dismissed the petition, and the plaintiff excepted. The court held that the plaintiff had a complete remedy at law, and that a court of equity had no jurisdiction of a case like the present.

In the view we take of this case, regardless of whether a court of equity or a court of law has jurisdiction, the controlling question is whether the petition sets out a cause of action against the defendant. It will be observed that the letter written by Gude & Co. to A. Ten Eyck Brown was not addressed to the plaintiff in this case, and it nowhere expressly appears that A. Ten Eyck Brown was the agent of the plaintiff. In order for the plaintiff to recover on the basis of the letter being made a part of the contract, it must appear that A. Ten Eyck Brown was the duly constituted agent of the plaintiff, and the letter was a part of the contract. As stated above, the letter is not referred to in the contract expressly or by necessary implication, and therefore the letter cannot be said to be a part of the written contract of July 30, 1917. It will be seen from the terms of the written contract itself that the contractors, "for the consideration of actual cost plus a commission of 10 per cent., will furnish all labor and material and all necessary estimates of cost, and will construct the owner's proposed building," etc. It was also agreed and understood that "the building will be constructed and completed according to the plans and specifications and under the directions of A. Ten Eyck Brown, architect; in all cases of doubt or dispute as to the meaning of the plans and specifications, the architect's decision shall be final"; also "that the estimates of the contractors made in writing from completed drawings and specifications and full information will be correct to the extent that the cost will not exceed the estimate more than 5 per cent."

It is contended by the plaintiff that the

contractor, Gude & Co., guaranteed to construct the building at a total cost of \$375,000, as stated in the letter of June 28, 1917. But it will be observed that when this letter was written there was no written contract between Brown-Randolph Company and Gude & Co., and, so far as appears in the record, there were at that time no "completed drawings and specifications and full information." It is true that in the amendment to the petition it is alleged that the letter of June 28 was a part of the contract of July 30; but such allegation must be construed as a mere conclusion of the pleader, or as an effort to vary the terms of the written contract, as there is nothing in the contract itself to justify this allegation and conclusion. The contract itself shows that the letter was not made a part of the contract, nor is there in the petition or either amendment any allegation that, when the estimate was made by Gude & Co. on June 28, they had in their possession completed plans and specifications and full information. It is alleged that Gude "had in his hands and possession all the information from the architect which said Gude & Co. thought would be needed"; but no such plans and specifications are attached to the petition, nor is their substance therein set out. The estimates that were to be binding were those made after completed plans and specifications and full information had been given to Gude & Co. The question, therefore, is whether the completed plans and specifications and full information as contemplated by the contract were in the hands of the contractor on the date that the contract of July 30 was entered into and executed. Even if the letter of June 28 could be construed as a part of the written contract, it does not show on its face that it was made from "completed plans and specifications and full information," but that it was simply from "outlined specifications."

We think that the facts alleged in the petition do not show that the letter of June 28 was a part of the contract (except as a conclusion of the pleader), and that the estimate of \$375,000 made on that date was not the estimate provided for in the subsequently executed written contract of July 30, which is plain and unambiguous. If any previous negotiations between Gude & Co. and the plaintiff were had, and they were consistent with the written contract, they will be construed as being merged into the contract; and if, on the other hand, any preliminary negotiations were had between the parties which were inconsistent with the written contract, they would be eliminated by the contract itself. But surely no preliminary estimates between Gude & Co. and A. Ten Eyck Brown, before the execution of the written contract, could bind Gude & Co. relatively to the plaintiff, in the absence of an

allegation to the effect that the architect was the agent and acted for the plaintiff, and there is no such allegation in the petition. We cannot, therefore, look to the letter from Gude & Co. to the architect as a basis for the suit, but must look to the words of the contract itself; and those words provide that—

"It is mutually agreed and understood that the contractors will complete the building within ten (10) months after they are given possession of the property and are furnished with complete plans and specifications and all other necessary information."

And under the contract of July 30 with Gude & Co. the plaintiff was to pay actual cost of the construction of the building, plus a commission to the contractors of 10 per cent. It cannot be said that the contract of July 30 confirms the estimate made in the letter of June 28 from the contractors to the architect. That was a tentative estimate, not made upon completed plans and specifications and full information, but only upon outlined plans and specifications, and, as already said, the contract of July 30 made no reference to the letter of June 28, but, on the contrary, an entirely new and different estimate was provided. The contract of July 30 provides for a totally different plan for estimating the cost of the building from the estimate of June 28, viz. "actual cost plus a commission of 10 per cent."

It is insisted, however, that the original petition alleged that the estimated cost of the building of eight stories, as first contemplated, was \$375,000. It is true that there is a general allegation to that effect; but, if the contract of July 30 is examined, this conclusion will be seen to be without foundation. It is only facts which are well pleaded that can be taken as true on demurrer. The petition and its amendments, therefore, taken as a whole, show that there was no estimated guaranteed offer of \$375,000 on the part of the contractors for the construction of the first eight stories of the building. Under the express terms of the contract the building was to be built for actual cost plus 10 per cent.

[1] A building contract, to be valid, must have the necessary element of certainty, the same as other contracts. Such a contract may be made sufficiently certain by reference to other documents, or to plans and specifications. But such reference must be sufficient to identify the documents or plans referred to. 4 Elliott on Contracts, § 3637, and cases cited; 6 R. C. L. 867, § 253. In *Cruthers v. Donahue*, 85 Conn. 629, 84 Atl. 322, Ann. Cas. 1913C, 221, 226, note, it was held:

"Where there is a conflict between a building contract and the specifications, the former prevails."

In *Willamette Steam Mills Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629, it was held:

"Code Civ. Proc. § 1183, provides, *inter alia*, that where the amount to be paid for any building exceeds \$1,000 the contract shall be in writing, signed by the parties, and 'shall, before the work is commenced, be filed in the office of the county recorder.' Held that, where a contract provided for the erection of a building 'conformable to drawings and specifications * * * hereto annexed,' but the drawings and specifications were not filed with the contract, the contract was void, and cannot serve as a basis in determining the rights of those claiming mechanics' liens on the building."

See, also, division 2 of the opinion.

In *Donnelly v. Adams*, 115 Cal. 129, 46 Pac. 916, it was held:

"Where a building contract refers, for a description of the buildings to be erected, to certain plans and specifications of the architect, 'which are signed by the parties hereto,' such plans are an essential part of the contract, without which it is incomplete, and cannot form the basis of a recovery; and where there are no plans 'signed by the parties' the contract cannot be completed by parol evidence to identify others as the ones referred to."

[2] The contract of July 30 does not refer specifically to the letter and estimate of June 28, and, as previously stated, the contract is unambiguous. Consequently it cannot be varied by parol evidence, so as to include in it the estimate of June 28. Standing alone, the contract provides a complete working basis for the cost of the building, which is cost plus 10 per cent. commission. Besides, it will be observed that the language of section 3 of the contract provides that the estimates of the contractors made in writing from "completed drawings and specifications and full information *will* be correct," etc., thus showing that the completed drawings and specifications contemplated did not refer to the past, but to the future, and that language also applies with equal force with reference to the "estimate," not that which *had* been made, but that which *was* to be made in the future. If completed plans and estimates had already been made, in all probability they would have been attached to the contract, or would have been referred to by express and definite reference.

As to the second contract for the two additional stories, it is insisted by the plaintiff that the petition alleges that the defendants fraudulently incorporated in the estimate of cost that they submitted to the plaintiff two items which were covered by the original contract, and that the plaintiff discovered this fact after the institution of the present litigation; also that the petition alleges that the two officers of the plaintiff were attorneys, neither of whom was familiar with the construction of buildings, and they did not know, at the time the contract for the ad-

ditional two stories was entered into, that the defendants had fraudulently padded the second estimate with these two items, amounting to nearly \$40,000; and that these allegations are to be taken as true on demurrer, and if this is done the plaintiffs are entitled to have the second contract reformed and these two items stricken. It is true that fraud upon one side and mistake upon the other in the execution of a contract is the legal equivalent of a mutual mistake, and that where these two things occur, equity has jurisdiction to reform such written instrument. *Venable v. Burton*, 129 Ga. 537, 59 S. E. 253; *Gabbett v. Hinman*, 137 Ga. 143, 72 S. E. 924.

But by reference to the petition itself it is found that the plaintiffs, by way of amendment to their petition, allege that Gude & Co. took advantage of the then situation, and in preparing the estimate of cost for these two additional stories—

"deliberately, illegally, and in defiance of the contractual right of this plaintiff, attempted to so word said estimate for the additional two stories as to include two items which constituted part of the contract for the original eight stories. Said estimates will be exhibited to the court, and it will be observed that it is headed 'Two Additional Stories and Advance in Labor and Material, Transportation Building, Atlanta, Georgia'; the words 'Two Additional Stories and' being in red ink, and the words 'Advance in Labor and Material' being in blue ink. The first item of this estimate is advance in labor and material, \$36,205.00; the fourth item is sidewalk lift, \$1,800.00."

So it is contended that when the second contract was signed for the construction of the two additional stories it contained two items which are now objected to as being fraudulently inserted by the defendants, and that such alleged fraud on the part of the defendants and the mistake of the plaintiffs in overlooking the same amounted to a mutual mistake, and that such mutual mistake should be relieved by a court of equity reforming the contract to meet the facts as they are alleged to be by the plaintiffs. We cannot agree to this contention. The additional estimate was not only in writing, but it was signed by the plaintiffs; it is plain and unambiguous, a portion of it was written in red ink and a portion in blue ink, so as to attract the attention of both parties to the contract. Parties to a contract who are competent to execute and make it are supposed to know what such contract contains, and the legal effect of it. From the allegations of the petition as indicated we do not think that such a case of fraud is alleged on the one side and mistake on the other as would justify a court of equity in reforming the contract.

[3] From what has been said, and the authorities cited, we reach the conclusion that the petition does not allege facts sufficient

for a recovery against Gude & Co., on the basis of \$375,000 guaranteed cost of the first eight stories of the building, as insisted by the plaintiff. The petition therefore does not set out a cause of action, and it is immaterial whether the suit sounded in equity or at law. The judge did not err in sustaining the general demurrer and in dismissing the case.

Judgment affirmed.

All the Justices concur, except FISH, C. J., and BECK, P. J., dissenting, and GILBERT, J., disqualified.

GEORGE, J. I concur specially in the judgment, on the ground that the allegations of the petition do not entitle the plaintiffs to the equitable relief prayed.

(151 Ga. 195)

COONEY v. WALTON et al. (No. 1889.)

(Supreme Court of Georgia. Feb. 21, 1921.)

(Syllabus by the Court.)

Remainders §16—Court might decree sale for reinvestment, binding on unborn contingent remaindermen.

A testator devised certain realty to his wife "to have and to hold, for and during the term of her natural life, and, at her death, to vest in and belong in fee simple to my issue then living, said issue taking per stirpes and not per capita; but if there be no such issue living at the death of my said wife, I devise the real estate above mentioned, together with all the remainder of my property," to named persons. Included in the realty was a city lot on which there were buildings that were in need of repair and could not be rented advantageously. While the life tenant was yet in life and while the only issue of the testator was an adult son who was childless, the widow instituted an equitable suit against the son and the other contingent remaindermen specified in the will. The object of the suit was to have a decree for sale of the property, including every possible interest of contingent remaindermen in esse or any possible future issue of the testator's son, for reinvestment under the same limitations as provided in the will. *Held*, that the court had jurisdiction of the parties and subject-matter, and the decree was binding upon all parties to the suit and upon any unborn issue of the son of the testator who might be in life at the death of the life tenant.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by Julia Scales Walton and others against William J. Cooney. Judgment for plaintiffs on demurrer, and defendant brings error. Affirmed.

Maurice Walton died in Augusta, Ga., on March 6, 1913, leaving a will which was duly probated. The second item of the will was:

"All the real estate, situate in the present corporate limits of the city of Augusta, Georgia, with the store buildings, dwellings, and other improvements that may be thereon, of or to which at my death I may be seized and possessed or entitled, or have the power to dispose of by will, I give and devise to my wife, Julia Scales Walton, to have and to hold for and during the term of her natural life, and, at her death, to vest in and belong in fee simple to my issue then living, said issue taking per stirpes and not per capita; but if there be no such issue living at the death of my said wife, I devise the real estate above mentioned, together with all the remainder of my property to Alexander R. Walton, John Moore, Noel M. Moore, and Lula S. Jackson."

Lula S. Jackson was the mother of Julia Scales Walton, and died on May 12, 1912, leaving as her only heirs at law her two children, Julia Scales Walton and Thomas M. Jackson. Thomas M. Jackson died intestate on June 1, 1913, leaving Julia Scales Walton as his sole heir at law. John Moore Walton was a son of the testator, Maurice Walton, and his only issue in life at the time of the negotiations and proceedings herein-after mentioned. Included in the real estate situated in the city of Augusta left by the testator was a city lot fronting about 53 feet on Broad street and extending back in uniform width about 180 feet to property of other persons, there being located on the lot certain storehouses and other improvements. Julia Scales Walton entered into a contract to sell this lot above mentioned to William J. Cooney at the price of \$32,000, provided that the vendor "could obtain the necessary authority to make a valid conveyance" of the property to the purchaser in fee simple. After making the contract Julia Scales Walton instituted a suit in the superior court, returnable to the September term, 1919, against John Moore Walton, son of the testator, and Alexander R. Walton, John Moore, and Noel M. Moore, thus embracing all existing contingent remaindermen under item 2 of the will. Service was acknowledged; and a consent was entered into by which the case should be decided at the first term, and that the judge should pass on all questions of law and fact without a jury. The purpose of the suit was to obtain authority to sell the property to William J. Cooney, in compliance with the contract, for the purpose of reinvestment in United States bonds, state bonds, or municipal bonds, as might be directed by the court. The grounds upon which it was sought to sell the realty were:

"The property is in need of repair, and such repairs will materially curtail the immediate income derived by your petitioner, and the investment which is proposed of the proceeds of the sale will produce a larger income for your petitioner. The property is not likely to enhance in value unless it is remodeled and ex-

tensively repaired, and this your petitioner does not care to undertake; so that it will be to the interest of the remaindermen to have said property sold for the price named and the funds invested as proposed. * * * The sale of the said property will be to the advantage not only of the life tenant, Julia Scales Walton, but also of all of the remaindermen, provided that the proceeds of such sales be invested upon the same terms and in the bonds above suggested. * * * The defendant John Moore Walton is the only issue of Maurice Walton now in life, and that he is the 'virtual representative' of any child or children that may be born to him and who would come in the description of 'issue of Maurice Walton,' and that his interest and that of any other issue of Maurice Walton should not be allowed to suffer and his and their property rights be impaired by either the real or alleged lack of power to effect said sales, especially as his interest is identical with that of any other issue of Maurice Walton that may come into being."

At the hearing the judge rendered a decree authorizing the sale of the property in fee and reinvestment of the purchase price, and relieved the purchaser from responsibility for the reinvestment. Afterward a deed was executed by the life tenant and several remaindermen, as provided in the decree, and was tendered to the proposed purchaser. He declined to accept the deed and pay the price, solely on the ground that the decree was invalid because the court was without jurisdiction to order a conveyance of the realty in fee simple. The life tenant and contingent remaindermen named in the decree then instituted an equitable suit against the purchaser, William J. Cooney, for specific performance of the contract. The petition alleged all that is stated above. The defendant filed a general demurrer to the petition, which was overruled, and he excepted.

Alexander & Lee and Cumming & Harper, all of Augusta, for plaintiff in error.

Barrett & Hull, of Augusta, for defendants in error.

ATKINSON, J. There is no question as to the right of the life tenant, Julia Scales Walton, to convey her interest in the land. The sole question is as to the jurisdiction of the court of equity to order a sale of the fee, before termination of the life estate, that would be binding upon the contingent remaindermen, including persons now in life and possible unborn children of one of those now in life. No trust is involved, and the title under consideration that is sought to be divested is the plain legal title of contingent remaindermen. In *Wilson v. Sullivan*, 81 Ga. 238, 245, 7 S. E. 274, 277, it was said:

"The test of jurisdiction to entertain a bill for injunction is not whether good cause for granting the injunction is set forth in the bill, but whether the court or its organ, the judge, could grant it for any cause. If the tribunal

applied to can grant the injunction for any cause, then any question about cause is not a question of jurisdiction, but of the proper exercise of jurisdiction."

For reasons stated the life tenant desired to sell for reinvestment which would be beneficial to her. Other persons who could be affected by the sale were contingent remaindermen, included among whom were the son of the testator and any possible future issue of the son that might be in life at the death of the life tenant. The son being a party to the suit, the decree would bind him. His issue in case of his death before the death of the life tenant would be in the same class that he now occupies. The question is: Will the decree bind such unborn children as members of the same class as the son? In *Phinizy v. Wallace*, 136 Ga. 520, 529, 71 S. E. 896, 900, it is recognized that in a proper case a decree of sale for reinvestment would be binding upon contingent remaindermen who were parties to the decree ordering the sale. While it was not decided in that case that such a decree would be binding upon unborn persons, it was said on that subject:

"In regard to the ability to render a valid decree of sale binding upon parties who may not now be in existence, there is some difficulty of determination. But the general trend of modern authority is not favorable to tying up property and preventing sales, especially where necessary for the protection and preservation of the corpus, if they can be legitimately made"—citing cases.

The case of *Mayer v. Hover*, 81 Ga. 308, 7 S. E. 562, was one in which the parents of a child as next friend instituted an action of ejectment, claiming title under the will of John Hover. The defendant set up title under a decree in equity, rendered before the child was born, directing the sale of the property. There was a question raised as to whether the equitable proceedings were brought to a regular term of the court, and therefore whether there was jurisdiction. Jurisdiction was held to exist over the subject-matter; and, after so holding this, it was said:

"The court in this case having jurisdiction of the persons and of the subject-matter contained in the bill, the decree rendered by it in 1864 was not void, and the plaintiff is bound by the decree, although he was not born until after the decree."

In a recent case, *Coquillard v. Coquillard*, 62 Ind. App. 426, 113 N. E. 474, it was held:

"Where a testator devised a life estate in an undivided one-half of certain lands to each of two sons, with the remainder in fee to the children, if any be born, of such sons, and by another item of the will a qualified fee in such lands was created in the widow and two sons as tenants in common, such qualified fee being subject to be divested by the contingent estate,

it was not erroneous for the trial court to make a decree, in an action for partition wherein the widow and the two sons were properly made parties, no children having been born to such sons, that the lands should be sold free of all life estates and remainders, and that a title in fee simple pass to the purchasers free from all claims of the parties to the proceedings, their heirs and descendants. * * *

In the case at bar, unless a court exercising equitable powers may otherwise decree, the real estate involved cannot be sold and conveyed by perfect title until the expiration of the life estates created by the third item of the will. This is apparent from the nature and quantity of the various estates created by the will. As measured by the Carlisle Tables of Mortality, the life expectancies of testator's sons at his decease were approximately 50 and 51 years, respectively. At the commencement of this action in 1914 such expectancies were approximately 33 and 34 years, respectively. At the former time the real estate involved was situated a distance from South Bend, then a city of 21,000 inhabitants; at the latter time a part of such real estate was within the city limits and the balance contiguous thereto, and the city had increased in population to about 65,000 inhabitants. The proximity of the real estate to the city naturally increases its value, if such value may be rendered available, but does not necessarily augment its capacity to produce revenue. From an increase in value there inevitably results an increase in taxation expenses. Proximity to and absorption into the territorial limits of the city subject the real estate to assessments for public improvements in the ordinary course of events. The court finds that the period has arrived when the expenses of maintaining the real estate greatly exceed the income derived therefrom, and also that the value of such real estate consists mainly in the fact of its fitness for subdivision and sale as urban real estate. The tendency of taxation and special assessment charges is upward rather than downward. If the present status of this real estate must be maintained until the termination of the life estates created therein, it is at least possible that no owner of a limited estate therein will feel justified in discharging such land from taxation and special assessment charges as they arise. Moreover, it is apparent from the finding that such real estate, in the present condition of its title, stands as a partial barrier to the proper growth and development of the city of South Bend, and consequently to the development of the state. These considerations are sufficiently potent to arouse the powers of the court to the point of diligent inquiry whether there may not be a way within the equitable jurisdiction of the court by which the lands may be sold and the interest of all persons, including contingent owners not in being, safe guarded by the proper administration of the fund derived.

"We are thus brought face to face with the question whether the court, under the circumstances, was authorized to direct the sale of the real estate as against testator's sons' children not in being. In approaching this question, it should be remembered that in an action for partition, conceding that this proceeding must be regarded only as such, resulting in a

division rather than in a sale of the lands, the owners are not divested of any title or given any new title. Their respective shares are merely ascertained and set off to them in severalty. *Avery v. Akins* (1881) 74 Ind. 283. If such a proceeding results in a sale of the land as indivisible, the various estates and interests therein are merely transferred to the fund. Section 1261, Burns' 1914; section 1204, R. S. 1881. In cases where titles are complicated by limitations and contingencies, both private and public interests may, under some circumstances, require the sale of the involved real estate, even as against persons not in being. In such a situation, courts are sometimes impelled to act by expediency and practical necessity, binding the interests of persons not in being by recourse to the principle of representation. The Court of Appeals of South Carolina, in holding that a tribunal of competent jurisdiction may by its decree bind the contingent titles of remaindermen not in being, where all interested persons who could be made parties are brought before the court, uses this language: "To say that the court could not, under circumstances like these, convey away the fee, would be to assert a doctrine that would render conditional limitations and contingent remainders an intolerable evil to a growing and prosperous community. Thus to shackle estates without the power of relief, unless every person having a contingent and possible interest could be brought before the court as a party complainant or defendant, according to the usual forms and ordinary practice of the court, would be to sacrifice rights and interests of the present generation to those of posterity. * * * If the whole property of the country were thus situated, it is obvious that all improvement and advance would be completely checked; and this check upon progress and improvement would be in direct proportion to the extent to which this state of things exists. The case before the court is an apt illustration. Here are valuable unimproved lots, in a thriving and prosperous town, which the life tenant cannot with a due regard to his interest improve, and the remaindermen cannot, because their rights are contingent and may never vest." *Bofill v. Fisher* (1850) 3 Rich. Eq. (S. C.) 1, 55 Am. Dec. 627.

"The following language is used at page 51 of a valuable editorial note to *Downey v. Seib* (1906) 8 L. R. A. (N. S.) 49: "The complication of human affairs has become such that it is impossible for courts to act strictly on the general rule not to bind the interest or declare the right of any man in his absence. Cases arise in which, if you hold it necessary to bring before the court every person having an interest in the question, the suit could never be brought to a conclusion. The consequence would be that, if the court adhered to the strict rule, there would in many cases be a denial of justice. This has induced the courts to sanction a relaxation of the rule. And accordingly they have said: If we can be satisfied that we have before the court persons whose interests are the same as the interests of those who are absent, we will be content to hear the cause upon the argument of such persons; and, if we are then satisfied that the case has been fairly and honestly presented, we will order the distribution of the fund

on the representation of the persons present. *Powell v. Wright*, 7 Beav. 444.

"In a case involving the contingent title of persons not in being, the Court of Appeals of New York said: 'Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons.' *Kent v. Church of St. Michael* (1892) 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693. In a like case the Court of Errors and Appeals of New Jersey says: 'The established rule of equity practice is that estates limited over to persons not in esse are represented by the living owner of the first estate of inheritance.' *Dunham v. Doremus* (1897) 55 N. J. Eq. 511, 37 Atl. 62.

"In discussing the doctrine of representation and its application, *Jouge Story* says: 'And as it is sufficient to bring the first tenant in tail before the court, if in being, whether he be plaintiff or defendant in the suit; so, if there be no such tenant in tail in being, the first person in being, entitled to the inheritance, should be made a party, and, if there be no such person in being, then the tenant for life; and in such a case the decree made will bind the other persons not in being. Thus, if there be a tenant for life of an undivided share of an estate, with remainder to his unborn sons in tail, the tenant for life may maintain a bill for partition, and the decree will be binding upon the sons, when they come in esse. So if there be a tenant for life, remainder to his first son in tail, remainder over, and the tenant for life is brought before the court before he has issue, it is settled in equity that the contingent remaindermen are barred, and (as has been said) from necessity. So, where there are contingent limitations and executory devises to persons not in being, they may in like manner be barred by a decree against a person claiming a vested estate of inheritance.' *Story*, Eq. Pleading, § 145. The same author says that, while there are exceptions to the rule, 'the cases within the exception must, however, stand upon peculiar equities and interests not affected by the same circumstances which attach to the prior parties.' *Id.* § 146.

"On the subject of exceptions, *Mr. Freeman* says: 'An English case recognizes an exception to this principle of virtual representation by denying its applicability in cases where the person seized in fee is liable to have his seizin defeated by a conditional limitation or an executory devise, because, in that event, the estate is insufficiently represented by the person holding the first vested estate of inheritance. This exception is repudiated so far as it seems to be noticed in the United States.' *Freeman, Coten, and Part.* (2d Ed.) § 482. In a leading New York case the court, in applying the doctrine of representation, says: 'It is not a question of entirely divesting and destroying such

contingent interests, but simply a question whether the property upon which they are attached may be changed in form; whether land may be converted into personal securities under the direction of the court, preserving such interests intact upon the property in its new form. * * * A decree against the person having the first estate of inheritance would bind those in remainder or reversion, although the estate might afterwards vest in possession. * * * It would therefore follow, as a matter of course, from this rule, that contingent limitations and executory devises to persons not in being would in like manner be bound by a decree against the virtual representative of these remote and contingent interests, the person having the first vested estate of inheritance.' *Mead v. Mitchell* (1858) 17 N. Y. 210, 72 Am. Dec. 455.

"In the case at bar testator's sons, as the owners of the life estates created by the third item of the will, are parties. The widow also is a party. As we have said, the qualified fee that arises under the seventeenth item of the will is vested in the widow and sons as tenants in common. Such qualified fee, although liable to be defeated by the contingent estates created by the third item of the will, is, as we have said, an estate of inheritance. The contingent owners of such contingent estates are not in being. It follows that all possible parties are before the court. By way of illustration, if one of such contingent owners were in being and a party to the proceeding, his interests would not be broader than the question of the amount of the land that should be set off to his father as life tenant, on a division of the land, or the question of the amount of the selling price, if the land should be ordered sold. The interests of such contingent owners would be so measured, because the land so set off, or that part of the purchase price or its equivalent representing it, would eventually come into his possession or the possession of his heirs, possibly, however, in common with brothers and sisters subsequently born. His interest would not be broader than as indicated. The father as life tenant has a like interest neither narrower nor broader. If the real estate should be divided, he would be interested in the amount of the same identified as his share. If the lands should be sold, he would be interested in the distributive amount representing his estate in the land. The larger the selling price, the larger such amount. On the sale of the lands, the parties to the proceeding as tenants in common to such qualified fee will likewise be interested in the amount of the selling price. We fail to see that the interests of such contingent owners are not fully represented in this proceeding."

A companion case to the foregoing is *Coquillard v. Coquillard*, 62 Ind. App. 489, 113 N. E. 481. In this case it was held:

"The trial court, in the exercise of its chancery powers, is clothed with jurisdiction to direct the sale and conversion of lands in fee held by a life tenant, with conditional estates over to unascertained persons, where emergencies arise rendering action by the court imperative in order that the persons interested may be protected in their legal rights, and the body

of the estate preserved for them; but such extraordinary powers should be used with caution. * * * And, when the exigencies of the situation require such action, * * * the trial court may by proper decree order that the lands be sold free of all life estates and remainders, and that title in fee simple shall pass to the purchaser; and such a decree is binding on the unborn grandchildren of a testator who devised to them, subject to intervening life estates, the fee in the lands involved."

In the opinion it was said:

"It cannot be doubted that the power is lodged in chancery in a proper case, where all persons interested and likely to be affected by the decree are before the court, to convert realty into personalty, and to direct and supervise reinvestment. Thus *Ridley v. Halliday* (1900) 106 Tenn. 607, 61 S. W. 1025, 53 L. R. A. 477, 82 Am. St. Rep. 902, involved lands held under a grant for the use of a life tenant, with remainder over to successive classes, some of whom were not in being. It was made to appear there that the interests of all concerned plainly required the sale of the lands and the reinvestment of the proceeds. In approving a decree to that end, the Court of Chancery Appeals of Tennessee held that, under the circumstances presented, a court of chancery has inherent power to order a sale, the interested persons in esse being before the court, and that a decree so entered is binding on contingent owners not in being. The facts there were very similar to those here, differing principally in that the lands there had been conveyed and were held in trust for the life tenant and remaindermen. In *Curtiss v. Brown* (1862) 29 Ill. 201, 230, likewise the lands involved were held in trust for the use of a life tenant, with contingent interests over to unascertained persons; and in a situation similar in effect to those presented here the court, in holding that chancery is clothed with power to grant relief by a sale, uses this language: 'Can it be said that the beneficiary of an estate which would bring in the market \$100,000 should perish in the street from want, or be sent to the poorhouse for support, or that the estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust? Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency.' A like conclusion was reached in *Hale v. Hale* (1893) 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247, wherein the court affirmed a decree directing the sale of lands, thereby affecting the titles of certain infants and the contingent interests of unborn persons. It was made to appear there that the lands were unproductive and subject to heavy charges by reason of their proximity to Chicago, but that they might be sold for a substantial sum, which upon being invested or loaned would yield to the persons interested a considerable income. The decision is justified

on the ground that, where it is for the benefit of infants, courts of equity have the power, by virtue of their general jurisdiction over the estates of minors and others under disabilities, to authorize a conversion of real estate into personalty and of personalty into realty.

"Each of the cases above cited and discussed involved an estate held in trust for the use of life tenants and contingent remaindermen, including persons not in being. While the fact that an expressed trust is involved may clothe a court of chancery with jurisdiction to direct its administration in order that its subject-matter may be preserved and its beneficiaries protected in their rights, yet some other equitable consideration must exist in order that the court may properly exercise its power, by directing the conversion of trust property into some other form where such conversion is not specifically authorized by the instrument of trust. In each of such cases such other consideration consisted in that it was made to appear that the trust property was likely to be lost, or that it was subject to great depreciation, unless such conversion was directed and consummated. A like consideration exists here; and we do not believe that the mere fact that no express trust is involved stands as a bulwark against action by the court. To this effect is *Gavin v. Curtin* (1898) 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776, where no express trust was involved. The lands there were held under a devise to testator's daughter for life, with contingent interests over to others, including persons not in being. A decree directing the sale, on a showing that the lands were comparatively unproductive, and that the charges and expenses very much exceeded the income, was approved; the court saying in substance that, independent of the existence of a trust, a court of equity has jurisdiction to intervene where it is made to appear that otherwise a substantial right would be lost, and that, in the presence of some exigency which makes the action of the court practically indispensable, it properly exercises its power. To the same effect is *Baldrige v. Coffey* (1900) 184 Ill. 78, 56 N. E. 411, following and approving *Gavin v. Curtin*, supra. See, also, *Ruggles v. Tyson* (1899) 104 Wis. 500, 79 N. W. 766, 81 N. W. 867, 48 L. R. A. 809; *Clyburn v. Reynolds* (1888) 31 S. C. 91, 9 S. E. 973; *Spring v. Scott* (1903) 132 N. C. 548, 44 S. E. 116; *Mayall v. Mayall* (1896) 63 Minn. 511, 516, 65 N. W. 942; *Bennett v. Nashville Trust Co.* (1912) 127 Tenn. 126, 153 S. W. 840, 46 L. R. A. (N. S.) 43, Ann. Cas. 1914A, 1045.

"Respecting the first two questions suggested as presented for consideration, we conclude that the trial court in the exercise of its chancery powers is clothed with jurisdiction to direct the sale and conversion of lands in fee held by a life tenant, with conditional estates over to unascertained persons, where emergencies arise rendering action by the court imperative in order that the persons interested may be protected in their legal rights, and the body of the estate preserved for them, and that, while such extraordinary powers should be used with caution, in the case at bar the court properly exercised such powers to the end indicated.

"Directing our attention more particularly to the third question above suggested, all par-

sons interested in the subject-matter of this proceeding, and who are in being, are before the court. The life tenants and owners of such qualified fee, which, as we have said, is an estate of inheritance, are parties. The owners of the contingent interests cannot be made parties, as they are not in being. If in being, they would be necessary parties. The persons before the court are interested in urging upon the attention of the court every consideration that such unborn persons would be interested in presenting, if in being and parties to the proceeding. Under such circumstances, and where the exigencies of the situation require action on the part of courts, impelled by practical necessity, they assume jurisdiction. Decrees entered under such circumstances are binding on persons not in being. We conclude that a proper decree entered in this proceeding is binding on the unborn children of testator's sons, and that the fifth conclusion of law is correct. In addition to authorities above cited, see the following: *Bofil v. Fisher* (1850) 3 Rich. Eq. 1, 55 Am. Dec. 627; *Downey v. Seib* (1906) 8 L. R. A. (N. S.) 49, note; *Powell v. Wright* (1844) 7 Beav. 444; *Kent v. Church of St. Michael* (1892) 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 631, 32 Am. St. Rep. 693; *Dunham v. Doremus* (1897) 55 N. J. Eq. 511, 37 Atl. 62; *Story, Eq. Pleading*, §§ 145, 146; *Freeman, Coten. and Part.* (2d Ed.) § 482; *Mead v. Mitchell* (1858) 17 N. Y. 210, 72 Am. Dec. 455; *Rutledge v. Fishburne* (1903) 97 Am. St. Rep. note p. 766; *Cheesman v. Thorne* (1833) 1 Edw. Ch. (N. Y.) 629; *Fox v. Fee* (1897) 24 App. Div. 314, 49 N. Y. Supp. 292; *Carter v. White* (1904) 101 Am. St. Rep. 870, note; *Coquillard v. Coquillard*, supra. * * *

"A proceeding such as this is maintainable only on the theory that, by reason of some exigency growing out of changed conditions, it becomes necessary to convert lands into personality in order that the body of the estate may be preserved. The courts are in accord that in order to the validity of the proceedings the funds must be substituted for the lands, all interests and estates in the latter transferred to the former, and that the fund must be ordered administered as nearly as possible as the lands would have been handled had there been no conversion. *Noble v. Cromwell* (1858) 28 Barb. (N. Y.) 475; *Gavin v. Curtin*, supra; *Mead v. Mitchell*, supra; *Cheesman v. Thorne*, supra; *Bofil v. Fisher*, supra; *Monarque v. Monarque* (1880) 80 N. Y. 320, 326; *Barnes v. Luther* (1894) 77 Hun, 234, 28 N. Y. Supp. 400; *Rutledge v. Fishburne*, supra, note page 767," 97 Am. St. Rep.

In the case under consideration, the court had jurisdiction of the subject-matter, and all persons in esse to be affected by the decree were before the court. One of them was John Moore Walton, the only child of the testator. The only possible issue of the testator, within the meaning of the will, not in esse, would be issue of John Moore Walton. They would be in the same class with him, and would be bound by the decree, as it was binding upon him. Under the circumstances the court had jurisdiction to render

the decree; and, this being the controlling question, there was no error in overruling the demurrer.

Judgment affirmed.

All the Justices concur.

(151 Ga. 203)

DONALDSON v. DONALDSON. (No. 1966.)

(Supreme Court of Georgia. Feb. 21, 1921.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Mrs. L. E. Donaldson against Earl Donaldson. Judgment for plaintiff, and defendant brings error. Affirmed.

Max Meyerhardt, of Rome, for plaintiff in error.

Willingham & Covington, of Rome, for defendant in error.

FISH, C. J. In view of the facts alleged in the petition and the general prayer for relief, the case is controlled by the decision this day rendered in *Cooney v. Walton*, 106 S. E. 167, and the court did not err in overruling a general demurrer to the petition.

Judgment affirmed.

All the Justices concur.

(151 Ga. 223)

SEIDELL v. SEIDELL et al. (No. 1969.)

(Supreme Court of Georgia. March 3, 1921.)

(Syllabus by the Court.)

Executors and administrators \Rightarrow 138(4)—Construed to give life estate with remainder subject to be divested upon death without children but to become fee in case of sale.

One of the items of the will under construction reads as follows: "I desire that all my property both real and personal, with the exception of the place received from my mother (the Roebuck place in Hart county, Georgia), go to my husband, Charles W. Seidell, and my two sons, Stafford and Atherton Seidell; but No. 32 Carnegie place not to be sold if possible during the lifetime of my husband, except by the united consent of my executors hereinafter named, and then only when in their judgment such sale shall be necessary, the rents thereof to be applied to paying off the mortgage now held by Francisco & Co., paying for vault if necessary, paying the insurance premiums as they fall due on the life of my husband, with the exception of premium in Equitable Company of N. Y., and the support of my husband during his lifetime, at his death the rents to be equally divided between my children Stafford and Atherton Seidell. If my children Stafford and Atherton should die without children, then the part going to them be theirs only during their lifetime, but at their death go to my sister Zedora F. Norman her lifetime, and at her death be equally divided between her children. Provided, however, should the property 32 Carnegie place and the Fuller place have been sold and Stafford and Atherton re-

ceive their one-half each in cash and in trust (as hereafter named), in that case it is to remain absolutely theirs, and does not revert as before mentioned to my sister Zedora F. Norman and her heirs." The court construed this item of the will to mean that the estate devised in 32 Carnegie place was an estate for life to the husband of the testatrix, subject to certain charges, and that "after his death the property vested in the two sons named, subject to be divested if they should both die without children; then remainder over to the testatrix's sister during her lifetime, and at her death to be equally divided between the children of the latter;" and further that the provision in the will as to the proceeds of the property above referred to in case it should be sold, under which provision it would become the absolute property of the sons, could only be effective in the event of a sale, before the death of the sons, under a proper order of the court, for the purpose of paying some lawful charge which might arise and be within the contemplation of the will, and not in conflict therewith; and further that the executor is not entitled to an order or decree authorizing him to sell the property for the purpose only of division or distribution between the two brothers. *Held*, that this was a proper construction of that item of the will; the intention of the testatrix as deducible from all the provisions of the will being considered.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by Atherton Seidell, executor, and others, against Stafford Seidell. Judgment construing a will, and Stafford Seidell brings error. Affirmed.

Anderson, Rountree & Crenshaw, of Atlanta, for plaintiff in error.

Moore & Pomeroy, W. W. Hood, and Hewlett & Dennis, all of Atlanta, for defendants in error.

PER CURIAM. Atherton Seidell as the surviving executor of the last will and testament of his mother, Mrs. Emma A. Seidell, filed his equitable petition, praying that the will be construed as to certain parts thereof set forth in the petition and that he be directed as to the proper administration of the estate. Among the provisions of the will set forth in the petition, and of which the executor desired the court's construction, was that contained in item 2, which reads as follows:

"I desire that all my property both real and personal, with the exception of the place received from my mother (the Roebuck place in Hart county, Georgia), go to my husband, Charles W. Seidell, and my two sons, Stafford and Atherton Seidell; but No. 32 Carnegie place not to be sold if possible during the lifetime of my husband, except by the united consent of my executors hereinafter named, and then only when in their judgment such sale shall be necessary, the rents thereof to be applied to paying off the mortgage now held by Francisco & Co., paying for vault if necessary,

paying for the insurance premiums as they fall due on the life of my husband, with the exception of premium in Equitable Company of N. Y., and the support of my husband during his lifetime, at his death the rents to be equally divided between my children Stafford and Atherton Seidell. If my children Stafford and Atherton should die without children, then the part going to them be theirs only during their lifetime, but at their death go to my sister Zedora F. Norman her lifetime, and at her death be equally divided between her children. Provided, however, should the property 32 Carnegie place and the Fuller place have been sold and Stafford and Atherton receive their one-half each in cash and in trust (as hereafter named), in that case it is to remain absolutely theirs, and does not revert as before mentioned to my sister Zedora F. Norman and her heirs."

The language of item 4 is as follows:

"The Fuller Place in Hart county, Georgia, containing — acres, to be sold whenever in the judgment of my executors it be deemed advisable to do so, and the proceeds towards paying the balance of vault in cemetery if necessary—other debts that may arise; the balance, or all of it if no debts, to be divided between my husband and Stafford Seidell (in trust as hereafter named) and Atherton Seidell, my children."

The court construed these items and other portions of the will; but the assignments of error contained in the bill of exceptions, which was sued out by the petitioner, relate only to that part of the decree construing item 2 of the will.

Under the court's construction of item 2 of the will under consideration, an estate for life in the property designated and referred to as 32 Carnegie place was devised to the husband of the testatrix, Charles W. Seidell, subject to certain charges which the court held not to be subject-matter of inquiry in this suit, and after his death the property was vested in two named sons, Stafford and Atherton Seidell, subject to be divested if they should die without children with remainder over to the sister of the testatrix, Mrs. Norman, during her lifetime, and at her death to be equally divided between the latter's children. In this connection the court construed the provision that "should the property 32 Carnegie place and the Fuller place have been sold and Stafford and Atherton receive their one-half each in cash and in trust (as hereafter named) in that case it is to remain absolutely theirs, and does not revert as before mentioned to my sister Zedora F. Norman and her heirs," and held that the same would be effective only in the event a sale of the property be made before the death of Stafford and Atherton Seidell, under proper order of the court, for the purpose of paying some lawful charge which might hereafter arise and be within the contemplation of the will or authorized by law, and not in conflict with the will;

and the court held further that the executor is not entitled to an order or decree authorizing him to sell the property for the sole purpose of division or distribution between himself and his brother Stafford.

We are of the opinion that the construction given to item 2 of the will by the court is more nearly in consonance with the intention of the testatrix, deducible from a consideration of all of the provisions of the will, than the constructions insisted upon in the briefs and arguments submitted by the counsel for plaintiff in error and by counsel for a third person having an interest in the estate of Charles W. Seidell, and gives effect to the intention of the testatrix as nearly as that intention can be ascertained from the language employed by the testatrix in expressing her wishes and intention as to the disposition of her property. If we consider merely the language expressing the desire and intention that the property "go to my husband, Charles W. Seidell, and my two sons, Stafford and Atherton Seidell," we would unhesitatingly reach the conclusion that a fee-simple estate had been devised to the three named persons. But the language indicating this desire and intention does not stand by itself. It is not even in a sentence complete in itself. In immediate connection with the language employed in this first part of the sentence are the provisions that No. 32 Carnegie place should not be sold, if possible, during the lifetime of the husband, except by the united consent of her executors, and then only when in their judgment "such sale shall be necessary"; and this is followed by the provision that the rents thereof (that is, 32 Carnegie place) should be applied to paying off the mortgage on it, and "paying for vault if necessary, paying the insurance premiums as they fall due on the life of my husband, with the exception of premium in Equitable Company of N. Y., and the support of my husband during his lifetime, at his death the rents to be equally divided between my children Stafford and Atherton Seidell." When the complete sentence is considered, it would seem that the testatrix intended that the rents of 32 Carnegie place should be applied for the purposes just recited, and it was in her mind that these rents might be sufficient for all purposes there stated. But the possibility was also contemplated that to meet these charges it might be necessary to sell the lot on Carnegie place because of the inadequacy of the rents to meet the charges contemplated as possible; that it might be necessary to make a substantial encroachment upon the corpus of this property, and then, if the

rents were insufficient to meet the charges, and encroachments upon the corpus were necessary, thereby diminishing its productivity, the proceeds of the sale should become the absolute property of the two sons, without limitation. It was not the intent nor the desire of the testatrix that the property should be sold in the lifetime of her husband, unless absolutely necessary to meet charges which she intended should be met by the rents, the possible insufficiency of which she foresaw, and therefore made in that case provision for encroachment upon the corpus, and then the further provision that, if the property should be sold, the proceeds should become the property absolutely of the two sons. Clearly the testatrix thought it probable that the rents would be sufficient to pay all charges not met by the proceeds of the sale of another piece of property, the "Fuller place," disposed of in item 4 of the will.

It must be admitted that the construction of this will is attended with great difficulties, but that given it by the trial judge seems to be most reasonable; and it is the only construction that is reconcilable with the evident intention that, if her sons should die without children," then the part going to them be theirs only during their lifetime, but at their death to go to my sister." If the two sons, the surviving executor consenting thereto, could have the property sold merely for distribution, independently of any necessity of selling it to meet the charges, then the provision that after their death, in case they died childless, the property should go to the sister of the testatrix, made the devise to the sister of the remainder interest dependent merely upon the generosity of the two sons in refraining from bringing the place to sale; and we do not think that it was the intention of the testatrix to make the rights of her sister and the latter's children dependent upon any such contingency, but it was her intention that the rights of the sister and the sister's children should be contingent upon the sufficiency of the rents of the place to pay the charges in case the proceeds of the sale of the Fuller place were not sufficient, and the consequent necessity of a sale of the property at 32 Carnegie place.

It follows from what we have said, showing our concurrence in the views of the court below as to the proper construction of item 2 of the will, that the judgment should be affirmed.

Judgment affirmed.

All the Justices concur.

(151 Ga. 213)

UPSON v. SMITH, County Treasurer.
(No. 1971.)

(Supreme Court of Georgia. March 3, 1921.)

*(Syllabus by the Court.)***Mandamus** \Rightarrow 109—Solicitor of city court held not entitled to mandamus to require payment of insolvent costs.

In view of Pen. Code 1910, § 1123, and the provisions of the act creating the city court of Athens (Acts 1878-79, p. 291; Acts 1894, p. 212) and of the amendments thereto (Acts 1911, p. 235), relating to the fines and forfeitures arising in that court, which are required to be paid into the treasury of Clarke county, a former solicitor of that court, with orders granted by the judge for insolvent costs, is not entitled by mandamus to require the treasurer to pay such orders, or any part thereof, although there may be in the treasury, as part of the general fund of the county, money arising from fines and forfeitures in the city court.

Error from Superior Court, Clarke County: A. J. Cobb, Judge.

Mandamus proceeding by S. C. Upson against E. I. Smith, Treasurer of Clarke County. Judgment dismissing the petition, and plaintiff brings error. Affirmed.

This is a proceeding for mandamus, brought on February 21, 1920, by Stephen C. Upson against the treasurer of Clarke county, E. I. Smith. The substance of the petition, as far as necessary to be stated, is to the following effect:

Petitioner was solicitor of the city court of Athens for three consecutive terms, from September 12, 1907, to September 11, 1919. During his first term, from September 12, 1907, to August 19, 1911, the date of the act placing the solicitor upon a salary, instead of fees, the judge of the court duly allowed orders for the petitioner's insolvent costs as solicitor, amounting to \$2,586.01, which were duly entered upon the minutes of the court. Petitioner, on August 29, 1911, was the owner as transferee of all the insolvent cost orders allowed former solicitors, and former clerks and sheriffs, of the aggregate amount of \$5,159.03. Between September, 1911, and September, 1919, the clerk of the court collected the sum of \$4,452.99, as fines and forfeitures in criminal cases disposed of in the court, which he paid to E. I. Smith, who has since and prior to January 1, 1911, been treasurer of Clarke county, which sums represented the share of the solicitor of the city court of such fines and forfeitures, and the dates on which the various items constituting this sum were paid to the treasurer are stated. On February 21, 1920, petitioner made a written demand upon the defendant, as treasurer, for the payment of all the aforementioned insolvent cost orders out of said fund paid by the clerk to defendant from fines and

forfeitures as stated, which demand was refused by the defendant.

The petition was demurred to on the ground that it set forth no cause of action, and that it appeared therefrom that the plaintiff's orders or judgments were barred under the dormant judgment act. The petition was dismissed under a general order sustaining the demurrers, and he excepted.

Wolver M. Smith and Horace M. Holden, both of Athens, for plaintiff in error.

Tate Wright and Lamar C. Rucker, both of Athens, for defendant in error.

FISH, C. J. (after stating the facts as above). The act of 1879 (Acts 1878-79, p. 291), establishing the city court of Clarke county (name changed by the act of 1894 [Acts 1894, p. 212] to the city court of Athens), provided (section 36) that all moneys arising from fines and forfeitures in the court should be subject to the payment of the fees of its officers, that for their insolvent costs they should have a lien upon the fines and forfeitures raised in the court, and that those in office at the time any money should be brought in, subject to insolvent costs, should be paid therefrom all their insolvent costs, before any predecessor in their respective offices should have a claim on such money for insolvent costs. In section 37 the act declared that, should any balance remain of the fines and forfeitures raised in the city court, after full payment in accordance with the priority stated, of all solvent costs due the officers of the city court and those of the superior court upon the cases transmitted from that court to the city court, such balance should be paid into the treasury of Clarke county.

On August 19, 1911, an act was passed (Acts 1911, p. 235), the purpose of which, among other things, was:

"To provide for the payment of a salary to the solicitor of said [city] court in lieu of the fees now received by him; to provide that all the fees now allowed * * * to the solicitor of said court should be collected and paid into the treasury of Clarke county; to provide that Clarke county should take the place of the solicitor of said court in all future insolvent costs and shall share as such in all fines, forfeitures, and for other purposes."

The fourth section of that act declared:

"That after paying the insolvent costs of the solicitor of said court due at the time of the passage of this act the share of all moneys arising from jury fines, fines imposed for violation of penal laws, and other fines, and collected from forfeited recognizances in said city court, which under the provisions of section 37 of said act approved September 9, 1879, are subject to the payment of the fees of the solicitor of said court shall be paid into the treasury of Clarke county."

As will be seen, all moneys arising from fines and forfeitures in the city court of Athens, required by the acts of 1879 and 1911 to be paid into the treasury of Clarke county, manifestly became, when so paid, a part of the general fund belonging to the county in its treasury, and not a special and separate fund, distinct from the county funds arising from other sources, of which the treasurer should keep a separate account, and to be paid out only on orders or warrants on the county treasury granted by the judge for insolvent costs. The provisions of Penal Code 1910, § 1118 et seq., as to the payment of fines and forfeitures arising in the superior courts into the county treasury, to be there kept as a special fund separate from all other moneys of the county, and subject to be paid out only upon orders and warrants of the judge allowed for insolvent costs, do not apply to fines and forfeitures arising in the city court of Athens. This is true because, as already stated, the acts of the Legislature creating that court make no such provision; and, moreover, Penal Code, § 1123, declares that—

"The foregoing sections [relating to the disposition of fines and forfeitures, etc.] do not apply to a city court; * * * nor do they affect any local law."

It follows that, notwithstanding the fact that the petitioner had orders for insolvent costs, granted to him by the judge of the city court, and was the owner as transferee of other orders of similar character to other officers of the court, he was not entitled to require the county treasurer by mandamus to pay such orders from the general county fund, although in part made up from fines and forfeitures arising in the city court. Entertaining this view, it is not necessary to discuss or rule upon any other point in the case. The court did not err in dismissing the petition on general demurrer.

Judgment affirmed.

All the Justices concur.

(151 Ga. 181)

GORDON v. RANSOM & LOMAX LUMBER CO. et al. (No. 2086.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by the Court.)

1. Adverse possession §85(2)—Good faith is question of fact, and party may testify as to ignorance of irregularities in tax sale.

The court did not err in permitting a witness for the defendants, Jasper S. Bleckley, to answer the question, "If there was any irregularity, did you know anything about any irregularity in the conduct before the sale, or afterwards?" the answer being, "No, sir; I had good faith it was being sold legally and all right;" the witness having reference to the

sale of the land in controversy by the sheriff at a tax sale. Good faith here was a question of fact and material in this as to one defense—that is, title by prescription—made by the defendants to the suit.

2. Evidence §83(4), 341—Copy of wild land digest certified by clerk of court of ordinary held admissible, though not showing who made list.

Nor did the court err in admitting in evidence a certified copy of an extract from the wild land digest of Rabun county for the year 1883, in which was listed, among other lots, the lot of land sued for, over the objection that "the certified copy does not show that either the tax collector or the tax receiver signed it, or that any officer charged with issuing executions or collecting taxes or receiving tax returns made the list and put it on the wild land digest, or on any digest required by law, no name appearing about the entries and nothing to indicate the law was complied with in regard to such cases." The presumption is, in the absence of evidence to the contrary, that the digest had been properly made and kept, and the certified copy was made by the clerk of the court of ordinary, where the digest was deposited in accordance with the law.

3. Evidence §178(5)—Sheriff's deed admissible on proof of loss of tax f. fa.

Upon proof of the loss of a tax f. fa. recited in a sheriff's deed, the deed itself containing the usual recitals of seizure and sale under the f. fa., the court did not err in admitting the sheriff's deed in evidence as muniment of title.

4. Taxation §772—Failure of tax deed to show month of execution held clerical mistake.

The recital in the deed that it was made "on the sixth day of the year 1884," is evidently a mere clerical mistake or failure on the part of the scrivener to insert the word "May" after the word "day," as the sale took place on the first Tuesday in May, 1884.

(Additional Syllabus by Editorial Staff.)

5. Names §19—That witness did not give collector's initial as in tax deed held not to raise question for jury.

Where the execution under which a tax sale was made was lost and its contents were proved by witnesses, the fact that one of the witnesses did not state the tax collector's middle initial as given in the deed did not make a material conflict requiring the question to be submitted to the jury.

Atkinson, J., dissenting in part.

Error from Superior Court, Rabun County; J. B. Jones, Judge.

Ejectment by H. H. Gordon, Jr., administrator, against the Ransom & Lomax Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Gordon, administrator, brought ejectment against Ransom & Lomax Lumber Company and L. S. Bleckley, to recover a tract of

land described as lot of land No. 36 in the Third land district of Rabun county. At the conclusion of the evidence the court directed a verdict in favor of the defendants. The plaintiff made a motion for a new trial, which was overruled, and he excepted.

Thad L. Bynum, of Clayton, for plaintiff in error.

A. M. Tillman, of Nashville, Tenn., J. M. Bleckley, of Cochran, and Hall, Grice & Bloch, of Macon, for defendant in error.

BECK, P. J. [1, 2, 4] 1, 2, 4. The rulings in headnotes 1, 2, and 4 require no elaboration.

[3] 3. The defendants in this case, after showing that the property was listed as unreturned wild land, introduced proof of the issuance and existence of the tax *fi. fa.* recited in the deed from the sheriff to the defendants' predecessors in title. The sheriff's deed introduced was as follows:

"Georgia, Rabun County. Whereas lot of land No. 36 in the Third land district of said county, being wild and unimproved land subject to taxation, and not having been returned for taxation nor the tax thereon paid for the year 1883, L. L. Page, tax collector of said county, did lawfully issue execution against said lot of wild land for state and county taxes due and payable thereon for said year, and Andrew B. Wall, sheriff of said county, did by virtue of said execution lawfully seize and levy upon said lot, and, after duly advertising the same for sale, did on the first Tuesday in May, the sixth day of the year 1884, lawfully expose the same for sale, in the manner of conducting tax sales, at public outcry before the courthouse door, within the legal hours of sale, when Jasper S. Bleckley of said county, being the highest and best bidder, the same was knocked off to him at the price of thirty dollars, in hand paid: Now, therefore, the said Andrew B. Wall, sheriff as aforesaid, hereby conveys, according to law, the said lot of land to him, the said Jasper S. Bleckley, to have and to hold the same as fully and completely as the law authorizes. In witness whereof the said sheriff has hereunto set his hand and affixed his seal. This ninth day of May, 1884."

The deed showed proper execution by Andrew B. Wall, sheriff of Rabun county; and the certified copy showed by entry on the back that the deed was recorded on December 31, 1888.

[5] The failure to produce the execution itself in connection with the deed was explained by the testimony of witnesses who testified positively that they had seen the

execution, had read it; and who gave the substance of its contents, which were in accordance with the recitals in the deed. It is true that one of the witnesses gave the initial of the tax collector as L. B. Page instead of L. L. Page; but this did not make such a conflict in the testimony as required the question to be submitted to the jury. Other witnesses gave the correct name of the tax collector and the testimony of one witness who was mistaken as to the middle initial merely, in the name of the tax collector made no material conflict. When the deed was introduced in evidence and proof of the execution under which the sale took place was made by uncontroverted testimony, the deed accompanied by the execution was not merely color of title, but was muniment of title. A sheriff's deed must be accompanied by the execution under which the land was sold, or the judgment upon which it issued. *Watson v. Tindal*, 24 Ga. 494, 71 Am. Dec. 142. And in the case of *Ellis v. Smith*, 10 Ga. 253, it was held that—

"The recitals in a deed of the *fi. fa.* and seizure and sale of the property under them is *prima facie* proof at least of the facts contained in the deed."

Further elaboration of the principle ruled here is unnecessary in view of the discussion in the case of *Sweeney v. Sweeney*, 119 Ga. 76, 46 S. E. 76, 100 Am. St. Rep. 159.

As to the sufficiency of the advertisement introduced in evidence, see the case of *Saunders v. Register*, 149 Ga. 286, 99 S. E. 857, where it was said:

"Where wild lands unreturned for taxation are sold under a valid tax *fi. fa.*, a defect in the advertisement of the sale of the property levied upon is a mere irregularity and does not affect the validity of the sheriff's sale made to an innocent purchaser."

As to the sufficiency of the tax execution, see *Vickers v. Hawkins*, 128 Ga. 794, 58 S. E. 44.

Upon the introduction of the deed in evidence and proof of the prior existence and of the loss of the *fi. fa.*, title to the property in dispute was shown by uncontroverted testimony to be in the defendants; and the court did not err in directing a verdict accordingly.

Judgment affirmed.

All the Justices concur, except ATKINSON, J., who dissents from the ruling in the third division of the opinion.

(151 Ga. 145)

MAYOR AND ALDERMEN OF CITY OF SAVANNAH v. STANDARD FUEL SUPPLY CO. (No. 1903.)

(Supreme Court of Georgia. Feb. 18, 1921.)

*(Syllabus by the Court.)***1. Fixtures §15—Permanent pavement not removable by tenant as trade fixture.**

Where a tenant of a tract or strip of land during a term of years laid down blocks of stone, so as to compose or make a pavement rendering access to the premises by vehicles conveying loads more easy and convenient, the pavement was not removable as a trade fixture.

2. Vendor and purchaser §232(9)—Tenant's possession not notice of right under oral agreement to remove permanent pavement.

Even though occupancy by a tenant holding under a lease for a term of years is notice to one purchasing from the landlord the leased premises, it is not notice of the right on the part of the tenant to remove permanent fixtures placed upon the premises by the tenant before the sale by the landlord; there being no reference in the written lease, afterwards assigned to the purchaser, of the agreement between the landlord and the tenant, giving the latter the right to remove the fixtures.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by the Mayor and Aldermen of the City of Savannah against the Standard Fuel Supply Company. Judgment refusing an interlocutory injunction, and plaintiff brings error. Reversed.

The mayor and aldermen of the city of Savannah filed its petition against Standard Fuel Supply Company, wherein it is alleged that the municipality is the owner in fee of a certain described tract or lot of land; and that the defendant, tenant in possession, is threatening and proposing to remove from said property certain pavement belonging to the plaintiff, consisting of paving blocks described, covering a strip of land 304 by 25 feet, to the injury and damage of petitioner in an amount equal to the value of the paving stone, some \$2,000. The petitioner prayed for injunction to prevent the defendant from removing or interfering with the pavement. The defendant admitted that it was in possession as tenant under a lease from the predecessor in title of petitioner, the grantor in the deed under which the city held title; and that that lease was executed in 1909. It claimed that the pavement was a trade fixture, and that it had the right to remove the same; that the area over which the stones were laid for the pavement was the necessary approach to the wharf on which it unloaded and stored sand, and that it was necessary for its purpose that it should be able to run its teams over the hard surface rather than on the ground, and that

for this reason the stone blocks were laid as a pavement; that the pavement was put down in the year 1914, and upon express agreement between the defendant and its landlord, the predecessor in title of the petitioner, the defendant could, at the expiration of the lease, remove the pavement. At the hearing evidence was submitted by both plaintiff and defendant.

The court rendered its judgment refusing the interlocutory injunction, and the plaintiff excepted.

Shelby Myrick and Edwin A. Cohen, both of Savannah, for plaintiff in error.

Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

BECK, P. J. (after stating the facts as above). [1] Under the pleadings and the facts in the record, the city was entitled to an injunction restraining the defendant from removing the pavement or paving blocks. The written lease under which the defendant held the premises in dispute expired January 1, 1919. There was an agreement between the agent of the owners of the property at that time and the tenant, that the latter should continue in possession for another year. On August 13, 1919, the owners of the property sold it to the city and executed a deed of conveyance. During the existence of the original lease and in the year 1914 the tenant had laid down the pavement in question under an express agreement with the landlord that when the lease expired the tenant should have the right to remove the blocks constituting the pavement; and the defendant now insists that both on the ground that such a pavement, under the facts stated, was a trade fixture, and under the terms of the express agreement as to the removal of the pavement, it should have the right to remove the same. The pavement which the defendant proposes to remove cannot be regarded as a trade fixture; and it is unnecessary to enter here upon a discussion of trade fixtures, or attempt a definition of the same, for the purpose of showing that the pavement falls in none of the recognized definitions. Questions similar to this have been discussed in several Georgia cases. See *Wright v. Du Bignon*, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 869, and the cases there cited; *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 484, 10 L. R. A. (N. S.) 452, 11 Ann. Cas. 75. Under the provisions of the Civil Code, § 3621, it is declared that—

"Anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it."

Section 3695 of the Civil Code declares:

"The tenant cannot cut or destroy growing trees, remove permanent fixtures, or otherwise injure the property."

And in section 3617 it is declared that realty includes all lands and the buildings thereon, and all things permanently attached to either. Taking into consideration these sections and the discussions in the above cases and authorities there cited, it is clear that a fixture permanently attached to the land, such as a pavement, is not removable under the right to remove trade fixtures.

[2] Nor could the tenant in this case remove the pavement because of an express agreement with the owners of the property from whom the tenant leased it, after the sale of the property to the city, without showing that the city had notice before or at the time of the purchase of the claim of right on the part of the tenant to remove the pavement. The agreement between the owner of the property and the tenant, the defendant, was not included in the written lease which was assigned to the city, but was entered into after the execution of the lease, through a correspondence between the tenant and the agents of the owner; the city had no knowledge of the agreement contained in this correspondence before its purchase of the property. It is urged by defendant in error, however, that possession by the tenant of the premises and knowledge on the part of the city of the possession of the tenant was notice of the rights of the tenant under the agreement with the owner to remove the pavement, and in support of this contention reference is made to section 4528 of the Civil Code, which reads as follows:

"Possession of land is notice of whatever right or title the occupant has. Possession by the husband with the wife is presumptively his possession, but it may be rebutted."

The case of *Garbutt v. Mayo*, 128 Ga. 269, 57 S. E. 495, 13 L. R. A. (N. S.) 58, construing this Code section, is also cited. In that case the court said:

"Possession of land is notice to the world of every right that the possessor has therein, legal or equitable."

And it is urged that there is no reason why the statute cited should not cover the case of a lessee; that he is the occupant of the premises and has a right in them. To most of this we agree, but not to the proposition that the statute quoted is applicable to the issue made in this case. Where a tenant is in possession under a lease for a term of years and the landlord conveys to a third party, the statute makes the tenant's possession of the land notice to the purchaser of the length and duration of the term of tenancy; but it does not follow that that possession is notice of the tenant's claim of right in regard to every separate appurtenance or incident to the property. The possession of land is notice of "whatever right or title the occupant has," to which should be added "in

the land." But it is not notice of exceptional rights claimed in particular parts of the land that differs from his general right. Suppose, for instance, that a tenant for a term of years should enter into an agreement with his landlord, under the terms of which the tenant would set out in various parts of the land rented a large number of trees, consisting of shade trees, and fruit trees, and under the terms of this agreement the tenant should have the right at the expiration of the lease, upon his removal from the premises, to take and remove all of the shade trees on a designated part of the land, and one-third of the fruit trees. This would be an agreement enforceable as against the landlord; and, though these became a part of the realty, the landlord could not prevent the removal of them. But could it be insisted that if the landlord sold the property to a third person during the continuance of the lease, the tenant, as against the third person, would have the right to remove those trees, although the purchaser had no notice of this exceptional privilege which was reserved? If so, a purchaser of land in possession of a tenant would be compelled to make inquiries of varied and extensive scope, or otherwise be concluded as to an agreement between the tenant and the landlord concerning the right of the tenant to remove fixtures. We do not think that mere knowledge upon the part of the city of the occupancy of the premises in controversy by the defendant under a lease put the city upon notice of the agreement between the landlord and the tenant as to the removal of permanent fixtures.

It follows from what we have said that the court should have granted the interlocutory injunction.

Judgment reversed.

All the Justices concur.

(151 Ga. 128)

NATIONAL SURETY CO. v. CITY OF ATLANTA. (No. 1946.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by the Court.)

1. Contracts \S 10(4)—Contract for delivery in installments lacks mutuality, when authorizing buyer to terminate.

Where, in response to an advertisement by a municipality for bids for the furnishing and delivery of coal for a period of 12 months, a bid is made to furnish a specified number of tons, and a contract is afterwards entered into for the delivery of so many tons per month at a given price and at a stated place, but it is expressly stipulated in the contract that the purchaser shall be at liberty at any time by a written notice to order a suspension of deliveries of the coal and to refuse to accept further deliveries, the element of mutuality is wanting in the contract.

2. Contracts ¶10(4)—Contract lacking mutuality not rendered binding by orders for part of quantity of coal sold.

Orders subsequently given by the purchaser for deliveries of a portion of the quantity included in the bid will not render the contract binding upon the bidder, even for the delivery of the portion thus ordered. This is not an acceptance of the bid as made.

3. Principal and surety ¶7—Bond to secure performance of invalid contract not enforceable.

There being no contract binding upon the principal, the bond for performance was not enforceable against the surety.

Certiorari from Court of Appeals.

Action by the City of Atlanta against the National Surety Company. A judgment overruling a demurrer was affirmed by the Court of Appeals (24 Ga. App. 732, 102 S. E. 175), and defendant brings certiorari. Reversed.

The city of Atlanta brought suit against the National Surety Company, alleging a breach, on the part of the defendant as guarantor, of a bond guaranteeing to the plaintiff the performance of certain obligations assumed by the Tennessee & Southeastern Coal Company under an alleged contract between the coal company and the city of Atlanta, whereby the coal company promised to furnish and deliver to the city coal in certain carload quantities at certain intervals during a period of 12 months. The alleged contract provided that the coal company would furnish the coal upon orders of a designated officer of the city, and contained a provision for the suspension of deliveries of the coal under the contract upon written notice from the city. The petition set out the bond and the alleged contract between the coal company and the city, which was executed by both parties, and alleged a failure upon the part of the coal company to carry out its promises and undertakings therein contained, and that by reason of such failure the defendant breached the bond sued on, to the damage of the plaintiff. The petition contained two counts. The first count alleged the existence of a contract between the coal company and the city, by the terms of which the coal company was obligated to furnish coal to the city as above stated, and alleged a breach of the same by reason of the failure on the part of the coal company to perform, to the damage of the city, thereby constituting a breach of the bond. The second count alleged written communication from the city to the coal company from time to time throughout the year, ordering coal in small quantities, in accordance with the promises and obligations of the coal company as contained in the alleged contract, and the refusal and failure on the part of the coal company to furnish coal in compliance with such or-

ders, to the damage of the city, thereby constituting a breach of the bond. The defendant demurred to the petition, upon the grounds that the alleged contract attached thereto was void for want of consideration; that it was lacking in mutuality, and fixed no binding obligation upon the city, and, there being no contract to be performed, there appeared no breach of the bond, which had been given to secure the performance of a contract which did not exist; and that the petition failed generally to set out a cause of action. The demurrer was overruled by the trial court, and this ruling was affirmed by the Court of Appeals (24 Ga. App. 732, 102 S. E. 175). The case was then brought by writ of certiorari to this court.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

J. L. Mayson and J. M. Wood, both of Atlanta, for defendant in error.

BECK, P. J. (after stating the facts as above). The statement of facts appearing above is substantially that made by the Court of Appeals in its official report. The demurrer setting forth the contention that the contract was unilateral, and fixed no binding obligation upon the city, and was therefore lacking in mutuality, raised the question upon the determination of which depended the right of the plaintiff to a verdict in the case.

[1] We agree with the Court of Appeals that the contract in the case was unilateral. The insertion in the contract of the stipulation contained in the ninth paragraph of the contract destroyed any quality of mutuality which might have existed in the contract had that paragraph been omitted. That paragraph reads in part as follows:

"It is further agreed that the deliveries are to be made at the rate of five (5) cars per week to each station, or in quantities more or less as may be ordered by the general manager of the department of waterworks of the city of Atlanta. All coal must be delivered in hopper bottom cars. After verbal or written notice has been given to deliver coal under this contract, a further notice may be served in writing upon the contractor to make delivery of the coal so ordered within twenty-four (24) hours after receipt of said second notice. Should the contractor, for any reason, fail to comply with the second notice, the city will be at liberty to buy coal in the open market and to charge against the contractor any excess in price of coal so purchased, over the adjusted price. After a verbal or written notice to suspend deliveries under this contract, a further notice may be served in writing to suspend deliveries of coal, and the city will be at liberty to refuse to accept any coal delivered after forty-eight (48) hours from date of such written notice."

If, independently of the part of the contract quoted, the city agreed to take the coal

which the contractor by its bid offered to supply in response to the city's advertisement for bids, that portion of the contract just quoted left it entirely optional with the city to take or refuse to take the coal. A contract for the purchase of goods to be delivered in lots throughout a period of 12 months, which gives the purchaser the right at any time to serve notice upon the party contracting to deliver the goods to suspend deliveries, and stipulates that upon giving this notice to suspend deliveries the purchaser will be "at liberty to refuse to accept" any further deliveries after 48 hours from the date of such written notice, is not a contract binding upon the purchaser. If the purchaser can at pleasure cancel an agreement to purchase, he has incurred no obligation; and to render a contract mutual, the obligation must be upon both parties.

[2] Thus far we agree with the Court of Appeals. But we cannot agree that where subsequently the city from time to time ordered the delivery of the coal which the contractor offered to supply at the stipulated rates, it thereby converted the contract into an obligation binding upon both parties. If before the offer to deliver the coal was withdrawn the city had closed with the offer of the contractor, accepting its proposal for the supply of coal, the mutuality in the contract, lacking as it stood, might have been supplied. But the mere ordering or the delivery of a part of the coal from time to time was not an acceptance of the bid of the contractor. This case differs in material particulars from the case of *Buick Motor Co. v. Thompson*, 138 Ga. 282, 75 S. E. 354. The contract relied on in that case, headed "Memorandum," was in the form of a letter from the motor company to a retail dealer, who afterwards sued the company for a breach of the contract, and was in the following language:

"D. V. Thompson, Pelham, Ga. Until further advised, but not later than July 31, 1909, provided the handling of your business is not in conflict with policy of our company, the Buick Motor Company will, the conditions permitting, supply you with goods of its manufacture, herein described by letter and number (and more particularly described in its 1909 catalogue), at the following prices and terms."

Then followed an itemized list of the cars, their model, price, and the quantity. It was said in that case:

"It was urged that the contract was unilateral, and that it did not bind the plaintiff to buy,

and accordingly did not bind the defendant to sell. Where mutual promises are relied on as the consideration to support a contract, the obligations of the contract must be mutually binding upon the respective parties. *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998. This does not exclude the fact that one may, for a valuable consideration other than such mutual promises, bind himself by an option or offer to sell on certain terms during a specified time. In such a case he is bound to keep the offer open during the specified time, for the other party to accept or decline to buy. If acceptance is made within the time prescribed, the transaction then ceases to be a mere option or offer, and becomes a contract to sell and buy."

And in conclusion it was held that the demurrer of the defendant in the case was properly overruled. If in the present case the contractor had, in response to an advertisement calling for bids of such a character, offered to supply the city with coal of a certain character at a specified price per ton, or had offered to furnish, say, 10 tons per month, at a specified price per ton, and before the offer was withdrawn the city had ordered monthly so many tons, the acceptance of this offer would have made a binding contract upon the coal company, and it would have been bound to deliver. But in this case, where there was an offer to furnish 12 months' supply, some 18,000 tons, at a price stated, a specified number of tons to be delivered monthly, with the right reserved in the contract by the city to stop deliveries at any time, the subsequent orders for installment deliveries of coal did not impose an obligation on the bidder to deliver the installments thus ordered. The ruling in the case of *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664, is based upon facts essentially different from the present case.

[3] We have therefore reached the conclusion that because of lack of mutuality in the contract it was not binding upon the coal company. And it then necessarily follows that as there is no valid contract binding upon the principal, the surety upon the bond given by the principal for the compliance with the contract would not be liable.

A decision of the constitutional question raised in the application for certiorari is unnecessary, in view of the foregoing, and, moreover, it was not made in the trial court.

Judgment reversed.

All the Justices concur.

(151 Ga. 208)

REYNOLDS v. REYNOLDS. (No. 1907.)

(Supreme Court of Georgia. Feb. 21, 1921.)

(Syllabus by the Court.)

1. New trial \S 21—Remark of court, in denying nonsuit, as to necessity of strengthening case, held not to require new trial.

The court announced, in response to a motion for nonsuit, that he would overrule the motion, but added, continuing his remarks to counsel, that the testimony for plaintiff would have to be strengthened, or he would reconsider his denial of the nonsuit later in the case. Other evidence was introduced to strengthen the plaintiff's case, and the motion for the grant of a nonsuit was not sustained. Held that, though the jury were present in the courtroom at the time the remarks were made, a new trial will not be granted, as the court was addressing himself, not to the jury, but to counsel, in regard to the motion for a nonsuit.

2. New trial \S 53—That jury had been in courtroom during other similar cases held not ground, when no objection made.

The fact that the jury trying this case remained in the courtroom while other divorce cases were being tried, and that this was known to counsel at the time, will not be a valid ground of a motion for a new trial; no objection having been made to proceeding with the trial.

3. New trial \S 140(3)—Motion on ground that jurors read newspaper article must be supported by proof; affidavit held insufficient as showing affiant's knowledge was hearsay.

The ground of the motion for a new trial alleging that two named jurors read an article in a daily newspaper published in the city where the trial was had, commenting upon the trial and ridiculing the ground of the divorce in the plaintiff's petition, cannot avail the plaintiff here, in the absence of proof that the article referred to was actually read by one or both of the jurors named. The statement in the affidavit of counsel that he learned of the alleged fact after the verdict is not sufficient, and indicates that counsel had merely hearsay evidence of the fact upon which this ground of the motion for new trial is based.

4. Divorce \S 184(12)—Judgment not reversed for inaccurate instruction, which was not hurtful.

The charge of the court as to the necessity of corroborating evidence or circumstances to authorize the finding by the jury in favor of plaintiff on the ground of adultery, where confession of the defendant is relied on to establish the alleged act of adultery, while containing an inaccurate statement of the law, was not hurtful to the plaintiff.

5. Divorce \S 148—Instruction as to corroboration of confession held not to exclude letters from consideration.

Instructions to the jury to the effect that, unless the evidence of confession was corroborated, the jury could not find in favor of the plaintiff upon the charge of adultery, did not

have the effect of excluding from the consideration of the jury certain letters introduced by the plaintiff, which were alleged to be a corroboration.

6. Verdict for plaintiff not required by evidence.

The evidence in the case did not authorize a verdict granting a divorce on the ground of cruel treatment, the evidence upon the charge of habitual intoxication was conflicting, and a verdict for the defendant on this ground was authorized.

Atkinson, J., dissenting.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by Mrs. G. B. Reynolds against E. B. Reynolds. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 104 S. E. 638.

H. P. Cobb, of Savannah, for plaintiff in error.

Simon N. Gazan, of Savannah, for defendant in error.

BECK, P. J. Mrs. Gertrude Reynolds brought a libel for divorce against her husband, Edgar Reynolds, on the three grounds of cruel treatment, habitual intoxication, and adultery. The husband denied the alleged acts of cruel treatment, habitual intoxication, and adultery. The jury returned a verdict refusing a divorce; and the plaintiff made a motion for a new trial, which was overruled.

[1, 2, 4-8] The rulings made in headnotes 1, 2, 4, 5, and 6 require no elaboration.

[3] The remaining ground of the motion for a new trial is based upon the alleged fact that one of the jurors, after having been impaneled, and after having heard a part of the evidence in the case, read an article in a daily newspaper published in the city where the trial took place, which contained comments upon the case on trial, and which, it is contended, ridiculed the plaintiff's grounds for divorce, intimating that the same were frivolous, etc. The alleged fact of the juror's having read this article is not proved by competent evidence. In reference to this ground, the plaintiff made an affidavit deposing that the knowledge of the occurrence came to her after the rendition of the verdict; but she does not state affirmatively that the juror did read the article. One of the counsel for plaintiff also made an affidavit deposing that—

"he learned subsequently to the rendition of the verdict that the juror had read the article in the Savannah Press of December 3d, which is attached to the amended motion, and that another juror had heard the same talked about; that he did not have the means or opportunity of learning these facts until after the rendition of the verdict."

This affidavit does not contain affirmative proof that the two jurors read the article or heard the same talked about, the source of the attorney's information is not given, and apparently he based his conclusion that the article had been read, as charged, upon purely hearsay evidence.

Judgment affirmed.

All the Justices concur, except

ATKINSON, J. (dissenting). In the case of *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Ann. Cas. 176, the judgment was reversed solely on the ground of newly discovered evidence as to misconduct of certain jurors in reading an article in a newspaper prejudicial to the accused, after they had been selected to serve in the case. The defense submitted an affidavit of a juror tending to show the alleged misconduct; but, as a juror cannot be heard to impeach his verdict (Civil Code, § 5933), the affidavit of the juror was considered of no value by this court, and it was held:

"Where a motion for new trial, predicated upon the improper conduct of certain of the jurors charged with the trial of the case, recites that 'the jurors, after they had been impaneled and before all the evidence had been submitted, read copies' of a certain 'newspaper containing a certain editorial,' which was 'calculated to mislead the jurors, prejudice their verdict,' etc., and there is no denial by the state, and the recitals of the motion are certified by the judge to be true, the motion and certificate will be construed to mean that the jurors actually read the editorial to which the objection related."

The decision thus rendered was decisive of the exact question involved in the ruling made in the third division of the opinion. The case was decided by all the Justices, and has never been reviewed and modified, and is controlling.

(151 Ga. 185)

NEW YORK LIFE INS. CO. v. PATTEN.*
(No. 2108.)

(Supreme Court of Georgia. Feb. 19, 1921.)

(Syllabus by the Court.)

Insurance §376(1)—Agreement in application held to prevent agent's knowledge of falsity of representation being imputable to insurer.

An applicant for a policy of life insurance, "in his written and signed application for the policy," made a false representation as to a matter material to the risk. The application contained the following: "I agree * * * that only the president, a vice president, a second vice president, a secretary or the treasurer of the company can make, modify, or discharge contracts or waive any of the company's rights or requirements, and that none of these acts can be done by the agent taking this application." The insurance agent who solicited and

delivered the policy knew, at the time of soliciting the writing and the delivery thereof, of this false representation made by the insured. Held that, in view of the express limitations upon the power of the soliciting agent who received the application and who made manual delivery of the policy, the knowledge of such agent is not imputable to the insurer.

Certified Question from Court of Appeals.

Action by E. E. Patten against the New York Life Insurance Company. Judgment for plaintiff, and defendant brought error to the Court of Appeals, which certified a question to the Supreme Court. Question answered in the negative.

Bryan & Middlebrooks, of Atlanta, and Franklin & Langdale, of Valdosta, for plaintiff in error.

E. K. Wilcox, of Valdosta, for defendant in error.

GEORGE, J. The question certified by the Court of Appeals is based upon the following state of facts:

"This was a suit upon a policy of life insurance issued by the New York Life Insurance Company. A verdict was returned in favor of the plaintiff, and a new trial was subsequently denied. The undisputed evidence showed the insured, in his written and signed application for the policy sued upon, made a false representation as to a matter material to the risk, to wit, that no application for insurance upon his life had ever been declined or was then pending. It also appears that in that application the insured stipulated as follows: 'I agree * * * that only the president, a vice president, a second vice president, a secretary, or the treasurer of the company can make, modify, or discharge contracts, or waive any of the company's rights or requirements, and that none of these acts can be done by the agent taking the application.' There was evidence showing that the defendant company's agent who solicited and delivered the policy knew, at the time of the solicitation, the writing and the delivery thereof, of this false representation made by the insured."

The question is whether, in view of the express limitations contained in the application upon the authority of the agent who received the application and who made the manual delivery of the policy, the knowledge of such agent is imputable to the insurer. The question excludes that class of cases where the application contains no express limitations upon the power of the agent. It also excludes that class of cases where the application contains express limitations upon the power of the agent, but where the applicant has no notice or knowledge of such limitations, or where the agent has himself inserted false statements without authority from the applicant and without his knowledge or assent. While much may be said to the contrary, and there are many cases in

other jurisdictions apparently to the contrary, nevertheless, in view of our own cases, the question propounded must be answered in the negative. In the recent case of *Reliance Life Insurance Co. v. Hightower*, 148 Ga. 843, 845, 98 S. E. 469, 470, this court ruled:

"An insurance company may limit the power of its agent; and when notice that the agent's power is limited is brought home to the insured in such manner as would put a prudent man on his guard, the insured relies at his peril on any act of the agent in excess of his power. The insured is bound by plain and unambiguous limitations upon the power of the agent contained in his policy."

In addition to the cases there cited see *Home Friendly Society v. Berry*, 94 Ga. 606, 21 S. E. 583. See, also, *Keasler v. Mutual Life Insurance Co. of New York*, 177 N. C. 394, 99 S. E. 97, a case dealing with a Georgia contract of life insurance; *Aetna Life Insurance Co. v. Moore*, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; *Prudential Life Insurance Co. v. Moore*, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. 367; *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202. Attention is again directed to the distinction between the powers of agents of fire and life companies. Generally the agent of a fire insurance company has power to fill up and issue the policies, and the acts and knowledge of such agent are the acts and knowledge of the company. There is therefore manifest propriety in holding that the knowledge of such agent is imputable to the company. This is true even though the policy undertakes to limit expressly the power of the agent. In other words, where the agent is charged by the company with the duty of acquiring knowledge for the company, or is clothed by the company with the actual or apparent authority to act for the company in the issuance of the policy, express limitations upon the power of such agent will not prevent the application of the general rule that knowledge of the agent as to matters within the general scope of his authority is the knowledge of the principal. *Johnson v. Aetna Insurance Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92. The applicant in the instant case expressly agreed that "the agent taking the application" could not "waive any of the company's rights or requirements." Manifestly, a life insurance company may define and limit the power of a mere soliciting agent; and one dealing with such agent cannot set up a waiver which he knew the agent had no power to make. The fact that such agent is intrusted with the policy merely for the purpose of making manual delivery thereof to the applicant does not alter the case.

All the Justices concur.

(26 Ga. App. 350)

NEW YORK LIFE INS. CO. v. PATTEN.
(No. 10946.)

(Court of Appeals of Georgia, Division No. 1.
March 2, 1921.)

(Syllabus by the Court.)

1. Knowledge of agent not imputable to insurer.

Where the written application, signed by the applicant, for a policy of life insurance contains a stipulation "that only the president, a vice president, a second vice president, a secretary or the treasurer of the company can make, modify, or discharge contracts or waive any of the company's rights or requirements, and that none of these acts can be done by the agent taking this application," and where the applicant makes in his application a false representation as to a matter material to the risk, to wit, that no application for insurance upon his life had ever been declined or was then pending, and where the agent who solicited and delivered the policy to the applicant knew of this false representation at the time of the soliciting and delivery thereof, the knowledge of the agent was not imputable to the company, and, the company itself having no such knowledge, the policy was void, and no recovery could be had thereon.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by E. E. Patten against the New York Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed in conformity to answer of Supreme Court to certified question (151 Ga. —, 106 S. E. 183).

Bryan & Middlebrooks, of Atlanta, and Franklin & Langdale, of Valdosta, for plaintiff in error.

E. K. Wilcox, of Valdosta, for defendant in error.

LUKE, J. This was a suit upon a policy of life insurance issued by the New York Life Insurance Company. A verdict was returned in favor of the plaintiff, and a new trial was subsequently denied. The undisputed evidence showed that the insured, in his written and signed application for the policy sued upon, made a false representation as to a matter material to the risk, to wit, that no application for insurance upon his life had ever been declined or was then pending. It also appears that in that application the insured stipulated as follows:

"I agree * * * that only the president, a vice president, a second vice president, a secretary, or the treasurer of the company can make, modify, or discharge contracts, or waive any of the company's rights or requirements, and that none of these acts can be done by the agent taking this application."

There was evidence showing that the defendant company's agent, who solicited and delivered the policy, knew, at the time of the solicitation, the writing, and the delivery thereof, of this false representation made by the insured. It is conceded by counsel for the insured that the plaintiff could not legally recover except for the last-stated fact. He insists, however, that as the soliciting agent knew of the false representation made by the insured in his application, the knowledge of the agent was the knowledge of the company, and it therefore waived its right to set up this false representation as a defense to the action.

This court certified to the Supreme Court the question whether, under the above-stated facts, the knowledge of the company's agent who solicited and delivered the policy was the knowledge of the company, and the answer of the Supreme Court is substantially set forth in the headnote to this case. See 151 Ga. —, 106 S. E. 183, rendered February 19, 1921.

It follows from what has been said that the verdict in favor of the plaintiff was contrary to law and the evidence, and that the court erred in overruling the motion for a new trial.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 374)

SOVEREIGN CAMP, W. O. W. v. RICKS.
(No. 11552.)

(Court of Appeals of Georgia, Division No. 2.
March 4, 1921.)

(Syllabus by Editorial Staff.)

Insurance §755(2)—Agent of fraternal society held not authorized to waive provision for increased premium during military or naval service.

Where the Constitution and laws of a fraternal benefit society, made a part of a certificate by the application, provided that no officer, employee, or agent could waive any conditions or provisions, and a certificate required the holder when entering the military or naval service to notify the home office and pay an additional premium, in default of which it provided for a reduction of the insurance, a statement by an agent to the applicant that the society had waived payment of such additional premium was not a waiver of the conditions in the certificate.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by W. E. Ricks against the Sovereign Camp, Woodmen of the World. Judgment for plaintiff, and defendant brings error. Reversed.

L. L. Moore, of Moultrie, and D. E. Bradshaw, of Omaha, Neb., for plaintiff in error.
Dowling & Askew, of Moultrie, for defendant in error.

STEPHENS, J. 1. Where the constitution and laws of a fraternal benefit society provide that "no officer, employee or agent of the Sovereign Camp, or of any camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary, or waive any of the provisions of this constitution or these laws, nor shall any custom on the part of any camp or any number of camps—with or without the knowledge of any sovereign officer—have the effect of so changing, modifying, waiving, or foregoing such laws or requirements," and that "each and every beneficiary certificate is issued only upon the conditions stated in and subject to the constitution and laws then in force or thereafter enacted," and where the application of one applying for membership in the society and for the issuance to him of a benefit certificate by the society provides that the provisions of the constitution and laws of the society shall form a part of any beneficiary certificate issued by the society, and where the constitution and laws provide that the application and certificate shall constitute a part of the beneficiary contract between the society and the member, no statement made by any officer, employee, or agent to such applicant, either to induce him to make application or after he became a member and received a certificate that the society had waived certain provisions in its constitution and laws, which were expressed in the certificate and became a part of the contract, could amount to a waiver by the society of any of the provisions of the constitution or laws or conditions in the contract. New York Life Ins. Co. v. Patten, 26 Ga. App. —, 106 S. E. 184.

2. Where the certificate provided that if the holder thereof should enter the service in any branch of the United States army or navy as an officer or enlisted man, and should within 30 days of entering such service notify the home office of the society of such fact and pay a certain additional premium required, he would then be insured for the full amount prescribed in the certificate, but that upon his failure to give such notice and pay such additional premium after entering the army or navy of the United States the amount prescribed in the certificate would, in the event of his death while in the service outside the boundaries of the United States of America, be reduced to an amount to be ascertained by certain rules and regulations prescribed, a statement, made by an agent of the society to the applicant applying for a certificate in contemplation of entering the army of the United States, that

the society had waived the payment of such additional premium, and that in the event of the certificate holder's death beyond the boundaries of the United States while in the United States army or navy during the life of the certificate the beneficiary or beneficiaries named in the certificate would receive the full amount prescribed in the certificate, less the amount of the additional premium required, did not amount to a waiver of the conditions in the certificate.

3. In a suit against a fraternal benefit society by a beneficiary under a certificate issued by the society, where the insured, during the life of the certificate, had died outside the boundaries of the United States of America while serving in the navy of the United States, and where the undisputed evidence showed the facts as above set forth, a verdict for the plaintiff was unauthorized.

Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(151 Ga. 191)

WESTCHESTER FIRE INS. CO. v. BELL.
(No. 1825.)

(Supreme Court of Georgia. Feb. 21, 1921.
Rehearing Denied Feb. 28, 1921.)

(Syllabus by the Court.)

Insurance §421.—Damage from blowing up neighboring building to prevent spread of fire within exception as to explosion; statutory provision may be avoided by express stipulation; exception not contrary to public policy.

A policy issued to the owner of a described building insured him in a stated amount against all direct loss or damage by fire, except as provided in the policy, which might be sustained by the assured upon the building; it being further provided therein that the insurer should not be liable for loss caused directly or indirectly by explosion of any kind, unless fire ensues, and in that event for damage by fire only. *Held*, that a loss by the breaking of glass in the doors and windows, and by the destruction of plastering in the insured building, caused from concussion alone produced by explosion of dynamite employed by the fire department of a city in blowing up a neighboring building to prevent a further spread of a conflagration which threatened to burn the injured building, fell within the exception stated in the policy, and the company was not liable therefor; and this is true notwithstanding the declaration in the Civ. Code 1910, § 2476, that "a loss or injury may occur from fire without the actual burning of the articles or property; as, a house blown up to stop a conflagration."

Beck, P. J., and Atkinson, J., dissenting.

Certiorari from Court of Appeals.

Action by B. F. Bell, administrator, against the Westchester Fire Insurance Company. Judgment for plaintiff was affirmed

by the Court of Appeals (24 Ga. App. 528, 101 S. E. 590), and defendant brings certiorari. Reversed. Judgment conformed to in Court of Appeals, in 106 S. E. 188.

King & Spalding, of Atlanta, for plaintiff in error.

McElreath & Scott, of Atlanta, for defendant in error.

FISH, C. J. Bell brought suit against the Westchester Fire Insurance Company in the municipal court of Atlanta, upon a policy of insurance issued by the defendant. The case was tried by the court without a jury, upon an agreed statement of facts; and judgment was rendered against the defendant; it was taken by certiorari to the superior court, where the judgment of the trial court was affirmed. Upon writ of error to the Court of Appeals there was an affirmance of the ruling of the superior court 24 Ga. App. 528, 101 S. E. 590. The case is here on certiorari to the Court of Appeals.

The policy was on the building known as 670 North Boulevard in the city of Atlanta. While it was in force a conflagration occurred in the city, which became so great that the fire department, in order to prevent its farther progress, resorted to the use of dynamite to blow up the buildings in the path of the fire, the purpose being to thus stop the progress of the conflagration, and to prevent its extending beyond the buildings thus dynamited. A building approximately 150 feet distant from No. 670 was for such purpose dynamited, but no part thereof was burned, but the concussion of the air resulting from the explosion caused by the dynamite broke many glasses in the doors and windows and destroyed plastering in No. 670, the insured building, which was not ignited by fire. Due proof of such loss was made by the plaintiff. The question whether the insurance company would have been liable under the policy, in view of the general law of insurance, or under the Civil Code 1910, § 2476, providing that:

"A loss or injury may occur from fire without the actual burning of the article or property; as, a house blown up to stop a conflagration"

—had there been no excepting clause in the policy, is of course not here for decision. The only question presented for determination is whether or not the loss claimed is covered by the policy in suit, or excepted therefrom.

It is clear to us that the loss was not covered by the policy, but fell squarely within the exception set out therein. The policy insured "against all direct loss or damage by fire, except as provided in the policy, which might be sustained by the assured upon" the building known as No. 670, etc. The ex-

ception is that the company "shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for damage by fire only) by explosion of any kind, or lightning, but liability for direct damage by lightning may be assumed by specific agreement hereon." The exception expressly states that the company shall not be liable for loss caused directly or indirectly by explosion of any kind, unless fire ensues, and, in that event, for damage by fire only. This language is explicit and unequivocal. The use of the expression "explosion of any kind" indicates that explosions of more than one kind were contemplated; and the obvious meaning of the exception is that the company shall not be liable for loss caused directly or indirectly by any kind of an explosion whatsoever, unless fire ensues from the explosion, and in that event the company shall be liable for damages caused by the fire only, and not by the explosion. The provision of our Civil Code, § 2476, which, in effect, declares that a house blown up to stop a conflagration may be considered a loss by fire, if applicable to the facts of this case, cannot be considered a part of the contract of insurance under the policy here involved, for the conclusive reason that the language embodied in the exception in the policy necessarily excludes the provisions of the Code section from the contract made by the policy. The exception was doubtless inserted in the policy with the specific intention of preventing such Code section, and similar statutes of other states, as well as the general law of insurance as pronounced by some courts from becoming a part of the policy. The Code section not requiring expressly, or even impliedly, that its provisions shall become and constitute a part of every policy of fire insurance executed in this state, the parties to such a contract of insurance had a right to avoid its application by an express stipulation in the policy which necessarily excluded it. Nor do we see how the contract of insurance entered into voluntarily and knowingly by the parties thereto, and which necessarily eliminates therefrom a provision of the Code that the blowing up of a house to prevent a conflagration may be a fire loss, contravenes public policy.

The question whether a loss of the character of that in this case falls within an exception in a policy similar to the one here involved has been before many courts of last resort; and the overwhelming weight of authority is to the effect that such a loss

falls within the exception, and that the company is not liable. See *United States Life, etc., Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403; *Briggs v. Ins. Co.*, 53 N. Y. 446, 449; *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74; *Washburn v. Western Ins. Co.*, Fed. Cas. No. 17,216; *Phoenix Ins. Co. v. Greer*, 61 Ark. 509, 33 S. W. 840; *Heuer v. Winchester Fire Ins. Co.*, 151 Ill. 331, 37 N. E. 873, affirming 44 Ill. App. 429; *Miller v. London, etc., Fire Ins. Co.*, 41 Ill. App. 305; *Caballero v. Home Mutual Ins. Co.*, 15 La. Ann. 217; *Hustace v. Phenix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651, reversing 71 App. Div. 309, 75 N. Y. Supp. 568; *German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; *Smiley v. Citizens' Fire & Life Ins. Co.*, 14 W. Va. 33; *Insurance Co. v. Tweed*, 74 U. S. (7 Wall.) 44, 19 L. Ed. 65; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557; *Dows v. Faneuil Hall Ins. Co.*, 127 Mass. 346, 34 Am. Rep. 384; *Hall v. National Fire Ins. Co.*, 115 Tenn. 513, 92 S. W. 402, 112 Am. St. Rep. 870, 5 Ann. Cas. 779; *Everett v. London Assur.*, 19 C. B. N. S. 126; *Ross v. Liverpool, etc., Ins. Co.*, 83 N. J. Law, 342, 84 Atl. 1050; *Eppens v. Hartford Fire Ins. Co.*, 99 App. Div. 221, 90 N. Y. Supp. 1035; *Phoenix Ins. Co. v. Adams (Ky.)*, 127 S. W. 1008; *Metropolitan Casualty Ins. Co. v. Berghelm*, 21 Colo. App. 527, 122 Pac. 812.

Judgment reversed.

All the Justices concur, except

BECK, P. J., and ATKINSON, J. (dissenting). The statute (Civil Code, § 2476) referred to in the opinion of the majority, defines "loss by fire," and makes it include loss by explosion of dynamite when done to stop a conflagration. Under this definition, a loss is "by fire," whether caused by actual flames or from explosion of dynamite made to stop a conflagration. The contract of insurance must be construed in connection with the statute, which becomes a part of the contract. The explosion of dynamite to stop the conflagration was intentional, and was done for the benefit of both the insurer and insured. That is not the kind of explosion contemplated by the exception in the policy of insurance. It had reference to accidental explosions or explosion from other causes, such as might result from negligence or wrongdoing, or other cause than voluntary act where necessary and done to stop a conflagration. Applying the contract as embodying the statute, if dynamite is exploded to prevent a conflagration, and a window in a neighboring building be broken by the concussion, the loss would be as much a direct loss by fire, within the meaning of the contract, as if a burning coal blowing from a

conflagration should touch the window and cause it to break from the heat. If the contract, as embodied in the policy of insurance, should be literally or strictly construed without reference to the statute, a different result would be required; but the statute is by operation of law written into the contract, and its provisions are not excluded expressly or by necessary implication by the language of the policy. The decisions cited by the majority did not involve cases in which statutes similar to the Code provision, *supra*, entered into the contract.

(26 Ga. App. 350)

WESTCHESTER FIRE INS. CO. v. BELL
(No. 10586.)

(Court of Appeals of Georgia, Division No. 1.
March 2, 1921.)

Error from Superior Court, Fulton County;
Geo. L. Bell, Judge.

Action by B. F. Bell, administrator, against the Westchester Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed in conformity to judgment of the Supreme Court on certiorari. 106 S. E. 186. For former judgment of the Court of Appeals, see 24 Ga. App. 528, 101 S. E. 590.

King & Spalding and Spalding, MacDougald & Sibley, all of Atlanta, for plaintiff in error. McElreath & Scott, of Atlanta, for defendant in error.

LUKE, J. The judgment originally rendered by this court in this case (24 Ga. App. 528, 101 S. E. 590), having been reversed by the Supreme Court (151 Ga. —, 106 S. E. 186), the former judgment of this court is vacated, and the judgment of the trial court is reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 371)

DISTRICT GRAND LODGE NO. 18, G. U.
O. O. F., v. MORRIS et al. (No. 11413.)

(Court of Appeals of Georgia, Division No. 2.
March 4, 1921.)

(Syllabus by the Court.)

1 Insurance ⇨771—Law of benefit society as to persons who might be beneficiaries held binding and enforceable.

Where it does not appear that the charter of a benefit society prohibits the society from designating what classes of persons may be named as beneficiaries in the benefit certificates issued by it to its members, and where there is nothing in the laws of the state in which the charter is granted prohibiting such designation, a rule or law of the society, printed on

the back of the certificate, and by the terms of the certificate expressly made a part thereof, prescribing that "only persons related to members by consanguinity or who sustain the relation of husband and wife shall be designated * * * as beneficiaries: Provided, however, that the former class shall only be designated when they are dependent upon the member for support and maintenance"—is binding and enforceable. *Union Fraternal League v. Walton*, 112 Ga. 315, 87 S. E. 389.

2. Insurance ⇨777—Knowledge of officers of subordinate lodge that designated beneficiaries were not entitled to be designated held not notice to society.

Where it is provided in the application, which by the terms of the certificate is made a part of the contract, that knowledge by or information to the officers of the subordinate lodge of the society shall not be notice to the society or binding upon it, but that the society shall be bound only by knowledge or information in writing to the officers of the bureau of endowment of the society, any knowledge or information had by the officers of the subordinate lodge, either at the time of the issuance of the certificate or afterwards, that the beneficiaries named therein were not such as were entitled to be named as beneficiaries and receive benefits under the laws of the society, is not notice to the society. *Union Fraternal League v. Walton*, 112 Ga. 315, 87 S. E. 389.

3. Insurance ⇨777—Verdict for plaintiff unauthorized, where beneficiaries were not within classes specified and society was not charged with notice.

In a suit on the policy by the beneficiaries named therein, where it appeared that none of them sustained the relation of husband or wife to the insured, or were dependent upon him for support and maintenance, and where it appeared that no notice of these facts, either at the time the policy was issued or afterwards, was ever possessed by the officers of the bureau of endowment of the society, but was possessed only by certain officers of the subordinate lodge, a verdict for the plaintiff was unauthorized.

Error from City Court of Sparta; F. Holmes Johnson, Judge.

Action by J. A. Morris and others against the District Grand Lodge No. 18, Grand United Order of Odd Fellows of America, Jurisdiction of Georgia. Judgment for plaintiff, and defendant brings error. Reversed.

C. P. Goree, of Atlanta, for plaintiff in error.

Wiley & Lewis, of Sparta, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 327)

CALLAWAY v. JANKO. (No. 11381.)(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921.)*(Syllabus by Editorial Staff.)*

1. Malicious prosecution \S 16—Probable cause sufficient defense, notwithstanding malice.

Probable cause alone, without any proof of the absence of malice, is a defense to a suit for malicious prosecution, or malicious use of legal process.

2. Process \S 171—In action for malicious use, instruction for defendant, if suit instituted with probable cause and without malice, held misleading.

In an action for malicious use of legal process in a bail trover suit, in which plaintiff was arrested, an instruction that, if the suit was instituted with probable cause, with good faith, and without malice, plaintiff could not recover, was erroneous, as giving the impression that it was necessary to show both probable cause and the absence of malice, though the law was stated correctly in another portion of the charge.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Nathan Janko against T. O. Callaway. Judgment for plaintiff, and defendant brings error. Reversed.

T. B. Higdon, of Atlanta, for plaintiff in error.

C. D. Maddox and S. M. Castleton, both of Atlanta, for defendant in error.

STEPHENS, J. [1,2] 1. Probable cause alone, without any proof of the absence of malice, is a defense to a suit for a malicious prosecution or a malicious use of legal process. Upon the trial of an action for malicious use of legal process, it was therefore error to charge that if the prosecution, which was a trover suit to recover a piano, instituted against the plaintiff by the defendant, and which caused the plaintiff's arrest, was instituted by the defendant with probable cause, with good faith, and without malice, the plaintiff could not recover. Such charge was error, even though the judge elsewhere in his charge correctly stated the law. Such erroneous statement, standing unretracted, was calculated to influence the jury and give them the impression that it was necessary to a successful defense against a suit for a malicious use of legal process, where probable cause appeared, to show the absence of malice. The language in the charge excepted to reads as follows:

"If the proceedings were instituted in good faith, with probable cause, and without malice, the defendant had the right to institute these proceedings for his property, and the plaintiff

could not recover. In this case, gentlemen, I charge you that under the undisputed evidence Mr. Calloway would have a right to institute bail trover proceedings in the name of and for his principal, the Commercial Security Company, provided he had probable cause and it was not carried on with malice."

2. Since the judgment denying the defendant's motion for a new trial is reversed, it is not necessary to pass upon the assignment of error to the effect that the verdict for the plaintiff is excessive.

3. No other error of law appears, and the judgment is reversed, upon the ground that the court erred in overruling the defendant's motion for a new trial upon the ground of the above error in the charge.

Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 309)

UNION MFG. CO. v. HEATH.**HEATH v. UNION MFG. CO.**

(Nos. 11661, 11666.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 15, 1921.)*(Syllabus by the Court.)*

1. Master and servant \S 234(1)—Injury by known or discoverable defect not actionable.

While the master is bound to exercise ordinary care in furnishing machinery reasonably safe for his servant to operate with ordinary care and diligence, yet the servant assumes the ordinary risk of his employment and is bound to exercise his own skill and diligence to protect himself, and where he is injured by reason of a defect in the machinery caused by the failure of the master to comply with the above duty, the servant cannot recover if he knew of the defect and the danger incident thereto, or could by the exercise of due care have discovered the danger and avoided the injury. Civil Code 1910, §§ 3130, 3131.

2. Master and servant \S 234(4), 236(6)—Injury to machine operator from known or discoverable defect held not actionable; danger from defective machine held obvious.

Where a servant in the discharge of his duty in feeding cotton to a machine which receives the cotton on steel teeth revolving on a cylinder is, by too great an intake of the cotton caused by a too large and defective construction of the mouth of the machine, injured by his hand becoming caught in the revolving teeth, he cannot recover from the master for an injury caused by the master's failure to comply with the duty mentioned in the presiding paragraph, even though the master knew of the defective condition of the machine and the danger incident to operating it, when it appears that the servant also knew of such defect and danger, or by due care could have discovered such danger. Where a bar or guard, belonging

over the mouth of the machine for the purpose of regulating and retarding the inflow of the cotton, is displaced, and the mouth of the machine thereby rendered too large, thus causing the machine to become dangerous to one feeding cotton into it with the hand, such danger is perfectly obvious to a servant who actually knows of the defect.

3. Master and servant §245(4)—Injury to servant knowing obvious danger from compliance with order not actionable.

A servant cannot recover for an injury upon the ground of having complied with a negligent order of the master if the servant knew of the obvious danger incident to a compliance with the order. *Southern Railway Co. v. Taylor*, 137 Ga. 704, 73 S. E. 1055, and cases there cited.

4. Master and servant §260(3) — Petition showing servant knew of defect and that danger was obvious states no cause of action.

In a suit by a servant against the master to recover damages for a personal injury alleged to have been caused by the negligence of the master in failing to furnish machinery reasonably safe for the servant to operate, where the plaintiff declares upon the above-stated facts, no cause of action is alleged, and it is error to overrule a general demurrer to the petition.

Error from City Court of Greensboro; Jos. P. Brown, Judge.

Action by W. C. Heath against the Union Manufacturing Company. Judgment for plaintiff, and defendant brings error, and plaintiff files a cross-bill of exceptions. Judgment reversed, and cross-bill of exceptions dismissed.

Bryan & Middlebrooks, of Atlanta, and Noel P. Park, of Greensboro, for plaintiff in error.

Miles W. Lewis, of Greensboro, for defendant in error.

STEPHENS, J. Judgment reversed on the main bill of exceptions; cross-bill of exceptions dismissed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 339)

SHEHAN v. KEEN. (No. 11416.)

(Court of Appeals of Georgia, Division No. 2
Feb. 26, 1921.)

(Syllabus by the Court.)

1. Libel and slander §46—Employer's statement during investigation that employé stole shoes held privileged.

During an investigation by the proprietor of a mercantile house of the loss of a pair of shoes, which one of the clerks admitted was taken by him, but not with a felonious intent, a charge by the proprietor that the clerk stole the shoes, made in the presence of one of the other clerks and to certain members of the

family of the clerk charged with the theft, when made only for the purpose of effecting a return of the shoes, was a privileged communication, made "in the performance of a private duty" and with a "bona fide intent * * * to protect his own interest in a matter where it is concerned." Civ. Code 1910, § 4436.

2. Libel and slander §112(1)—Verdict for defendant demanded when evidence of privilege uncontradicted.

Where a suit for slander was brought against the proprietor by the clerk charged with the theft of the shoes, and the evidence of the proprietor was to the effect that the charge was made by him under such circumstances and for such purpose, and where such evidence stands uncontradicted and undisputed, the defendant's plea of privilege was sustained, and a verdict in his favor was demanded by the evidence. See note in 36 L. R. A. (N. S.) 449.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by J. D. Keen against George Shehan. Judgment for plaintiff, and defendant brings error. Reversed.

G. C. Bidgood, Geo. B. Davis, J. S. Adams, and R. Earl Camp, all of Dublin, for plaintiff in error.

Burch & Daley, of Dublin, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 330)

RAKESTRAW v. LUBBOCK. (No. 11581.)

(Court of Appeals of Georgia, Division No. 2
Feb. 24, 1921.)

(Syllabus by the Court.)

1. Landlord and tenant §25(2)—Lease executed by tenant under seal and by landlord not under seal valid as simple contract.

A lease contract executed by the tenant under seal and by the landlord not under seal, while not a contract under seal, is nevertheless a valid simple contract in writing. See, in this connection, *Allen v. Montgomery*, 25 Ga. App. 817, 105 S. E. 33.

2. Landlord and tenant §296(1)—Tenant cannot be summarily dispossessed because of subletting contrary to agreement.

Except in cases of a tenant at will or sufferance, a tenant may be dispossessed by summary proceedings only when he fails to pay the rent when due or when holding over and beyond the term for which the premises have been rented to him. It follows that the violation by a tenant of his written contract "not to sublet the premises or any part thereof without the written consent of" the landlord does not authorize the landlord to summarily dispossess the tenant. Civil Code 1910, § 5385.

3. Landlord and tenant \S 89½, 309—Lease may be renewed by paying rent to landlord's agents; Inference of renewal authorized when tenant continues to pay rent; Inference against renewal not demanded when evidence conflicting.

A lease may be renewed by the tenant for an additional term by a payment of the rent under the terms of the lease to the duly authorized agent of the landlord, and where the tenant after the termination of the lease contract continues to pay rent to the agent of the landlord who receives the rent, the inference is authorized that the lease was renewed under its terms. There appearing a conflict in the evidence as to whether or not the agent had authority to act for the landlord in receiving the rent and renewing the lease, the inference is not demanded that the lease had not been renewed, and that the tenant was holding over beyond his term, or that he had not paid the rent.

4. Landlord and tenant \S 308(3)—Verdict for tenant in proceeding to dispossess held authorized by evidence.

This being a proceeding by a landlord to dispossess his tenant under Civil Code, 1910, § 5385, and the evidence authorizing the inference that the tenant had paid the rent, and that he was not holding over beyond his term, a verdict for the defendant was authorized, and the judge did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by R. A. Rakestraw against F. R. Lubbock. Judgment for defendant, and certiorari overruled, and plaintiff brings error. Affirmed.

Lawton Nalley, of Atlanta, for plaintiff in error.

Fred E. Harrison and B. H. Hill, both of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., concurs.
HILL, J., disqualified.

(26 Ga. App. 325)

SMITH v. HARRISON et al. (No. 11273.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921.)

(Syllabus by the Court.)

1. Sales \S 62, 409—Contract held entire; on failure to deliver agreed installment right of action for breach of entire contract accrues.

In a bilateral contract of sale an obligation by the seller to deliver to the buyer by a certain date a gross quantity of a certain commodity for a certain estimated price, as "1,000 gross of round quart bottles at the rate of \$1.80 per gross," but which must be delivered in certain stipulated quantities periodically at

certain designated periods, is entire, and a failure by him to make any one of the deliveries at the time agreed upon amounts to a breach of the entire obligation and gives to the buyer the right to elect to bring suit before maturity for such damages as he may have sustained by reason of such breach. Civ. Code 1910, §§ 3588, 4121, 4223, 4228, 4389; Henderson Elevator Co. v. North Georgia Milling Co., 128 Ga. 279, 55 S. E. 50; Central Georgia Brick Co. v. Carolina Portland Cement Co., 136 Ga. 693, 71 S. E. 1048; Phosphate Mining Co. v. Atlanta Oil & Fertilizer Co., 20 Ga. App. 680, 93 S. E. 532; 3 Williston on Contracts, §§ 1298, 1336.

2. Sales \S 418(7)—Measure of damages for seller's breach of contract for delivery in installments stated; damages not abated because buyer had no use for goods or did not purchase them in the market.

In such an action the buyer may recover such damages as he would have sustained by a nonperformance by the seller of his obligations upon their maturity, viz. the difference in the contract price and the market value at the time and place of delivery, subject to abatement by any circumstances of which the buyer ought reasonably to have availed himself or did avail himself to mitigate his loss. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; 3 Williston on Contracts, § 1297. It is no defense to the seller and no ground for abatement in the buyer's damage that the latter contracted for the bottles for a purpose not mentioned in the contract, and that he had no use for them or that he failed to go into the market and buy.

3. Sales \S 176(3)—Demand that seller deliver installment does not waive right to sue for breach if demand refused.

Where the seller defaulted in making a periodic delivery under the contract, a demand by the buyer that the seller perform this obligation does not amount to a waiver by the buyer of his right to sue for the entire breach upon the seller's refusing to comply with such demand.

4. Sales \S 107—Failure to make payment does not justify refusal to deliver without notice that terms of contract will be insisted on.

Assuming that the seller could justify his refusal to make further deliveries under the terms of the contract upon the ground that the buyer had failed to make payment for any past delivery, yet, since the parties to a contract may in the course of its execution depart from its terms and pay or receive money under such departure without any right in the other party to treat such departure as a violation of the contract, in the absence of reasonable notice of his intention to do so given by the other party (Civ. Code 1910, § 4227), the seller cannot, after having acquiesced in such departure and having failed to give such notice to the buyer, justify his refusal to comply with his obligation to deliver under the terms of the contract upon the ground that the buyer has failed to make payment for a past delivery.

5. Sales \S 153—Tender at buyer's place of business during absence held insufficient.

"A tender of specific articles must be such as to enable the party to whom tendered to take immediate possession, and at the time and place agreed on in the contract. If no place is agreed on, they must be carried to the person entitled to them, if residing within this state, unless, from the nature of the articles, or the contract, another place of delivery be inferred." Civ. Code 1910, \S 4323. The contract in the instant case provides that the articles are to be delivered at such place as the buyer may direct, and there being nothing in their nature or in the contract from which another place of delivery could be inferred, in the absence of any direction by the buyer as to the place of delivery, to constitute a valid tender the articles should have been carried to the buyer in person. It not appearing that the buyer resided without the state, the carrying of the articles to his place of business, in his absence and without his knowledge, did not constitute a valid tender under the contract.

6. No error committed and verdict supported by evidence.

The trial judge did not err for any reason set out in the motion for a new trial, and the verdict for the plaintiff was supported by the evidence.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. M. Harrison and others against H. Smith. Judgment for plaintiffs, and defendant brings error. Affirmed.

Walter A. Sims, of Atlanta, for plaintiff in error.

Etheridge, Sams & Etheridge, of Atlanta, for defendants in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 364)

CHAMBLEE v. PHILLIPS. (No. 11571.)

(Court of Appeals of Georgia, Division No. 2. March 3, 1921.)

(Syllabus by the Court.)

1. Frauds, statute of \S 129(4)—Possession under parol contract insufficient to take contract out of statute.

Possession alone by the purchaser under a parol contract for the sale of land is insufficient to take the contract without the statute of frauds. Civ. Code 1910, $\S\S$ 4634, 4636.

2. Frauds, statute of \S 129(7)—Improvements must be substantial and permanent and such as only an owner would ordinarily make; use of fertilizer insufficient.

Valuable improvements made by the purchaser, which when coupled with possession alone will take the contract without the statute, must be improvements substantial and per-

manent in their nature, and such that no one but an owner ordinarily would make under like circumstances. The placing of fertilizer by the purchaser upon part of the land preparatory to making a crop thereon is not such an improvement. Porter v. Allen, 54 Ga. 623.

3. Frauds, statute of \S 150(1)—Petition properly dismissed on demurrer when not showing part performance.

In a suit by the purchaser to recover damages for a breach by the seller of a parol contract for the sale of land, the petition, which alleges such part performance, was, upon objection raised on demurrer that the contract was within the statute of frauds, properly dismissed.

Error from Superior Court, Hancock County; J. B. Park, Judge.

Action by W. T. Chamblee against J. M. Phillips. Judgment for defendant, and plaintiff brings error. Affirmed.

R. H. Lewis, of Sparta, for plaintiff in error.

R. L. Merritt, of Sparta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 307)

MILLER v. BYRD. (No. 11659.)

(Court of Appeals of Georgia, Division No. 2. Feb. 15, 1921. Rehearing Denied March 3, 1921.)

(Syllabus by the Court.)

Bill of exchange \S 431—Not paid when check intended as payment credited to maker and proceeds drawn out by him.

Under the undisputed evidence, as outlined in the statement of facts below, the court did not err in directing a verdict for the plaintiff.

Error from Superior Court, Coffee County; J. I. Summerall, Judge.

Action by Thomas Byrd against J. M. Miller. Judgment for plaintiff, and defendant brings error. Affirmed.

This was a suit on a promissory note. The defendant admitted the execution of the note, and relied upon a plea of payment. The undisputed evidence shows the following facts: Miller executed and delivered to one Evans the note sued on, which in due course was purchased by Byrd, the plaintiff. After its maturity Byrd left the note for collection with the Broxton Banking Company, which, as his agent, had authority, on its payment, to surrender it. While the bank thus held the note for collection the maker made arrangements with one Milhollin to borrow the money necessary to take it up, and Mil-

hollin acting solely as his agent, went to the bank and got the note, with the understanding that it should either be returned or paid. After the bank had thus intrusted the note to Milhollin, acting as Miller's agent, Milhollin made and delivered a check to Miller in a sum equal to the amount called for by the note; and Miller, after indorsing the check, returned it to Milhollin, who thereupon delivered to Miller the Byrd note. After about two weeks, the check, thus drawn and indorsed, was carried by Milhollin's bookkeeper to the bank, which credited Miller with it on the books of the bank. It does not appear that the bank was given any direction as to how the check should be applied, but it is undisputed that when the check was thus sent to the bank the bank "was not notified that the check was to be credited to Mr. Thomas Byrd, or that it was in payment of his note." It was not until after about one year that Byrd ascertained he had received no credit for the note, or that Miller became aware that the Milhollin check had been credited to his, and not Byrd's account, at which time the proceeds of the check had been withdrawn from the bank by Miller. The court directed a verdict in favor of the plaintiff, which the defendant assigned as error, on the theory that his defense of payment had been sustained.

R. B. Chastain and L. E. Heath, both of Douglas, for plaintiff in error.

J. W. Quincey, of Douglas, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

On Motion for Rehearing.

JENKINS, P. J. The gist of the ground of counsel's motion appears to be that, since this court has held that the bank was the authorized agent of the plaintiff, Byrd, to collect the note, and that Milhollin, in procuring the note from the bank was acting as the agent of the defendant, Miller, the mere sending of a check to the bank, which was payable to and indorsed by Miller, amounted to a payment of the note, although the bookkeeper who carried it gave no such direction, and although the check was, in conformity with the usual course of business, deposited to the credit of Miller, the apparent owner. This contention is based on the theory that a principal is bound by the authorized acts of his agent within the scope of his authority. Civil Code 1910, § 3593.

If Milhollin had actually paid over the check to the bank with direction that it be applied on the note held by the bank for collection, this principle might have application, although even then the defendant could not claim he had been injured, since he him-

self has received and appropriated to his own use the proceeds of the check. In a case such as that, however, the defense of payment might be good, and the owner of the note might have to look to the bank, and the bank, in turn, to Miller. However, since it is undisputed that the bookkeeper did not turn over the check to the bank for the benefit of Byrd, or with any sort of direction that it go in settlement of the note, and since the bank, in the absence of any such direction, simply applied the check to the account of the person having apparent ownership, these questions do not arise; and it is our opinion that the note has never been paid, either in fact or in law.

Rehearing denied.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 329)

EVERROAD et al. v. DICKSON PLANING MILL CO. (No. 11480.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921).

(Syllabus by the Court.)

1. *Replevin* §8(2), 71(2)—Plaintiff must recover on his own title; plaintiff may show adjudication re-establishing title to property sold bankrupt.

A plaintiff in trover must recover on his own title, and not on a lack of title in the defendant. Where it appears that the title was originally in the plaintiff, and would have continued in him but for a sale by him to one from whom the defendant claims title, the plaintiff may, in establishing his own title, show an adjudication voiding the sale and re-establishing his title, had in a proceeding between him as an intervening claimant and his vendee, in a bankruptcy proceeding which had been instituted against the vendee, which intervention was filed and adjudication had after the defendant had made his alleged purchase under which he claims title from the plaintiff's vendee, and it will not be necessary for the plaintiff to show that the defendant was a party to such intervention proceedings, when the evidence fails to establish any facts which will warrant the inference that the defendant acquired any title from the plaintiff's vendee.

2. *Sales* §202(2,3)—Title held not to pass when condition as to execution of notes not complied with.

Although the property was delivered by the plaintiff's vendee to the defendant under a contract of sale between them, by the terms of which the defendant was, as a condition to the sale, to cause promissory notes to be executed to the plaintiff's vendee for the payment of the purchase money, no title passed into the defendant because of his failure to execute the notes. *Wheeler & Wilson Mfg. Co. v. Irish-American Dime Savings Bank*, 106 Ga. 57, 81 S. E. 48.

3. Verdict properly directed.

Applying the above principle of law to the undisputed facts as shown by the evidence, a verdict for the plaintiff was properly directed.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Dickson Planing Mill Company against G. B. Everroad and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The Dickson Planing Mill Company, the plaintiff in the court below, on or about October 3, 1917, shipped a carload of lumber to the Phoenix Planing Mill Company, which latter company went into bankruptcy on October 25, 1917. The Dickson Planing Mill Company, by proper proceedings in the bankruptcy court, set aside the sale of the lumber to the bankrupt on account of fraudulent representations by the bankrupt, and secured an adjudication re-establishing the title to the lumber in the plaintiff. In the meantime, one G. B. Everroad secured possession of the lumber under an alleged contract of sale between him and the bankrupt, whereby Everroad was to execute and deliver to the bankrupt certain promissory notes, but which notes were never executed and delivered. The Dickson Planing Mill Company thereupon sued out a bill trover proceeding against Everroad, and upon the trial thereof the trial judge directed a verdict for the plaintiff, and the defendant excepts.

Burress & Dillard, of Atlanta, for plaintiffs in error.

Smith, Hammond & Smith, of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 363)

NEWTON et al. v. CHEMCRAFT CO.
(No. 11492.)

(Court of Appeals of Georgia, Division No. 2.
March 3, 1921.)

(Syllabus by Editorial Staff.)

1. Sales §406—Performance or offer to perform obligations of buyer held conditions precedent to suit against seller.

Where, under a contract of sale, the buyer must perform a certain obligation as a condition precedent to the performance of the obligations resting on the seller, he must show performance or an offer to perform prevented by the seller as a condition precedent to an action against the seller for breach of the contract.

2. Sales §174—Failure to furnish bank guaranty as agreed releases seller from liability.

Where a contract of sale requires the purchaser to furnish a bank guaranty to the seller

as a condition precedent to the shipment of the goods, the purchaser's failure to comply with such condition unless compliance be prevented by the seller is a breach of the contract releasing the seller from his obligations.

3. Sales §82(2)—Contract by telegraph calling for bank guaranty contemplates immediate furnishing.

Where a contract of sale requiring the buyer to furnish the seller a bank guaranty was made by telegraph, it was within the contemplation of the parties that the bank guaranty should be furnished immediately and without delay.

4. Sales §191—Obligation to furnish bank guaranty not complied with by arranging with bank to accept draft.

A provision of a contract of sale requiring the buyer to furnish the seller a bank guaranty was not performed by arranging with a bank to guarantee payment of a draft by the seller for the purchase price without actually furnishing the guaranty contracted for.

5. Sales §174 — Obligation to furnish bank guaranty held not complied with without unnecessary delay.

Where a contract of sale made by telegraph required the buyer to furnish the seller a bank guaranty, but the buyer notified the seller the following day that he had forwarded a certified check for part of the purchase price as evidence of good faith and requested approval of an arrangement with a bank to guarantee payment of a draft for the purchase price, such proposal amounted to a failure to comply with the condition precedent without unnecessary delay and released the seller from the contract.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the Chemcraft Company against C. E. Newton and others. Judgment for plaintiff, and defendants bring error. Reversed.

Strozler & Moore, of Macon, for plaintiffs in error.

Martin & Martin, of Macon, for defendant in error.

STEPHENS, J. [1] 1. A purchaser under a contract of sale for personalty, who by the terms of the contract must perform a certain obligation resting upon him as a condition precedent to a performance of the obligations resting upon the seller, must show a performance, or an offer to perform prevented by the seller, of such obligation on his part, as a condition precedent, before he can maintain an action against the seller for a breach of the contract.

[2, 3] 2. Where under the terms of such a contract the purchaser must furnish a bank guaranty to the seller as a condition precedent to the seller's shipping to him the commodity contracted for, a failure by the purchaser

chaser to comply with such condition precedent, unless compliance be prevented by the seller, amounts to a breach of the contract by the purchaser, and will operate to release the seller from his obligations under the contract. Where the offer and acceptance are made on the same day by telegraphic communication, it is within the contemplation of the contracting parties that the bank guaranty shall be furnished immediately and without unnecessary delay.

[4, 5] 3. The mere perfecting of arrangements by the purchaser with a bank to guarantee the payment of a draft by the seller upon the purchaser for the purchase money of the commodity sold, without actually furnishing the guaranty as contracted, is not a performance by the purchaser of the condition precedent; nor is this condition complied with by a communication by the purchaser to the seller on the day following the execution of the contract, wherein the purchaser notifies the seller that he has forwarded to the seller a certified check for only a part of the purchase money, as "evidence good faith," and requesting approval by the seller of such arrangement. Such a proposal by the purchaser, inviting delay and requesting approval of such proposed substitute for his compliance with the condition precedent, amounts to a failure by him to comply with the condition precedent without unnecessary delay, as contemplated in the contract, and releases the seller from his obligations under the contract.

4. In a suit by the purchaser against the seller to recover damages for an alleged breach of the contract by the seller, a petition alleging the above facts fails to set out a cause of action, and should have been dismissed on general demurrer.

Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(35 Ga. App. 349)

STAMPS v. DAWSON BROS. MFG. CO.
(No. 11650.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 26, 1921.)

(Syllabus by the Court.)

1. Evidence ¶441(9).—Buyer cannot defend suit on purchase-money note by showing goods not in accordance with oral contract.

Where goods sold and delivered under a written contract are of the character described in the contract, the purchaser cannot, after having inspected the goods and given a note in payment therefor and in discharge of his obligation under the contract as expressly stipulated in the note and for no other consideration, defend against a suit on the note upon the ground that the goods were bought under an oral agreement as to quality, at variance

with the written contract, which oral agreement was violated by delivery of goods of a different quality from that orally contracted for.

2. Evidence ¶434(11).—No defense to note that execution induced by fraudulent representation that goods could be converted into goods of description referred to in oral agreement.

While it is true that, after goods have been contracted for and delivered to the purchaser and he has inspected them there may be a new agreement by the terms of which the seller is to make good any breach of warranty or repair any defect in the goods sold as a consideration for the execution of a promissory note for the purchase money by the purchaser, yet, where there is no such consideration and a note is given for the purchase money, expressly stipulating in its face that it is given in compliance with the purchaser's obligation under the original contract, it is no defense to the note that the purchaser was deceived and fraudulently induced to execute it by a fraudulent representation to him by the seller that the goods which were of the description mentioned in the original written contract could by a simple process be easily altered and converted into goods of the description mentioned in the alleged oral agreement.

3. Motion for new trial properly overruled.

The evidence tending to establish such defense having been properly ruled out and a verdict for the plaintiff having been properly directed, it was not error to overrule the defendant's motion for a new trial.

Error from City Court of Floyd; W. J. Nunnally, Judge.

Action by the Dawson Bros. Manufacturing Company against O. L. Stamps. Judgment for plaintiff, and defendant brings error. Affirmed.

The Dawson Bros. Manufacturing Company, as plaintiff, sued O. L. Stamps, as defendant, on a promissory note for \$700. The defendant admitted the execution of the note, and filed a plea of failure of consideration. The evidence showed that on or about June 7, 1918, the plaintiff entered into a written contract with the defendant whereunder the plaintiff was to ship to the defendant 50 barrels of unsweetened apple juice in good secondhand barrels. About 30 days after the goods had been shipped to and received by the defendant, an agent of the plaintiff called on the defendant for a settlement, at which time the defendant complained to the plaintiff's agent that the apple juice was not sweetened, and was for that reason not suitable for the purposes intended, and was not salable. The barrels and their contents were then examined and inspected by the defendant and the plaintiff's agent, whereupon the plaintiff's agent gave to the defendant certain directions and instructions as to how to convert the contents of the barrels into a

sweet and salable article. The defendant then executed the note sued on, writing across its face the following words and figures: "In payment as per invoice 6/10/18." The invoice described the goods sold as vinegar stock. The trial court directed a verdict for the plaintiff, and the defendant excepts.

Willingham & Covington and L. A. Dean, all of Rome, for plaintiff in error.

M. B. Eubanks, Barry Wright and Lipscomb & Matthews, all of Rome, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 370)

**RUSHTON v. HALL & BROWN WOOD
WORKING MACH. CO. (No. 11388.)**

(Court of Appeals of Georgia, Division No. 2.
March 4, 1921.)

(Syllabus by Editorial Staff.)

1. Contracts §245(2)—When parties reaching agreement by correspondence make formal contract, with additional stipulations, it is the contract.

Where parties have arrived at a complete contract by correspondence, but immediately afterwards, and before performance by either party, execute a formal agreement containing additional stipulations, the formal agreement will be regarded as the contract.

2. Contracts §237(2)—Written contract not without consideration, though parties had reached complete agreement by correspondence.

Though parties had reached a complete contract through correspondence, a formal written agreement containing additional stipulations was not void for want of consideration on the ground that the promisor was already bound under another contract.

3. Appeal and error §1051(3)—Error in admitting instrument cured by maker's admission of execution.

Any error in admitting an instrument in evidence without producing the subscribing witness was cured when the maker in his testimony afterwards admitted the execution of the instrument.

4. Sales §38(1)—Statement of desire for formal contract for convenience held not fraud.

Where parties had reached a complete contract of sale by correspondence, a statement by the seller to the purchaser that he desired a formal contract for convenience in keeping a record of the transaction, whereby the purchaser was induced to execute a formal contract containing stipulations against his interest not contained in the correspondence, was not a fraud on the purchaser.

5. Sales §287(1)—Notice of dissatisfaction does not relieve buyer of effect of retention of goods which by contract is admission of truth of warranties.

Where a contract of sale provides that retention of the goods for a specified time shall constitute a trial and acceptance and be a conclusive admission of the truth of all warranties, the buyer is not relieved of the force of such provision by giving notice of dissatisfaction within the specified time while still retaining the goods.

Error from Superior Court, Campbell County; John B. Hutcheson, Judge.

Action by the Hall & Brown Wood Working Machine Company against W. W. Rush-ton. Judgment for plaintiff, and defendant brings error. Affirmed.

Johnson & Scott, of Atlanta, for plaintiff in error.

W. S. Dillon, C. M. Lancaster, and Wm. J. Davis, Jr., all of Atlanta, for defendant in error.

STEPHENS, J. [1, 2] 1. Where two parties by negotiations through written correspondence have arrived at an agreement which, without more, amounts to a complete contract, but immediately thereafter and before the performance by either party of any act under the agreement, execute a formal agreement in writing containing other stipulations regarding the subject-matter in addition to those contained in the correspondence, the contract between the parties will be considered as having been completed only upon the execution of the formal written agreement, and the latter will be regarded as the contract. It is not void for want of consideration upon the ground that at the time of its execution the promisor was already bound to the promisee under another contract. See, in this connection, 1 Williston on Contracts, § 28; 7 Am. & Eng. Ency. of Law (2d. Ed.) 139.

[3] 2. Where the signature of the maker of a written instrument purports to have been witnessed by a subscribing witness, any error in admitting the instrument in evidence without producing the subscribing witness is cured when the maker afterwards in his testimony admits the execution of the instrument.

[4] 3. Where such formal contract contains certain stipulations against the interest of the purchaser which were not contained in the preliminary negotiations, a statement made by the seller to the purchaser, to the effect that the seller desired that the contract be placed in formal shape for his convenience in keeping a record of the transaction, cannot amount to a fraud on the purchaser upon the ground that by such statement he was induced to execute the

agreement containing such stipulations. It not appearing that the other representations relied on by the purchaser as fraudulent were false, the defense that the execution of the contract was induced by fraud is not sustained.

[5] 4. "When the written contract for the sale of an article provides that the retention of the article for a given time after the date of shipment shall constitute a trial and acceptance and be a conclusive admission of the truth of all warranties, the mere fact that within the time stipulated notice of dissatisfaction has been given to the seller, but notwithstanding the article has been retained, will not have the effect to relieve the buyer from the force of the terms of the written contract." *Fay & Eagan Co. v. Dudley*, 129 Ga. 314(2), 58 S. E. 826.

5. In a suit by the seller against the purchaser to recover the purchase money for the property sold under the contract, a verdict for the plaintiff was properly directed.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 334)

HENDERSON v. HINES, Director General of Railroads. (No. 11286.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 26, 1921.)

(Syllabus by the Court.)

1. Exceptions, bill of \S 57—Not dismissed because record does not show entry of acknowledgment of service.

A motion to dismiss the bill of exceptions "because same does not properly show any service upon the defendant in error" will be denied when counsel for the defendant in error in their brief filed in this court admit "that due and legal service was acknowledged by its attorneys upon a paper which was properly entitled in the cause," and where such acknowledgment of service appears on a paper signed by counsel for the defendant in error, properly entitled in the case and properly describing the case filed in this court, although there appears from the record no entry of filing of such paper in the court below.

2. Master and servant \S 260(1), 261(1), 288(1), 289(1)—Assumption of risk and contributory negligence are ordinarily for jury, and not determined on demurrer; petition held not imperatively to demand inference of negligence or assumption of risk.

What acts of the master are among the risks assumed by the servant, and what conduct of the servant amounts to a failure to exercise due care to avoid the consequences of the master's negligence, are ordinarily questions for the jury, and in a suit by the servant to recover of the master for personal injuries received by the servant while in the master's employ, by reason of the alleged negligence of the master, these questions will not be solved

against the plaintiff on demurrer, unless the facts alleged in the petition imperatively demand the inference that the alleged negligent act of the master causing the injury to the servant was a risk assumed by the servant, or that the servant could by the exercise of due care have avoided the consequences of the master's negligence. *Augusta Southern R. R. Co. v. McDade*, 105 Ga. 134, 137, 31 S. E. 420; *Southern Cotton Oil Co. v. Gladman*, 1 Ga. App. 259(8), 58 S. E. 249. The facts alleged in the petition in the instant case not being of such a character as to demand this inference, the general demurrer to the petition was improperly sustained.

3. Master and servant \S 137(4)—Injury to brakeman by track crew throwing ties from train actionable.

Where the act complained of was the negligent throwing of cross-ties out of the train by a train crew at a place in a populous community where the train crew knew that people were in the habit of passing, an employee of the railroad, who happened in the discharge of his duties to be passing over such passageway, and was injured by such negligent act of the train crew, may recover for such negligence if it was the proximate cause of his injury. The special demurrer was improperly sustained.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by James Henderson against W. D. Hines, Director General of Railroads. Judgment for defendant, and plaintiff brings error. Reversed.

The petition alleges substantially that the plaintiff was in the employ of the defendant as a brakeman, and that on a certain date he was a member of the crew of a certain freight train of the defendant; that the train on that day had been stopping at intervals for the purpose of allowing certain track laborers under the supervision of a section foreman, who were in one of the box cars of the train, to throw off cross-ties; that these cross-ties were, in accordance with custom, being thrown off on the right side of the train; that at a certain stop the conductor of the train, in the presence of the section foreman, told the plaintiff that at the next stop the engine was to be cut off from the train, and directed the plaintiff to perform this duty; that the plaintiff, at the next stop, alighted from the rear of the train, and proceeded to walk up the track on the left side of the train, towards the engine, for the purpose of carrying out the orders of the conductor, and that, when he reached the door of the car where the section foreman and crew of track laborers were at work, he was suddenly and without warning struck by a cross-tie, which had been thrown off from the left side of the train in violation of the custom; that at the previous stops no cross-ties had been thrown

off on the left side of the train; that the place where the plaintiff was struck was near a large town, and that the right of way on both sides of the track at that point was used by the public as a highway and pathway, and that the section foreman and the plaintiff both knew of this; that the section foreman failed to give any warning before throwing off the cross-ties; and that the defendant was negligent in the following particulars: In permitting the cross-ties to be thrown off on the left side of the train and on the side opposite to that formerly used; in permitting the cross-ties to be thrown off without giving any warning to the plaintiff and others who might be passing, and in failing to maintain a lookout for that purpose; in permitting cross-ties to be thrown off at the time when the section foreman knew that the plaintiff was to pass the car in going up to the engine for the purpose of obeying the orders which the section foreman heard the conductor of the train give to the plaintiff, without giving warning to the plaintiff; in permitting cross-ties to be thrown off without maintaining a lookout and giving warning, when the section foreman knew that the right of way at that point was used by the public in general; that at the time of his injury the plaintiff was in the exercise of ordinary care, and did not anticipate and could not foresee any of the negligent acts complained of; that he took the precaution to walk on the left side of the track, knowing that no cross-ties had theretofore been thrown off on that side of the track. The trial judge sustained a general demurrer to the petition, and the plaintiff excepted.

W. I. MacIntyre and J. E. Craigmiles, both of Thomasville, and Shelby Myrick, of Savannah, for plaintiff in error.

Bennet & Branch, of Quitman, and Merrill & Moore, of Thomasville, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 122)

ASKEW v. CENTRAL TRUST CO. (No. 11375.)

(Court of Appeals of Georgia, Division No. 2. Jan. 20, 1921. Rehearing Denied Feb. 24, 1921.)

(Syllabus by Editorial Staff.)

1. Corporations §116—Sale of stock not avoided by false statement as to value.

Value being a mere matter of opinion, a false statement as to the value of corporate stock made by a seller to induce a sale of the stock is not such a misrepresentation of an

existing fact as amounts to fraud avoiding the sale or the note given for the purchase price.

2. Corporations §116—False statement as to price at which stock has sold may avoid sale.

A false statement by a seller of corporate stock, as to what stock in the corporation has sold for, might, if innocently acted upon by the purchaser to his damage, avoid the sale and afford a defense to the purchase-money note.

3. Bills and notes §351—Purchase before or after maturity immaterial when claim of fraud not sustained.

In an action on a note, the issue as to whether plaintiff purchased before or after maturity was immaterial, where the defense of fraud was not supported by the evidence.

4. Bills and notes §537(4)—Verdict properly directed when execution admitted and defense not proved.

In an action on a note where defendant admitted the execution of the note and the evidence failed to sustain the defense of fraud, a verdict for plaintiff was properly directed.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Action by the Central Trust Company against B. H. Askew, Jr. Judgment for plaintiff, and defendant brings error. Affirmed.

Dowling & Askew, of Moultrie, for plaintiff in error.

Pope & Bennet, of Albany, for defendant in error.

STEPHENS, J. [1] 1. Value being a mere matter of opinion, a false statement as to the value of stock in a corporation, made by a seller to induce a sale of the stock, is not such a misrepresentation of an existing fact as will amount to a fraud and void the sale. *Coca Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32. In a suit on a promissory note given for the purchase price of certain stock in a corporation, a defense by the maker that he was induced to execute the note by fraud is not sustained by evidence that at the time of the execution of the note the payee falsely represented to him the value of the stock.

[2] 2. A false statement made by the seller, as to what stock in the corporation has sold for, might, if innocently acted upon by the purchaser, to his damage, void the sale and afford a defense to the note. There is no evidence to sustain any such contention. The evidence as to various sales of stock from time to time, at values less than the price at which it is alleged that the seller had represented in making the sale for which the note sued on was given, does not show that they related to any transaction had prior to the time the note sued on was executed.

[3] 3. The defense to the note not being supported by the evidence, the issue as to

whether or not the plaintiff transferee was a purchaser before or after maturity is immaterial.

[4] 4. The defendant having admitted the execution of the note sued upon, and the evidence failing to sustain the defense relied upon, a verdict for the plaintiff was properly directed.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 175)

LUKE v. STATE. (No. 11865.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 25, 1921. Rehearing Denied
March 2, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 695(6)—Evidence objected to en bloc properly admitted when part admissible.

When testimony consisting of several sentences was objected to en bloc and a portion was admissible, its admission was not error.

2. Criminal law \S 1064(1)—Grounds of motion for new trial should be complete in themselves.

Grounds of a motion for a new trial should be complete in themselves, and reference to other grounds should not be required in order to understand the assignments of error.

3. Criminal law \S 1169(2)—Admission of evidence is harmless when facts established by other evidence admitted without objection.

The admission of testimony, if error, was harmless, where every substantial statement therein was established by other evidence admitted without objection.

4. Criminal law \S 448(7)—Testimony that carbon copy can be erased not opinion of witness.

Testimony that a carbon copy could be erased was a statement of fact, and not purely an opinion of the witness.

5. Criminal law \S 762(3)—Instruction that certain facts would be sufficient evidence of intent held not erroneous expression of opinion.

An instruction that, if an instrument was forged and defendant knew it and passed it with such knowledge, this would be sufficient evidence of his intent to defraud, was not erroneous, as it was an expression of opinion as to the legal effect of certain facts if proved and not an expression of opinion as to what was proved.

Error from Superior Court, Irwin County; R. Eve, Judge.

O. L. Luke was convicted of an offense in connection with forged paper, and he brings error. Affirmed.

Quincey & Rice, and Homer E. Oxford, all of Ocilla, for plaintiff in error.

R. S. Foy, Sol. Gen., of Sylvester, and Rogers & Rogers, of Ocilla, for the State.

BLOODWORTH, J. 1. Grounds 1, 2, 3, 4, and 8 of the amendment to the motion for a new trial, are but amplifications of the general grounds.

[1] 2. Ground 5 of the amendment to the motion for a new trial complains that certain evidence was erroneously allowed to go to the jury. This testimony, which consisted of several sentences, was objected to en bloc, and at least a portion of it was admissible. "Where evidence is offered and objected to, and a portion thereof is admissible and a part objectionable, unless the illegal portion is specified and properly objected to, the whole will be admitted." *City of Atlanta v. Sciple*, 19 Ga. App. 694 (3), 698, 92 S. E. 28, 29, and cases cited. See, also, *Thacher v. Carolina Cement Co.*, 21 Ga. App. 569 (1), 94 S. E. 838, and cases cited.

[2, 3] 3. "Grounds of a motion for a new trial should be complete in themselves; and when a particular ground is under consideration, reference to other grounds should not be required in order to understand the assignments of error." *Bowen v. Smith-Hall Grocery Co.*, 146 Ga. 157 (4), 160 (4), 91 S. E. 32, 34. Under this ruling we are not called upon to consider ground 6 of the amendment to the motion for a new trial. However, granting, but not conceding, that the admission of the testimony complained of in this ground of the motion for a new trial was erroneously admitted, it was harmless error, as every substantial statement therein was established by other evidence, admitted without objection.

[4] 4. A witness was asked: "I will get you to state whether or not a carbon copy can be erased." To this he replied: "Yes, sir; it can be erased." This was a statement of a fact, and not "purely an opinion of the witness."

[5] 5. The judge charged the jury:

"If the instrument was a forged paper, and the defendant knew it and passed it with this knowledge, this would be sufficient evidence of his intent to defraud."

This was not error. In *Johnson v. State*, 127 Ga. 278 (4), 56 S. E. 420, the Supreme Court approved a charge in almost these exact words. In thus charging the judge expressed an opinion as to the legal effect of certain facts if proved, but did not express any opinion as to what was proved.

"It is not error that the court should tell the jury what the legal effect of evidence is. On the contrary, it is his duty to do so. He must not say or intimate what is or is not proved, but if facts be proved, then he may and should say what effect the law gives to

the proof of such facts; and if the facts proved be the only way in which that legal effect or presumptive or logical conclusion in law can be reached, he may also tell the jury that. It will be a strong expression of opinion on the legal effect of facts when proved to the satisfaction of the jury, but it will not be either an expression or intimation of what has been proved to the satisfaction of the jury." Hagar v. State, 71 Ga. 187 (8).

6. The jury had ample evidence upon which to base their finding, the verdict is approved by the trial judge, and the judgment is affirmed.

BROYLES, C. J., concurs.
LUKE, J., disqualified.

(26 Ga. App. 368)

MORROW TRANSFER & STORAGE CO. v. WELLS BROS. CO. OF NEW YORK.

WELLS BROS. CO. OF NEW YORK v. MORROW TRANSFER & STORAGE CO.

(Nos. 11253, 11254.)

(Court of Appeals of Georgia, Division No. 2.
March 4, 1921.)

(*Syllabus by Editorial Staff.*)

1. Contracts \S 198(2)—Building contract held to contemplate construction of suitable and safe foundation.

A contract for the erection of a building of such size and dimensions as to require its foundation to be constructed with special reference to the character of the ground contemplates not only the erection of a properly constructed building, but also the construction of a suitable and safe foundation for the building,

2. Contracts \S 296 — Alteration of building contract to provide for different foundation held not breach of contract.

Where a building contract authorized the owner to make alterations, changes or additions and the builder to make additions, etc., an alteration providing for a different kind of foundation and different treatment of the ground found necessary to support the structure and render it safe was not a violation of the contract, though there was nothing to indicate that such an alteration might become necessary, especially where the contract provided that soil conditions were not guaranteed.

3. Contracts \S 296—Subcontractor held bound by alterations or changes permitted by main contract.

One having a subcontract to do excavating for the foundation of a building and to shore and protect adjoining walls in conformity with the plans, drawings, and specifications was bound to perform his obligations under any altered or changed conditions resulting from any alteration or deviation from the plans or specifications permitted under the provisions of the main contract.

4. Contracts \S 296—Subcontractor required to assume additional risks from change in plans of foundation.

Where a building contract authorized alterations and it was found necessary to abandon the plans for a concrete foundation and erect the building on a foundation resting on piles, one having a subcontract to do the excavating and shore and protect adjoining walls was bound to assume the additional risks and hazards incident to the construction of a foundation built on piles, though such alteration was not expected, and he was assured by the main contractor that it would not be made, especially where he knew that soil conditions were not guaranteed.

5. Contracts \S 296—Demand that subcontractor perform under conditions as changed by alterations held not to entitle him to rescind.

Where a subcontractor was bound to perform his contract under altered conditions permitted by the main contract, a demand by the principal contractor that he perform the work under such altered conditions for the extra compensation provided in case of alteration was not a breach of the contract entitling him to sue on quantum meruit.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Morrow Transfer & Storage Company against the Wells Bros. Company of New York. Judgment for defendant, and plaintiff brings error, and defendant files a cross-bill of exceptions. Judgment affirmed, and cross-bill of exceptions dismissed.

King & Spalding and Spalding, MacDougald & Sibley, all of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins and Smith, Hammond & Smith, all of Atlanta, for defendant in error.

STEPHENS, J. [1] 1. A builder's contract providing for the erection of a building, which is to be of such size and dimension as to require its foundation to be constructed with special reference to the character of the ground upon which it is to rest, contemplates not only the erection of a properly constructed building under the terms of the contract, but also contemplates the construction of a suitable and safe foundation for the building to rest upon.

[2] 2. In such a contract, which provides for the erection of the building according to certain plans and specifications which call for a certain character of foundation, where there is a provision that "the owner may make such alterations, changes, or additions to the work as may be required, without invalidating the terms of the contract," and that the builder may "at any time during the progress of this work make any additions to, or alterations or deviations from, the drawings or specifications without invalidating this agreement," an alteration afterwards made in the

contract, plans, or specifications providing for a different kind of foundation and a different treatment of the ground upon which the building is to rest; which is found after the work has progressed to be necessary in order to support the structure and render it safe, is not a violation of the contract, but is only such an alteration or deviation as is contemplated in the contract providing for a properly constructed building on a good and appropriate foundation. This is true even though at the time of the execution of the contract there was nothing in the nature of the work contemplated or in the character of the ground upon which the building was to be located which would then indicate that such an alteration in, or deviation from, the foundation plans might become necessary for the purpose of carrying out the builder's contractual obligation to erect a properly and safely constructed building. More especially is this true when the contract provides that test borings and samples of the soil had been made and were subject to the inspection of bidders, but that the soil conditions were not guaranteed.

[3] 3. A contract entered into by the builder with a third person, by the terms of which the third person obligated himself to do and perform for the builder certain work devolving upon the builder under his contract with the owner, such as excavating for the foundation of the building and shoring and protecting the adjoining walls and assuming responsibility for their safety, which provided that the subcontractor would perform his obligations under the contract "in conformity with the plans, drawings, and specifications, including all revisions to date made by [the architect], which said plans, drawings, and specifications are signed by the parties hereto and are hereby made a part of this agreement according to the true intent and meaning thereof," obligated the subcontractor to perform his obligations under the subcontract under any altered or changed conditions resulting from any alteration in or deviation from the plans or specifications contained in the builder's contract with the owner and permitted under the provisions of that contract.

[4] 4. Where, after the execution of the builder's contract with the owner, it was found that the character of the ground rendered it necessary, in order to obtain a building properly and safely constructed as contemplated in the contract, to abandon the original plans calling for a concrete foundation and to substitute therefor an alteration in such plans providing for the erection of the building upon a foundation resting upon piles, such alteration in the plans being necessary for the purpose of obtaining a properly and safely constructed building upon an appropriate foundation, was an alteration

permitted under the provisions of the contract; and the subcontractor, being bound to perform his obligations contained in the subcontract in conformity with and with reference to any alteration in the plans as permitted under the builder's contract with the owner, was bound to perform his obligations to excavate, shore, and protect the adjoining walls, with all additional risks and hazards attendant upon the construction of a foundation built on piles. He being bound to perform the subcontract in conformity with any alterations in the plans or specifications permitted by the builder's contract with the owner, his obligation to so perform is in no wise affected or lessened by the fact that the specific alteration afterwards made by the builder and the owner in the plans and specifications were not expected by the subcontractor when executing the subcontract, or that he was assured by the builder that the particular alteration would not be made. Especially is this true when the subcontractor before entering into the contract had notice that no guaranty was made as to the character of the ground upon which the foundation was to rest, and where the builder's contract with the owner provided in the plans and specifications that test borings and samples of the soil had been made and were subject to inspection, but that the soil conditions were not guaranteed.

[5] 5. The subcontractor being bound to the builder to perform his contractual obligations under such altered conditions permitted by and made in pursuance of the builder's contract with the owner, a demand by the builder that the subcontractor alter the plans of his work accordingly, and perform his contract under such altered conditions and for such extra compensation as the contract provided should be paid to him should alterations be made in the manner in which his contract was to be performed, did not amount to a breach of the subcontract by the builder, and the subcontractor had no right to rescind the contract upon the ground that the contract had been repudiated by the builder.

6. This being a suit by the subcontractor against the builder to recover on a quantum meruit after having attempted to rescind his contract on the ground of its having been breached by the builder, the trial judge, in view of the above rulings, did not err in his rulings on the exceptions of law and fact to the auditor's report, and in directing a verdict for the defendant. See in this connection: *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573; *American Surety Co. v. Scott*, 18 Okl. 264, 90 Pac. 7; *Daly v. Busk Tunnel Ry. Co.*, 129 Fed. 513, 64 C. C. A. 87; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 424, 24 Sup. Ct. 142, 48 L. Ed. 242; *United States v. Freel* (C. C.) 92 Fed. 209; *Id.*, 186 U. S.

309, 22 Sup. Ct. 875, 46 L. Ed. 1177; Northern Light Lodge v. Kennedy, 7 N. D. 146, 73 N. W. 524; Hormel v. American Bonding Co., 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513; People's Lumber Co. v. Gillard, 136 Cal. 55, 68 Pac. 576; Dorsey v. McGee, 30 Neb. 657, 46 N. W. 1018; Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; Hayden v. Cook, 34 Neb. 670, 52 N. W. 165; United States v. Walsh, 115 Fed. 697, 52 C. C. A. 419; McLennan v. Wellington, 48 Kan. 756, 30 Pac. 183; Howard County v. Baker, 119 Mo. 397, 24 S. W. 200; Getchell v. National Surety Co., 124 Iowa, 617, 100 N. W. 556; Doyle v. Faust, 187 Mich. 108, 153 N. W. 725; Kretchmar v. Bruss, 108 Wis. 396, 84 N. W. 429; Shields v. City of New York, 84 App. Div. 502, 82 N. Y. Supp. 1020; Sessions v. State, 115 Ga. 20, 41 S. E. 259; Davenport v. Magoon, 13 Or. 3, 4 Pac. 299, 57 Am. Rep. 4; Words and Phrases, vol. 1, p. 360.

Judgment affirmed on the main bill of exceptions. Cross-bill of exceptions dismissed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 361)

BENFORD v. BLEDSOE. (No. 11363.)

(Court of Appeals of Georgia, Division No. 2.
March 3, 1921.)

(Syllabus by Editorial Staff.)

1. Malicious prosecution §19—Facts insufficient to convict may afford probable cause.

Facts which are in law insufficient to authorize a conviction for a specific crime may nevertheless afford probable cause for the institution of a prosecution for such crime.

2. Malicious prosecution §18(2)—Probable cause for prosecution for simple larceny.

Facts which do not authorize a conviction for simple larceny, but do authorize a conviction for larceny after trust, may afford probable cause for a prosecution for simple larceny.

3. Malicious prosecution §71(2)—Probable cause question of law.

It is a question of law for the court as to what facts constitute probable cause.

4. Malicious prosecution §18(2)—Probable cause for simple larceny shown, though wrong offense charged.

Where plaintiff was intrusted by a member of a firm to which defendant belonged with lumber to be sold to a third party, the proceeds to be collected and paid to the firm, and plaintiff received payment but failed to transmit such payment, there was probable cause for a prosecution instituted by defendant with

knowledge of such facts, though the prosecution was for simple larceny instead of larceny after trust.

5. New trial §70—Improperly dealt when undisputed evidence failed to support verdict.

In an action for malicious prosecution where the undisputed evidence showed probable cause, the verdict for plaintiff was unsupported by the evidence, and it was error to overrule defendant's motion for a new trial.

Error from City Court of Carrollton; James Beall, Judge.

Action by Johnson Bledsoe against J. W. H. Benford. Judgment for plaintiff, and defendant brings error. Reversed.

C. E. Roop and Leon Hood, both of Carrollton, for plaintiff in error.

Smith & Smith and Eugene Spradlin, all of Carrollton, for defendant in error.

STEPHENS, J. [1, 2] 1. Facts which are in law insufficient to authorize a conviction for a specific crime may nevertheless afford probable cause for the institution of a prosecution for such crime. Facts which do not authorize a conviction for simple larceny may afford probable cause for a prosecution for such crime when they do authorize a conviction for larceny after trust.

[3, 4] 2. In a suit for malicious prosecution, it being a question of law for the court as to what facts constitute probable cause (Hicks v. Brantley, 102 Ga. 264, 272, 29 S. E. 459), it follows that where the plaintiff had been intrusted by a member of a firm, to which the defendant belonged, with an amount of lumber to be delivered by the plaintiff and sold to a third party, the proceeds of the sale to be collected by the plaintiff and paid to the defendant's firm, and such third party had made payment for the lumber to the plaintiff and the latter had failed to transmit such payment to the defendant's firm, which facts were known to the defendant, who, with knowledge of the facts, instituted a prosecution against the plaintiff for simple larceny instead of larceny after trust, the prosecution was instituted by the defendant with probable cause.

[5] 3. The undisputed evidence showing the above facts and demanding the inference that the prosecution was carried on with probable cause, the verdict for the plaintiff was without evidence to support it, and it was error to overrule the defendant's motion for a new trial.

Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 269)

RAILEY v. UNITED LIFE & ACCIDENT INS. CO. (No. 11922.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 28, 1921. Rehearing Denied
March 2, 1921.)

(Syllabus by the Court.)

1. Insurance \S 389(6), 392(1), 438—Exemption from liability for death in military service not against public policy; not waived because insurer knew insured would probably engage in such service; not waived by retaining unpaid portion of premium with knowledge.

The provisions of a life insurance policy exempting the insurer from liability for death occasioned by the insured engaging in military or naval service in time of war unless a written permit shall be issued by the company are not void as against public policy; and this is so even where the insured is drafted into the service.

(a) The fact that the insurer knew, at the time the policy was issued, that the insured would in all probability engage in military or naval service, is legally insufficient to work a waiver of the above war clause.

(b) Nor was the retention by the company of an unearned portion of the first premium, with knowledge of the fact that the insured was engaged in the military service of his government in time of war, sufficient to constitute such a waiver.

2. Insurance \S 438—Under policy excluding death in military service, death from drowning as result of collision of transports held excluded.

The death of the insured, who had been drafted into the military service of the United States during the recent war with Germany, having occurred in the North Channel, between the coasts of Scotland and Ireland, as a result of an accidental collision between a ship (upon which he and other soldiers were being transported to Europe) and a sister ship under the same convoy, no liability under the policy (except the reserve due thereon) existed, in view of the plain and unambiguous provisions of the policy exempting the insurer from all indemnity (except the amount of the reserve thereon) in the event the insured lost his life while engaged in military service without the confines of continental United States.

(Additional Syllabus by Editorial Staff.)

3. Evidence \S 11—Judicial notice taken of sinking of transport.

The court will take judicial cognizance of the time and place of the sinking of the transport Otranto as a result of an accidental collision with a sister ship; it being a well-known and historical fact.

4. Appeal and error \S 1139—Judgment affirmed notwithstanding plaintiff's right to recover nominal amount, with directions that defendant pay such amount.

Where the petition on a life insurance policy was drawn in three counts seeking to recover \$1,500, \$3,000, and \$4,500, respectively,

a judgment dismissing the case will not be reversed because of plaintiff's right to recover the reserve amounting to \$2.28, but will be affirmed, with direction that, when the remittitur is filed, defendant pay such amount.

Error from City Court of Tifton; James H. Price, Judge.

Action by J. H. Railey, administrator, against the United Life & Accident Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed, with directions.

See, also, 103 S. E. 184.

John Henry Poole, of Tifton, for plaintiff in error.

Fulwood & Hargrett, of Tifton, for defendant in error.

BROYLES, C. J. This is a suit by J. H. Railey, as administrator of the estate of G. S. Railey, against the United Life & Accident Insurance Company on a policy issued by the defendant in December, 1917, upon the life of the deceased, and payable to the latter's estate. The defendant interposed both a general and special demurrer, and to the judgment sustaining the general demurrer and dismissing the suit the plaintiff excepted.

The policy sued upon provided for payment of a single indemnity, under certain conditions; for payment of a double indemnity, under certain conditions; and for payment of a triple indemnity, under certain other conditions. The plaintiff's petition was drawn in three counts, the first seeking a recovery of the single indemnity; the second seeking a recovery of the double indemnity; and the third asking a recovery of the triple indemnity.

The material and controlling exempting clauses of the policy are as follows:

"In event of death resulting from or occasioned by the insured *engaging in military or naval service in time of war* [italics ours], or at any time in aeronautic ascension or aviation or in submarine voyage, whether the insured shall actually be engaged in military or naval service or not, unless a written permit shall be issued by the company, the sum payable under this policy shall be the reserve thereon."

Written upon the back of the policy was the notice:

"Upon written request by the insured, a war service permit to the amount of the single indemnity will be issued and renewed annually, without extra premium, to cover additional risk of war conditions, while the insured is engaged in military service *within the confines of continental United States* during the present war with Germany or any of her present allies; such permit will not, however, cover death occasioned by or resulting from aeronautic ascension, aviation or submarine voyage." (italics ours.)

These provisions did not conflict with any of the other terms of the policy or with the incontestability clause thereof, which provided that—

"After one year in force this policy will be incontestable except for nonpayment of premium and *military or naval service in time of war* [italics ours], and for aeronautic ascension or aviation and submarine voyage."

[1] 1. The above provisions limiting liability in event of the death of the insured while engaged in military or naval service, without the written permit of the insurance company, are not void as being against public policy. See 4 Joyce on the Law of Insurance, § 2237; 3 Cooley's Briefs on the Law of Insurance, p. 2217 (h); Reid v. American Nat. Assurance Co. (Mo. App.) 218 S. W. 957; La Rue v. Insurance Co., 68 Kan. 539, 75 Pac. 494; Miller v. Illinois Bankers' Life Ass'n, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378. Attention is also directed in this connection to the recent case of Mattox v. New England Mutual Life Ins. Co., 25 Ga. App. 311, 103 S. E. 180, where this court recognized the validity of such war clauses.

The fact alleged in the petition that the company knew at the time the policy was issued that the insured would in all probability engage in military or naval service is insufficient to constitute a waiver of the war provisions of the contract, for it reasonably appears that the company and the insured expected the policy to continue in force for a long number of years, and, in view of the probability of military service, agreed to a practical suspension of liability during such service. Neither was the fact that the company retained an unearned portion of the first premium after the insured's entry into the army legally sufficient to constitute a waiver of the war clauses of the policy. If, as held by this court in the Mattox Case, supra, the company's retention of unpaid premium notes did not operate to waive the war clauses in that case, then surely the mere retention of an unearned portion of the premium in the instant case was insufficient to constitute such a waiver. Moreover, in the Miller case, supra, it was expressly held that the acceptance of the premium, even with full knowledge that the insured was, at the time of payment, actually engaged in war service, did not work a waiver. See, also, to the same effect Sandstedt v. American Central Life Ins. Co., 109 Wash. 338, 186 Pac. 1069. The fact (as shown by a certified copy from the clerk of the Supreme Court of Arkansas) that the agreed statement of facts in the Miller Case showed that the insured had entered the military service as a volunteer, is immaterial. The same rule would apply where the insured was drafted into the service.

[2] 2. It being clear, therefore, that the war clauses of the policy are valid, and

that they were not waived by the insurer, we will proceed to briefly apply them to the facts as alleged in the petition. It is distinctly alleged that the policy was issued in December, 1917, and that the insured, who was drafted into the army, lost his life by accident on October 6, 1918, when the ship Otranto, which was conveying the insured, together with other soldiers, to Europe, in order that they might be used in the great World War, collided with a sister ship. Obviously, therefore, these facts precluded a recovery of either the single, double, or triple indemnity ties, the policy expressly, in plain and unequivocal terms, providing that no liability (except for the reserve on the policy) should exist if the death of the insured occurred while engaged in military or naval service in time of war, without the written permit of the insurance company, and the petition not showing that such a permit was ever issued. Nor does the petition show that the insured took advantage of the written notice indorsed on the back of the policy, which provided that—

"Upon written request of the insured, a war service permit to the amount of the single indemnity, will be issued and renewed annually, without extra premium, to cover additional risk of war conditions, while the insured is engaged in military service within the confines of continental United States during the present war with Germany or any of her present allies."

[3] Moreover, even had the insured exercised this right, there could still be no recovery, as the war service permit was, by express stipulation, to be effective only in the event the insured's death occurred while engaged in military service "within the confines of continental United States," and while the petition is silent as to exactly where the insured lost his life, it alleges, as above stated, that his death was the result of a collision between the Otranto, a ship upon which he was being conveyed to Europe, and another ship under the same convoy, and this court will take judicial cognizance of the now well-known and historical fact that on October 6, 1918, the transport steamer Otranto accidentally collided with her sister ship Kashmir and was sunk in the North Channel, between the Irish and Scottish coasts.

[4] It is true, and so conceded by the defendant, that, under the allegations of the petition, the plaintiff was entitled to recover the sum of \$2.28, the reserve alleged to be due on the policy at the date of the death of the insured, and the petition showed a cause of action for that amount. Moreover, it does not appear that this amount was ever tendered to the plaintiff by the defendant. Since, however, the petition was drawn in three counts, seeking a recovery of \$1,500, \$3,000, and \$4,500, respectively, and the reserve admitted to be due was only the nom-

inal sum of \$226, we think that the defendant should be allowed the privilege of paying this small amount and have the case finally disposed of, and we decline to reverse the judgment dismissing the plaintiff's case, but affirm it, with direction that, when the remittitur is filed, the defendant pay to the plaintiff the amount of the reserve on the policy, with interest from August 11, 1919, the date when the defendant refused payment of the policy.

Judgment affirmed, with direction.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 249)

PYNETREE PAPER CO. v. WOOD.
(No. 11518.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 28, 1921. Rehearing Denied
March 2, 1921.)

(Syllabus by Editorial Staff.)

Master and servant §185(6), 233(4)—Fellow servant's act and contributory negligence cause of injury from using rope.

Where a rope too short for its intended purpose had been spliced by a fellow servant, and the injured employee discovered that it was too short but undertook to force it on a pulley and in so doing was injured, the injury was due to the negligence of the fellow servant and to his own negligence.

Error from Superior Court, Wilkinson County; J. B. Park, Judge.

Action by R. L. Wood against the Pynetree Paper Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bryan & Middlebrooks, of Atlanta, and Geo. H. Carswell, of Irwinton, for plaintiff in error.

Allen & Pottle, of Milledgeville, for defendant in error.

PER CURIAM. The only negligence alleged in the petition was that the defendant failed to furnish to the plaintiff a rope of proper length for the purpose intended, it being alleged that the rope was too short and that on that account it would not go into the grooves as the other ropes which he had placed therein. Upon the trial the evidence conclusively showed that the rope furnished by the defendant to the plaintiff had been spliced by a fellow servant who was assisted by the plaintiff, and that, upon undertaking to put upon the pulley this particular rope which was used as a belt, the plaintiff discovered that the rope was too short and undertook to force it on the pulley with a bar, and that in so doing he suffered his injury.

We hold that the evidence in this case showed that the injury sustained by the

plaintiff was due to the negligence of a fellow servant, and to his own negligence in undertaking to place the rope on the pulley. For this reason the court erred in overruling the motion for a new trial. See *Donaldson v. Marsh Cypress Co.*, 9 Ga. App. 267, 70 S. E. 1121, and cases there cited.

Judgment reversed.

BROYLES, C. J., and LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 328)

RICKER v. LOWRY NAT. BANK.

LOWRY NAT. BANK v. RICKER.

(Nos. 11395, 11403.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921.)

(Syllabus by the Court.)

1. Bills and notes §537(1)—Verdict for plaintiff demanded when execution admitted and defense not sustained.

In a suit against the maker by the transferee of a series of promissory notes falling due consecutively, some of the notes appearing on the face to have matured and the others appearing not to have matured, where the defendant admits the execution of the notes and the indebtedness represented by them, and does not deny the allegation in the petition that the entire series is due by virtue of the terms of a collateral agreement between the maker and the payee, which provides that the entire series shall become due upon default by the maker in payment of other notes in the series when due, but disputes the title of the plaintiff in the notes and pleads a failure of consideration and breach of warranty, a verdict for the plaintiff is demanded, in the absence of any evidence to sustain the defendant's plea.

2. Appeal and error §728(3)—Assignment of error not setting out excluded evidence, or showing evidence offered to support plea, held insufficient.

Where it does not appear what evidence was offered by the defendant in support of the plea of failure of consideration and breach of warranty, an assignment of error that the court erred in refusing to allow the defendant to prove by a named witness that the consideration of the notes had failed, and that the ruling of the court in excluding the evidence prevented the defendant from establishing his defense, presents nothing for consideration, where neither the evidence nor the nature of the evidence is set out.

3. Bills and notes §370—Exclusion of evidence of failure of consideration and breach of warranty as against transferee not error.

There being no evidence that the plaintiff transferee had not acquired the notes bona fide for value and without notice of any defense by the maker, and the maker's plea of failure of consideration and breach of warranty being predicated upon an alleged contract between him and the payee, and there being no evidence

as to this contract, and it not appearing from any of the assignments of error in the motion for a new trial that such contract was offered in evidence, none of the assignments of error in the motion for a new trial show grounds for a reversal, since they except only to the failure of the trial judge to admit testimony tending to show that the consideration had failed and that the warranties contained in the contract had been breached.

4. Motion for new trial properly overruled.

It was not error to overrule the defendant's motion for a new trial.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Action by the Lowry National Bank against G. E. Ricker. Judgment for plaintiff, and defendant brings error, and plaintiff files a cross-bill of exceptions. Judgment affirmed, and cross-bill dismissed.

A. J. & J. O. McDonald and Jessie Jones, all of Fitzgerald, for plaintiff in error.

Wall & Grantham and Sam'l Kasewitz, all of Fitzgerald, and J. H. Porter, of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed on the main bill of exceptions; cross-bill dismissed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 327)

PATILLO v. HALLET & DAVIS PIANO CO. (No. 11308.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921.)

(Syllabus by the Court.)

1. Mortgages §235—Blank indorsement of secured note transfers legal title and authorizes holder to foreclose.

A blank indorsement of the payee of a mortgage note is sufficient to pass the legal title in the note and the mortgage to the holder thereof, and the mortgage may be foreclosed by the holder in his own name. Civil Code 1910, §§ 3278, 3345, 3346, 3347, 4274; *Setze v. First National Bank of Pensacola*, 140 Ga. 606, 79 S. E. 540.

2. Appeal and error §679(1)—Assignment that defendant had right to plead failure of consideration held without merit.

The plea of failure of consideration not being stricken, and it not appearing what evidence, if any, was offered by the defendant in support of such plea, an assignment of error that "the defendant had a legal right to plead failure of consideration" is without merit.

3. Verdict properly directed.

The verdict for the plaintiff was properly directed.

Error from Superior Court, Talbot County; G. H. Howard, Judge.

Action by the Hallet & Davis Piano Company against Mrs. J. S. Patillo. Judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Bull & Son, of Oglethorpe, for plaintiff in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 336)

SELPH & DANIELS v. WILLIAMS.

WILLIAMS v. SELPH & DANIELS.

(Nos. 11304, 11305.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 26, 1921.)

(Syllabus by the Court.)

1. Brokers §55(1)—Contract held not broken by procuring another broker to obtain purchaser.

A real estate brokerage contract, which provides that the agent may sell, or through his influence may sell, certain real estate for the owner, is not breached by the agent procuring another real estate dealer to obtain a purchaser. It being within the contemplation of the contracting parties that the agent will not necessarily be required to personally perform his duties under the contract, but that he may through his influence procure the performance of such duties through the instrumentality of some other person, such performance by a third party is not subject to the objection that the agent has delegated his authority. *Springfield Fire Ins. Co. v. Price*, 132 Ga. 687, 64 S. E. 1074.

2. Brokers §55(1)—Contract to sell at stipulated sum not broken by procuring another to obtain purchaser.

A contract which provides that the agent may sell the property at a certain stipulated amount, as \$50 per acre, does not necessarily repose any personal trust or special confidence in the skill, discretion, or judgment of the agent, and the agent may, without committing a breach of the contract, perform his duties under it by procuring the services of another, who, acting for the agent, obtains a purchaser under the terms of the contract. Civil Code 1910, § 3578; *McCroskey v. Hamilton*, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79.

3. Brokers §40—Contract held not contradictory as to commissions.

The contract does not contain terms that are contradictory, where it provides that an agent is employed by the owner to sell certain real estate, consisting of a certain number of acres, at a certain price per acre, to net the owner a certain price per acre, and to retain, as a commission for his services in selling the property, the difference between the selling price and the net price to the own-

er, and also where it provides that the agent may sell, or through his influence in procuring the services of another, cause to be sold, such described property, and retain as a commission for his services all of the purchase price above a certain amount.

4. Evidence \S 442(4)—When brokerage contract leaves selling price blank, it may be proved by extrinsic evidence.

Where, in such a contract, the amount at which the agent is to sell the property is left blank, the amount may be proved by extrinsic evidence, under a proper allegation in the petition as to the amount. *Georgia Railroad & Banking Co. v. Reid*, 91 Ga. 377, 17 S. E. 934.

5. Brokers \S 82(1)—Petition in action for commissions held not demurrable.

In a suit by the agent against the owner on such a contract, the petition, which contains two counts, one count alleging such a contract as is set out above in paragraph 1 of the syllabus, and the other count alleging a contract as set out in paragraph 2 of the syllabus, is not subject to any of the special or general grounds of the demurrers interposed. The plaintiff is therefore entitled to recover the larger amount sued for, if he can prove the contract declared upon.

6. Pleading \S 192(6)—No demurrer for matter requiring evidence to show.

The contract, as it appears copied and set out in the petition, contains no evidence of any physical characteristics (such as being partly printed and partly in writing) as might aid in its construction or show the invalidity of any of its clauses, and such question cannot be raised on demurrer. Such facts, if they exist, must be established by proof.

7. Rulings on demurrer.

On demurrer to the petition the first count was improperly stricken, and the other count was properly allowed to stand.

8. Petition held sufficient.

The petition otherwise sets out a cause of action.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by Selp & Daniels against W. W. Williams. On demurrer, one count was stricken from the petition, and plaintiff brings error, and defendant files a cross-bill of exceptions. Reversed on the main bill of exceptions, and affirmed on the cross-bill.

Titus & Dekle, of Thomasville, for plaintiff in error.

H. J. MacIntyre, of Thomasville, and Branch & Snow, of Quitman, for defendant in error.

STEPHENS, J. Judgment reversed on the main bill of exceptions. Judgment affirmed on the cross-bill of exceptions.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 365)

GLYNN CANNING CO. v. E. L. ADAMS CO.
(No. 11637.)

(Court of Appeals of Georgia, Division No. 2.
March 3, 1921.)

(Syllabus by Editorial Staff.)

1. Frauds, statute of \S 152(1)—Must be pleaded.

In a suit for breach of contract, defendant cannot claim the benefit of the statute unless the statute is pleaded.

2. Evidence \S 471(20)—Testimony as to state of market and actual selling price not opinion evidence.

While direct testimony as to market value is in the nature of opinion evidence, testimony as to the state of the market and the actual selling price of a certain commodity at a particular time and place is testimony as to a positive fact, and not opinion evidence.

3. Evidence \S 113(2)—Value of commodity at distant place is irrelevant and creates no issue.

Where the issue to be determined is the state of the market as respects a certain commodity at a certain time and place, evidence as to the state of the market at the same time at a place several hundred miles distant is irrelevant and, though admitted, creates no issue for the jury.

4. Evidence \S 113(1)—Food regulations not admissible when value not affected.

When it does not appear that the value of the article involved was in any way affected by the United States food regulations, they cannot be considered in determining such value.

5. Appeal and error \S 1078(1)—Assignments not insisted upon not considered.

It is not necessary to pass on assignments of error that are not insisted upon.

6. Sales \S 420—Verdict properly directed when evidence undisputed.

In an action for breach of a contract for the sale of personal property where the undisputed evidence established the contract and its breach and plaintiff's damage, a verdict for plaintiff was properly directed.

Error from Superior Court, Glynn County; J. I. Summerall, Judge.

Action by the E. L. Adams Company against the Glynn Canning Company. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

Conyers & Wilcox, of Brunswick, for plaintiff in error.

Krauss & Strong, of Brunswick, and Anderson & Slate, of Atlanta, for defendant in error.

STEPHENS, J. [1] 1. The defendant in a suit for a breach of contract cannot claim the benefit of the statute of frauds unless the

statute is pleaded. *Johnson v. Latimer*, 71 Ga. 470 (3). Where he has failed to plead the statute, he cannot be heard to except to the direction of a verdict against him upon the ground that the contract is within the statute.

[2, 3] 2. While "direct testimony as to market value is in the nature of opinion evidence," testimony as to the state of the market and as to the actual selling price of a certain commodity at a particular time and place is testimony as to a positive fact and is not in its nature opinion evidence, and where undisputed a verdict may properly be directed as to the value thus proved. Where the issue to be determined is as to the state of the market as respects a certain commodity at a certain time and place, evidence as to the state of the market of the commodity at the same time at a place several hundred miles distant is irrelevant, and, although admitted, creates no issue for a jury upon the question under consideration.

[4] 3. Where it does not appear that the value of the article in question was in any affected by the United States food regulations, such regulations cannot be considered in determining the value of such article.

[5] 4. It is not necessary to pass upon the other assignments of error, as they are not insisted upon.

[6] 5. This being a suit for a breach of a contract for the sale of personal property to be delivered in the future, and the undisputed evidence establishing the contract and its breach by the defendant, to the plaintiff's damage in a certain amount, a verdict for the plaintiff was properly directed.

6. A verdict, however, was demanded for the plaintiff in the sum of only \$472.50. Since the verdict directed was for \$500.50, the judgment is affirmed, with direction that the plaintiff write off the excess.

Judgment affirmed, with direction.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 331)

BROWN v. MERCHANTS' TRADING CO.
(No. 11657.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921.)

(Syllabus by the Court.)

1. Evidence §423(8)—Surety not required to give principal notice of intention before proving suretyship as defense to suit on contract.

Section 3556 of Civil Code 1910, which provides that where the fact of suretyship does not appear upon the face of the contract it may be proved by parol provided the surety gives notice to the principal of his intention to make such proof, applies only to cases where the defendant seeks to establish himself as a surety,

not by way of a plea in bar to a suit against him on the contract, but for the purpose of enforcing his rights as a surety against his principal.

2. Husband and wife §158—Married woman may plead that she was surety and not bound without giving principal notice of intention to make such a defense.

A female defendant whose name appears as a principal on the face of the contract sued on may plead in bar to the suit that she was in fact a surety only, and that, being a married woman at the time she entered into the contract, the contract of suretyship was void, and it is not necessary to the validity of such plea that it appear that notice was given to the alleged principal as required by Civil Code 1910, § 3556, of her intention to make such defense. The court erred in striking the defendant's plea and in giving judgment for the plaintiff.

Error from City Court of Dublin; R. D. Flynt, Judge.

Action by the Merchants' Trading Company against Mrs. D. Brown. Judgment for plaintiff, and defendant brings error. Reversed.

W. A. Dampier, of Dublin, for plaintiff in error.

Burch & Daley, of Dublin, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 308)

GROVE MFG. CO. v. SALTER. (No. 11360.)

(Court of Appeals of Georgia, Division No. 2.
March 4, 1921.)

(Syllabus by the Court.)

1. Fraudulent conveyances §47—Bulk sales statute applies only to sales by merchant, trader, or dealer.

The sale in bulk act of this state (Civ. Code 1910, §§ 3226-3229) applies only to sales of "any stock of goods, wares, or merchandise in bulk" by a merchant, trader, or dealer in such articles. A bona fide purchaser for value of any stock of "goods, wares, or merchandise in bulk" from a vendor who is not such a merchant, trader, or dealer acquires good title to the property, even though he has not complied with the terms of this act. See, in this connection, Civ. Code 1910, §§ 4120, 3225; *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 512, 66 S. E. 257, 25 L. R. A. (N. S.) 758.

2. Fraudulent conveyances §198—Good-faith purchaser from one not a merchant, etc., acquires good title notwithstanding prior sale in violation of bulk sales act.

Where, in a claim case, the defendant in *fi. fa.* was a merchant, trader, or dealer in merchandise contemplated in the act, and had made a sale of his stock of goods, wares, or merchandise in bulk which was fraudulent for

failure to comply with the terms of this act, a claimant who had bona fide and for value afterwards purchased such stock of goods, wares, or merchandise in bulk, without notice of such fraudulent sale, from another party who was not a merchant, trader, or dealer in merchandise in such property, acquired good title to the property.

3. Certiorari \Leftrightarrow 68—Properly overruled when verdict and judgment authorized by law and evidence.

The verdict and judgment as rendered for the claimant being authorized under the law and the evidence, the trial judge did not err in overruling the certiorari.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Proceedings on a claim by H. M. Salter to property levied on under a *fi. fa.* in favor of the Grove Manufacturing Company. Judgment for the claimant, and certiorari overruled, and plaintiff in *fi. fa.* brings error. Affirmed.

Wm. Brunson and Larsen & Crockett, all of Dublin, for plaintiff in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 333)

METROPOLITAN LIFE INS. CO. v. MONROE. (No. 11536.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921.)

(Syllabus by Editorial Staff.)

1. Certiorari \Leftrightarrow 43—Superior court does not acquire jurisdiction unless bond given.

Under Civ. Code 1910, § 5185, requiring the party applying for a writ of certiorari to give bond and security for the payment of all future costs and eventual condemnation money, the superior court acquires no jurisdiction if the bond is not given.

2. Certiorari \Leftrightarrow 43—Bond to person described as administrator runs to him personally, when actual principal cannot be ascertained.

Under Civ. Code 1910, § 3570, providing that the words, "agent, administrator," etc. are generally words of description, a certiorari bond, payable to an individual whose name is followed by the word "administrator," runs to him individually, and the word "administrator" is to be taken merely as descriptio personæ, when there is no means of ascertaining the actual principal with absolute and legal certainty.

3. Certiorari \Leftrightarrow 43—Bond cannot be considered as payable to one as administrator of another, where it merely describes him as administrator.

Where a certiorari bond, in the caption and in the body of the bond, describes the obligee

as M., administrator, it cannot be construed as payable to M. as administrator of G., though physically attached to a petition for certiorari, not referred to in the bond, reciting a verdict and judgment in favor of M. as administrator of G. against the party giving the bond.

4. Certiorari \Leftrightarrow 43—Amendment of writ and answer held not to give jurisdiction when bond insufficient.

Where a certiorari bond was insufficient because describing the obligee merely as M., administrator, with nothing to show who the actual principal was, the allowance of an amendment of the writ and answer of the trial judge to properly designate the defendant in certiorari as M., as administrator of G., did not give the superior court jurisdiction.

5. Certiorari \Leftrightarrow 43—Defendant entitled to have writ dismissed when bond insufficient under statute.

Though an instrument void as a statutory bond may be good when properly sued on as a common-law obligation, defendant in certiorari was entitled to have the writ dismissed when the bond did not comply with the statutory requirements.

Stephens, J., dissenting.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Turner Monroe, administrator, against the Metropolitan Life Insurance Company. Judgment for plaintiff, and writ of certiorari dismissed by the superior court, and defendant brings error. Affirmed.

Jones, Park & Johnston and C. Baxter Jones, all of Macon, for plaintiff in error.

C. H. Hall, of Macon, for defendant in error.

JENKINS, P. J. [1] 1. Under the provisions of section 5185 of Civil Code 1910, it is the general rule that before any writ of certiorari shall issue the party applying for the same shall give bond and security for all future costs and the eventual condemnation money, payable to the adverse party, and if he fails so to do the superior court does not acquire jurisdiction of the case. *Miller v. Anderson*, 118 Ga. 432, 433 (2), 45 S. E. 365; *Jones v. Gill*, 121 Ga. 93, 96, 48 S. E. 688; *Carroll v. Inner Shoe Tire Co.*, 21 Ga. App. 397, 94 S. E. 643.

[2] 2. A certiorari bond, payable on its face to a named individual, followed by the word "administrator," which falls within itself to furnish the means whereby the actual principal for whose benefit the bond is executed can be ascertained with absolute and legal certainty, amounts to nothing more than an undertaking in favor of the named individual, and the word "administrator" is to be taken merely as descriptio personæ. Code 1910, § 3570.

[3] Thus, where the caption to a certiorari bond is entitled "Turner Monroe, Adminis-

trator, v. Metropolitan Life Ins. Co., in the Municipal Court of the City of Macon, September Term, 1919," and where the bond recites dissatisfaction with the verdict rendered in said case, and a desire to certiorari the same, as a reason for entering into said bond, and where the obligor binds himself for future cost and the eventual condemnation money unto "Turner Monroe, Administrator," the obligation must be taken as being executed in favor of Turner Monroe individually, and cannot be construed as payable to "Turner Monroe as administrator upon the estate of Jeannette Green," although the bond may be physically attached to a petition for certiorari, but to which no reference is made, reciting a verdict and judgment adverse to petitioner in the case of Turner Monroe as administrator upon the estate of Jeannette Green v. Metropolitan Life Ins. Co., filed to the September term, 1919, of the Municipal Court of the city of Macon.

[4] 3. The fact that the judge of the superior court may have allowed the answer of the trial judge and the writ of certiorari issued by the clerk, both referring to the case as "Turner Monroe, administrator," to be amended nunc pro tunc, so as to read "Turner Monroe, as administrator upon the estate of Jeannette Green," would not operate to give the superior court jurisdiction of a case which in the absence of the required bond it could not entertain. *Miller Co. v. Anderson*, 118 Ga. 432 (2), 45 S. E. 365.

[5] 4. Irrespective of whether or not under section 5707 of Civil Code 1910 a certiorari bond is amendable in any respect (see *Simpkins v. Johnson*, 3 Ga. App. 437, 60 S. E. 202, and *Carroll v. Inner Shoe Tire Co.*, 21 Ga. App. 397, 94 S. E. 643, holding it to be not amendable), no offer to amend was made in this case; and, while it is sometimes true that an instrument may be void as a statutory bond, and yet be good when properly sued on as a common-law obligation (*Paxson v. Planters' Warehouse & Loan Co.*, 20 Ga. App. 267, 92 S. E. 1023), yet the defendant in certiorari is entitled to whatever rights were his pertaining to the statutory requirements of the bond, and the judge of the superior court did not err in dismissing the writ. Judgment affirmed.

HILL, J., concurs.

STEPHENS, J. (dissenting). It is true that the bond is payable to Turner Monroe in his individual capacity. He can nevertheless, by proper proof of all the circumstances, sue in his representative capacity as administrator of the estate of Jeannette Green, and recover on the bond. 18 Cyc. 877. This being true, it would seem that, where all of the facts necessary to support a recovery can be ascertained from the record, judgment could be entered up in favor of the opposite party,

Turner Monroe, as administrator of the estate of Jeannette Green, just as if the bond had been made to Turner Monroe in his representative capacity, and without inquiring into any matters dehors the record. The bond being entitled in the cause of Turner Monroe, Administrator, v. Metropolitan Life Insurance Company, in the municipal court of Macon, and it appearing from the answer of the judge of that court to the writ of certiorari on file in the instant case that no case was pending in the municipal court of Macon in which Turner Monroe was plaintiff against the Metropolitan Life Insurance Company, except the case of Turner Monroe as administrator of the estate of Jeannette Green, it seems that the facts necessary to establish liability on the bond in favor of Turner Monroe as administrator of the estate of Jeannette Green are supplied by the record, and therefore judgment can be rendered on the bond without inquiry into matters outside the record.

(26 Ga. App. 372)

JACKSON et al. v. DORSEY, Governor.
(No. 11453.)

(Court of Appeals of Georgia, Division No. 2
March 4, 1921.)

(Syllabus by the Court.)

1. Ball ¶84—Not defense to forfeiture that prisoner not brought to trial after demand.

Where a scire facias has issued upon a forfeiture of a criminal recognizance, it is no defense by the surety that his principal was not brought to trial at the subsequent term of court after having made a legal demand for a trial at the former term as provided in Pen. Code 1910, § 983, when it does not appear that the principal had been discharged and acquitted or was legally entitled to be discharged and acquitted.

2. Criminal law ¶576(5)—Demand for trial waived by absence and discharge defeated.

Voluntary absence from court (such as being a fugitive from justice) by one under a criminal charge, who made a demand for a trial at a former term of the court, amounts to a waiver of such demand and does not entitle him to a discharge and acquittal of the offense charged, as provided in Pen. Code 1910, § 983. *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562.

3. Other assignments not passed on.

In view of the above ruling, it is unnecessary to pass upon the other assignments of error as to rulings on the pleadings.

4. Criminal law ¶1103—Assignments requiring inquiry into evidence not considered when evidence not properly briefed.

The brief of the evidence in this case consists of questions and answers and colloquies between the court and counsel, and it appearing that no bona fide effort has been made to brief the evidence as is required by law, this

court will not consider any assignment of error in the determination of which it is necessary to inquire into the evidence, such as an exception to the direction of a verdict upon the ground that evidence was improperly admitted or that the evidence raises an issue of fact for the jury. *Trueheart v. State*, 13 Ga. App. 661(2), 79 S. E. 755, and cases cited.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Action by H. M. Dorsey, Governor, against P. P. Jackson and others. Judgment for plaintiff, and defendants bring error. Affirmed.

R. R. Jackson, and John F. Echols, both of Atlanta, for plaintiffs in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(16 Ga. App. 369)

SOUERBRY v. ORRELL

ORRELL v. SOUERBRY.

(Nos. 11256, 11257.)

(Court of Appeals of Georgia, Division No. 2.
March 4, 1921.)

(*Syllabus by Editorial Staff.*)

1. Certiorari \S 43—Writ void, if issued before bond given as required by law.

A writ of certiorari in a civil case, unless sued out in forma pauperis, is absolutely void, if issued before the applicant has given bond as prescribed by law.

2. Certiorari \S 43—Bond must be approved, and certificate is not substitute.

A bond on certiorari, to be effectual, must be approved by the judge or justice of the court in which the case was tried, and a certificate of the trial magistrate that the plaintiff has paid all costs accrued and given bond as required by law is not a sufficient substitute for the written approval required by law.

3. Certiorari \S 70(9)—Writ of error to judgment overruling certiorari dismissed, when judgment refusing to dismiss certiorari must be reversed.

Where a certiorari should have been dismissed, and the judgment refusing to dismiss it must be reversed, the subsequent hearing was nugatory, and a writ of error to the overruling of the certiorari will be dismissed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between Mrs. M. H. Souerbry and A. D. Orrell. Judgment for the latter, and the former brings error, and Orrell files a cross-bill of exceptions. Reversed on cross-bill of exceptions, and main bill of exceptions dismissed.

Weltner & Cheatham, of Atlanta, for plaintiff in error.

T. B. Higdon, of Atlanta, for defendant in error.

STEPHENS, J. [1,2] 1. "A writ of certiorari in a civil case, unless sued out in forma pauperis, is absolutely void, if it be issued before the applicant has given the bond prescribed by law; and the bond, to be effectual, must be approved by the judge or justice of the court in which the case was originally tried. A certificate of the trial magistrate that the plaintiff 'has paid all costs accrued in the trial and given bond as required by law in said case' is not a sufficient substitute for the written approval required by law." *Sanford v. Wade*, 17 Ga. App. 366, 86 S. E. 945.

[3] 2. "Inasmuch as the judgment, in the present case, refusing to dismiss the certiorari, complained of in the cross-bill of exceptions, must be reversed, the subsequent hearing was nugatory, and a writ of error to the overruling of the certiorari will be dismissed." *Alabama Midland Ry. Co. v. Stevens*, 116 Ga. 790 (4), 43 S. E. 46.

Judgment reversed on cross-bill of exceptions; main bill of exceptions dismissed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 338)

KLINE CAR CORPORATION v. WATKINS MOTOR CO. (No. 11314.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 26, 1921.)

(*Syllabus by the Court.*)

1. Abatement and revival \S 3—Question of jurisdiction cannot be raised by denial of jurisdictional allegations.

"Pleas to the jurisdiction must be pleaded in person, and must, when relied on, be pleaded specially, unless a want of jurisdiction appears on the face of the proceedings—in which case it may be taken advantage of on motion." Civ. Code 1910, \S 5665. The defendant, not having filed a special plea to the jurisdiction, cannot raise the question in his plea by a general denial of facts alleged in the petition showing jurisdiction of the person.

2. Damages \S 85—Party making deposit to secure performance may recover it after expiration of contract in absence of any default.

Where a contract provides that a sum of money deposited by one of the contracting parties with the other party as a guaranty for the faithful performance of the contract by the party making the deposit shall, upon the latter party's failure to faithfully perform his obligations under the contract, be appropriated by the other party and applied as liquidated damages, the party making the deposit may, after the expiration of the contract, recover the

amount of the deposit when it appears that he had not in any way violated his obligations under the contract and is in no way indebted to the opposite party.

3. Sales \S 183—Failure to deliver, when not due to excepted causes, relieves other party of performing.

Where the contract provides that the party making the deposit shall at certain intervals during the life of the contract purchase automobiles from the other party, and further provides that the other party will not be liable for any loss or damage thereunder arising from a nonperformance of his obligations to make the deliveries contracted for if such loss or damage is caused by reason of fires, strikes, or causes beyond his control, a failure by him to make deliveries, when not due to any of such causes, amounts to a breach of the contract by him, absolving the other party from performing.

4. Verdict for plaintiff authorized.

In a suit, therefore, by the party making the deposit, to recover the same, where the evidence shows no breach of the contract on his part, and fails to show that performance by the opposite party was prevented by fires, strikes, or causes beyond his control, a verdict for the plaintiff was authorized.

5. Evidence \S 271(6)—Statement of seller giving reasons for nondelivery of goods not evidence in his behalf.

Where a party, under the contract, has the right to delay deliveries on account of such causes, a mere statement by him assigning such causes as a reason for a failure by him to comply with his obligations under the contract is not evidence in his behalf showing the existence of such causes.

6. Evidence \S 5(2)—No judicial notice that failure to perform act was due to war or general public condition.

While the existence of a war or any fact of general public notoriety may be taken notice of by the courts without proof, it does not follow that a court will take notice, without proof, that a failure to perform any particular act is due to the existence of a recognized war or any general public condition.

7. Evidence \S 222(2)—Promise to refund deposit under contract held an admission and not varying written contract.

A party to a contract may, as in the instant case, make admissions tending to establish his liability—as a statement by the party holding the deposit, promising to refund the deposit to the party who made it—and such evidence is not subject to the objection that it is extrinsic evidence seeking to vary the terms of a written contract.

8. Evidence \S 427—Trial \S 255(3)—Failure to charge on burden of proof without request held not error.

It does not appear that a charge instructing the jury that the plaintiff carried the burden of proof would, under the evidence in this case, likely have produced a different result; and therefore a failure of the court so to charge,

in the absence of any special request to do so, was not error.

9. Sufficiency of evidence.

The evidence authorized the verdict, and no error of law appears.

Error from City Court of Dublin; M. H. Blackshear, Judge pro hac.

Action by the Watkins Motor Company against the Kline Car Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

W. C. Davis, of Dublin, for plaintiff in error.

Burch & Daley, of Dublin, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 373)

BEVERIDGE v. SIMMERVILLE. (No. 11486.)

(Court of Appeals of Georgia, Division No. 2, March 4, 1921.)

(Syllabus by the Court.)

1. Landlord and tenant \S 310(1)—On judgment in landlord's favor in proceeding to dispossess, he is entitled to double rent.

Upon the trial of an issue formed upon a summary proceeding under Civ. Code 1910, \S 5385, by a landlord to dispossess his tenant for failure to pay rent, where judgment goes against the tenant, the landlord is entitled to recover double the rent reserved or stipulated to be paid, unless the tenant was one at will or sufferance, in either of which latter events the landlord is entitled to recover double what the rent of the premises is shown to be worth.

2. Landlord and tenant \S 309—Instruction that parol contract for more than one year created tenancy at will not error.

Where upon the trial of such an issue there is evidence authorizing the inference that the rental contract was in parol and for a term longer than one year, it was not error to instruct the jury that such a contract by operation of law, became a tenancy at will. Civ. Code 1910, $\S\S$ 3693, 3708.

3. Landlord and tenant \S 309—Failure to charge that law implied renewal, when tenant continued to pay rent after termination of lease held error.

There being evidence also authorizing the inference that the lease contract as originally entered into was for a period of one year, and that the tenant after the expiration of the year continued in possession of the premises and continued to pay rent under the terms of the contract, and continued to live on from year to year, paying rent under the terms of the original lease contract, it was therefore error to fail to charge that under such state of

facts the law implied a renewal of the original lease contract for a year, and that a tenancy from year to year was created. *Allen v. Montgomery*, 25 Ga. App. 817, 105 S. E. 88.

4. Landlord and tenant \S 297(1, 2)—Summary proceedings do not lie unless possession has been demanded and refused; notice to terminate tenancy at will not sufficient demand; agreement to vacate does not dispense with demand.

Before a tenant can be summarily dispossessed under the Civ. Code 1910, \S 5385, for holding over beyond his term or for failure to pay rent, it must appear that possession of the premises has been demanded of him, and that he had refused or failed to vacate. The giving by the landlord to the tenant of two months' notice, as required by Civ. Code 1910, \S 3709, to terminate a tenancy at will, is not such a demand for possession of the premises as will warrant the issuance by the landlord of a summary proceeding to dispossess the tenant; nor will an agreement by the tenant with the landlord to vacate by a certain date operate in lieu of the demand required by the statute.

5. Landlord and tenant \S 298(2)—Damages from landlord's conversion of tenant's property cannot be recouped in proceeding to dispossess.

The tenant cannot, in such a proceeding, recoup damages not arising under the contract. Where the landlord entered upon the premises without authority, after the issuance of the writ and after the giving of the counter affidavit and bond by the tenant, and converted to his own use certain personal property belonging to the tenant, damages arising out of such unlawful conversion cannot be set up by the tenant by way of recoupment in defense to the proceeding to dispossess.

6. Landlord and tenant \S 310(1)—Double rent not recoverable without evidence as to when possession was demanded.

Double rent cannot be recovered from a tenant prior to demand for possession, and, there being no evidence as to when demand, if any, was made, the verdict for double rent is not supported by the evidence. *Talley v. Mitchell*, 138 Ga. 392, 75 S. E. 465.

7. Motion for new trial should have been sustained.

The court having erred as set out in paragraphs 3 and 6, the defendant's motion for a new trial should have been sustained.

Error from Superior Court, Polk County; C. O. Bunn, Judge pro hac.

Suit by George Simmerville against George E. Beveridge. Judgment for plaintiff, and defendant brings error. Reversed.

Mundy & Watkins, of Cedartown, for plaintiff in error.

John K. Davis, of Cedartown, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(36 Ga. App. 331)

CITY OF COLLINS v. FINDLEY.
(No. 11634.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921.)

(Syllabus by the Court.)

1. Bridges \S 37—City liable for negligent failure to maintain small bridge in safe condition.

Failure of a municipal corporation to use due care in maintaining its streets in a condition safe for persons traveling over them renders the municipality liable to any one injured without fault on his part on account of any negligently permitted defect in a small bridge or timbers placed across a ditch in the street.

2. Bridges \S 48(4)—Doctrine of *res ipsa loquitur* applies when plank of bridge apparently safe flies up and strikes mule.

Where a bridge over a ditch along a public thoroughfare in a city is covered with planks apparently safe, but one of which, as a team passes over the bridge, flies up and injures one of the mules to the team, the doctrine of *res ipsa loquitur* applies, and the inference is authorized that the municipality was negligent.

3. New Trial \S 70—Motion properly overruled when evidence authorized verdict.

The evidence authorized the inference that the driveway over which the plaintiff's mules were traveling and in which the bridge was located was a public thoroughfare in the city of Collins, and otherwise authorized the verdict for the plaintiff. It was therefore not error to overrule the defendant's motion for a new trial.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by Rhoda Findley against the City of Collins. Judgment for plaintiff, and defendant brings error. Affirmed.

Elders & De Loach, of Reidsville, for plaintiff in error.

W. T. Burkhalter, of Reidsville, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 332)

BELL v. STATE MUT. LIFE INS. CO. OF INDIANAPOLIS, IND. (No. 10358.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 24, 1921.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. B. Bell, administrator, against the State Mutual Life Insurance Company of Indianapolis, Ind. Judgment for defendant, and plaintiff brings error. Reversed in conformity to judgment of Supreme Court on certiorari, 151 Ga. —, 105 S. E. 846.

For former opinion of Court of Appeals, see 24 Ga. App. 497, 101 S. E. 541.

Smith, Hammond & Smith, of Atlanta, for plaintiff in error.

W. Carroll Latimer, of Atlanta, for defendant in error.

JENKINS, P. J. In conformity with the rulings made in this case by the Supreme Court (151 Ga. —, 105 S. E. 846) on a writ of certiorari from the judgment rendered therein by this court (24 Ga. App. 497, 101 S. E. 541), the previous judgment of this court affirming the judgment of the court below is vacated, and the judgment of the superior court in directing a verdict for the defendant is reversed.

Judgment reversed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 326)

AKIN v. BRANTLEY. (No. 11298.)

(Court of Appeals of Georgia, Division No. 2. Feb. 24, 1921.)

(Syllabus by Editorial Staff.)

1. Negligence \S 15—Parties committing separate acts co-operating to cause injury joint tort-feasors.

Parties who are guilty of separate acts of negligence which jointly and concurrently co-operate and cause an injury are joint tort-feasors.

2. Action \S 50(6)—Parties \S 27—No misjoinder in action against two automobile drivers for injuries in a collision.

Where plaintiff was injured in a collision between two automobiles, caused by the concurrent negligence of the two defendants in approaching each other at an illegal rate of speed, there was no misjoinder of actions or of parties defendant in an action against both defendants.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Irene Brantley, by next friend, against W. H. Akin. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. H. Beck, of Griffin, for plaintiff in error.

W. T. Moyers, of Atlanta, for defendant in error.

STEPHENS, J. [1, 2] Where two parties are guilty of separate acts of negligence which jointly and concurrently co-operate and cause an injury, the parties are joint tort-feasors. In a suit against two defendants a petition is not subject to demurrer upon the ground that there was a misjoinder of actions or parties defendant, where the petition alleges that the plaintiff was injured in a collision between two automobiles caused by the concurrent negligence of the two defendants in approaching each other from

intersecting roadways, each driving an automobile at an illegal rate of speed. See, in this connection, Aaron v. Coca-Cola Bottling Co., 143 Ga. 153, 84 S. E. 556; Ga. Ry. & Power Co. v. Ryan, 24 Ga. App. 288, 100 S. E. 713; Kelly v. Ga. Ry. & Power Co., 24 Ga. App. 439, 101 S. E. 401.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(181 N. C. 483)

HILL et al. v. AMAN et al. (No. 223.)

(Supreme Court of North Carolina. March 16, 1921.)

Appeal and error \S 759—Assignments not in brief are deemed abandoned.

Assignments of error which appear in the record but are not brought forward in defendant's brief are deemed to be abandoned under Supreme Court rule 84 (81 S. E. xii).

Exceptions and Appeal from Superior Court, Sampson County; Connor, Judge.

Action by J. H. Hill and another against A. W. Aman and others. Judgment for the plaintiffs, and defendant Aman excepts and appeals. No error.

Civil action tried upon exceptions to report of referee. Upon the hearing his honor modified the findings of the referee in some particulars, and, as thus amended, the same was adopted and approved and judgment entered thereon in favor of the plaintiff. Defendant A. W. Aman excepted and appealed.

Grady & Graham, and H. E. Faison, all of Clinton, for Hill.

Butler & Herring and John D. Kerr, Sr., all of Clinton, for Aman.

PER CURIAM. There are only three assignments of error in the record: (1) That the court erred in not setting aside the findings of fact by the referee; (2) that the court erred in not sustaining the defendant's first exception to the referee's finding of fact; and (3) that the court erred in not sustaining the defendant's first exception to the referee's conclusion of law. While these assignments of error appear in the record, they do not seem to have been brought forward in defendant's brief, and therefore are deemed to be abandoned under rule 34 (81 S. E. xii). Notwithstanding this irregularity, we have examined the record, and find no error of which the defendant can justly complain.

The controversy was largely one of fact. It appears upon the face of the record that the case was heard with care and with due regard for the rights of the parties.

No error.

(151 N. C. 482)

BRINSON et al. v. McCOTTER et ux.
(No. 177.)

(Supreme Court of North Carolina. March 18, 1921.)

Appeal and error \S 1106(3)—**Action to determine title remanded to have necessary parties joined.**

Where, on appeal in an action to settle the title to a tract of land submitted on an agreed statement of facts, it appears that there can be no complete determination in the absence of the heirs of a certain claimant, the cause will be remanded to the lower court to have those heirs made parties with the right to plead, or, if so advised, the heirs may become parties in the Supreme Court and adopt the agreed statement of facts.

Appeal from Superior Court, Pamlico County; Bond, Judge.

Action by F. C. Brinson and others against S. E. McCotter and wife. Judgment for the plaintiffs, and defendants appeal. Cause remanded to have necessary parties made parties to the action.

Z. V. Rawls, of Bayboro, for appellants. Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellees.

PER CURIAM. This is an action to settle the title to a tract of land, submitted upon an agreed statement of facts, and, it appearing that there cannot be a complete determination of the rights of the parties in the absence of the heirs of Ellis H. Pickles, it is ordered that the cause be remanded to the superior court in order that the said heirs be made parties to this action with the right to plead, or, if so advised, they may make themselves parties in this court and adopt the agreed statement of facts.

(151 N. C. 60)

SLUDER v. WOLF MOUNTAIN LUMBER CO. et al. (No. 586.)

(Supreme Court of North Carolina. March 9, 1921.)

1. Acknowledgment \S 59 — **Seal of commissioner of affidavits presumed.**

Where acknowledgment of a deed was taken before a commissioner of affidavits of North Carolina for the state of Maryland and no seal appears on the record, but the commissioner recites his official seal, the same is presumed.

2. Acknowledgment \S 33—**Of commissioner of affidavits not required to be under seal.**

In 1856, the certificate of acknowledgment of the commissioner of affidavits was not required to be under seal.

3. Records \S 10 $\frac{1}{2}$ —**Order for registration not necessary.**

If a deed be in fact registered after proper probate, the lack of an order of the clerk of

the superior court ordering its registration does not invalidate the registration; the statutory provision for such an order being directory and not mandatory.

4. Wills \S 242—**Probate in one state does not pass title to land in another state.**

Probate of a will in the state of Maryland was insufficient to pass title to land in the state of North Carolina, where the will was dated December 28, 1877, and was subscribed by two witnesses, only one of whom testified, and there was no evidence that the other witness was dead or beyond the state, or that his testimony could not be procured.

5. Wills \S 434—**Improper probate cured by statute.**

Probate of a will in Maryland, insufficient under the law of North Carolina because only one of two witnesses testified, was cured by the curative act, Pub. Loc. Laws (Ex. Sess.) 1913, c. 142, as to an heir, who had no vested interest at the time of the ratification of the act.

6. Wills \S 71, 204—**Effect of curative acts on rights of heirs.**

If a will has been defectively executed, as if it has one witness instead of two, or if for any reason void, rights of heirs could not be affected by subsequent legislation, because this would be to make a will for one who died intestate; but curing a defect in the probate of a will executed in accordance with statutes stands upon an entirely different footing, as an heir has no vested interest by reason of a defect in the probate of a will.

Appeal from Superior Court, Jackson County; Bryson, Judge.

Action by Margaret Sluder against the Wolf Mountain Lumber Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Civil action tried May term, 1920, superior court Jackson county, Bryson, J., upon these issues:

(1) Is the plaintiff, Margaret Sluder, the owner of the land described in the complaint? Answer: No.

(2) Are the defendants, the Wolf Mountain Lumber Company, George H. Smathers, trustee, the owners of the land embraced in state grant No. 290, to T. J. Foster, as alleged in the answer? Answer: Yes.

At the conclusion of the evidence the court directed the jury to answer the issues, "No," and rendered judgment for the defendant. Plaintiff appealed.

J. G. Merrimon and A. Hall Johnston, both of Ashville, for appellant.

E. C. Ward, of Ashville, for appellees.

ALLEN, J. This action involves the title to a tract of land containing 424 acres lying in the county of Jackson and described in the complaint. The plaintiff introduced the fol-

lowing chain of title: Deed from P. G. Bowman to Nelson B. Gowan dated May 25, 1880. Thence deeds and a will connecting the plaintiff with Nelson B. Gowan. The plaintiff then offered for the purpose of showing a cloud upon her title and as estoppel as against the defendants, a deed from Nelson B. Gowan to F. P. Hooper dated October 17, 1896, for one-fourth interest in this land, and then a deed from W. A. Henson, sheriff, to F. P. Hooper, dated June 20, 1901, for three-fourths interest; thence subsequent deeds connecting the defendants with Nelson B. Gowan. The plaintiff then rested.

The defendant then offered state grant No. 290 to John T. Foster dated October 9, 1856; deed from John T. Foster to Robert L. Dashiell dated November 26, 1856; will of Robert L. Dashiell devising the property to Mary J. Dashiell, his widow, exemplified copy of which was recorded in Jackson county July 27, 1917; deed from Mary J. Dashiell to defendant George H. Smathers dated September 23, 1908; and then deeds to the Wolf Mountain Lumber Company.

[1, 2] The plaintiff insists that the deed from Foster to Dashiell was never properly probated. This exception cannot be sustained. The acknowledgment of the deed was taken before a commissioner of affidavits of North Carolina for the state of Maryland. No seal appears on the record, but the commissioner recites his official seal, and the same is therefore presumed. *Johnson v. Eversole Lumber Co.*, 144 N. C. 717, 57 S. E. 518; *Heath v. Cotton Mills*, 115 N. C. 208, 20 S. E. 369. However, the statute in question, did not require the certificate of acknowledgment in force in 1856, the date of the acknowledgment made by commissioner of affidavits to be under seal. Revised Code, c. 21, § 2; *Johnson v. Duvall*, 135 N. C. 642, 47 S. E. 611; *Johnson v. Lumber Co.*, 144 N. C. 717, 57 S. E. 518.

[3] There is no order of the clerk of the superior court of Jackson county ordering this deed to registration. We do not think this invalidates the registration. It has been in effect held that the fiat for registration is not absolutely essential. The statutory provision for such an order is directory and not mandatory. If the deed be in fact registered after proper probate, the lack of a fiat does not invalidate the registration. *Holmes v. Marshall*, 72 N. C. 37; *Young v. Jackson*, 92 N. C. 144; *Darden v. Steamboat Co.*, 107 N. C. 437, 12 S. E. 46; *U. S. v. Hiwassee Lumber Co.*, 238 U. S. 553, 35 Sup. Ct. 851, 59 L. Ed. 1453.

But in any event the probate or registration of this deed is validated by chapter 204, Public, Local and Private Laws North Carolina Extra Session 1913. It is true this statute "is valid as against creditors or purchasers for value from the donor, bargainer or lessor named in such deed only from the ratification of this act." The act was ratified

October 11, 1913. The plaintiff does not claim under the said deed and derives no title by any other conveyance from the grantor in said deed.

It is contended:

"That the court erred in admitting the will of Robt. L. Dashiell, for that the same was not properly probated, and was not properly recorded in the state of North Carolina."

[4] We are of opinion that the probate of the will in the state of Maryland was insufficient to pass title to land in the state of North Carolina. The will was dated December 28, 1877. The witnesses were John M. Phillips and David Terry. David Terry testified that he saw the said testator sign and seal the said annexed writing, and heard him publish, pronounce, and declare the same as and for his last will and testament; that at the time of the doing thereof the said testator was of sound disposing mind, memory, and understanding, so far as this deponent knows, and as he verily believes; and John M. Phillips the other subscribing witness thereto were present at the same time with this deponent, and together with him subscribed his name thereto as a witness in the presence of the testator and of each other, at the request of the testator.

[5] There is no evidence that the other witness is dead or beyond the state or that his testimony cannot be procured. The probate fails to comply with our statute, but we think it is cured by the curative act, chapter 142, Public, Local and Private Laws Extra Session 1913. This act contains the following provision, viz.:

"That this act shall not apply to pending suits or vested interests, and nothing herein shall be construed to prevent such wills from being impeached for fraud."

This will devises the property to Mary J. Dashiell, under whom the defendants claim by deed dated September 23, 1908. The plaintiff claims also under the heirs at law of Robert L. Dashiell by deed dated May 14, 1917, some time after the act was ratified. We cannot see that the plaintiff had any vested interest in the land at the time of the ratification of the act. She certainly had none from the heirs of Dashiell, because her deed was dated some years afterwards. In our opinion she had no vested interest derived from Nelson B. Gowan because it is not shown that he had any title to the land in 1880.

[6] If the will had been defectively executed, as if it had one witness instead of two, or if for any reason void, the rights of the heirs could not be affected by subsequent legislation, because this would be to make a will for one who died intestate, but curing a defect in the probate of a will, executed in accordance with our statutes, stands upon an entirely different footing, and if the pow-

er cannot be exercised, then all of the legislative acts validating probates of wills are void, because wills are probated after death and the interest of the heir has then accrued.

The question is, however, foreclosed by the unanimous opinion of the court in *Vanderbilt v. Johnson*, 141 N. C. 370, 54 S. E. 298, which has been approved in *Weston v. Lumber Co.*, 160 N. C. 263, 75 S. E. 800, and *Vaught v. Williams*, 177 N. C. 82, 97 S. E. 737.

In the *Vanderbilt* Case the court states the facts and its conclusion as follows:

"In derailing his title, the plaintiff offered in evidence the will of John Strother, dated November 22, 1816. The will is attested by two witnesses, but was admitted to probate in Tennessee upon the testimony of one only. The General Assembly of North Carolina at its session of 1885 enacted an act to cure the defects in the probate of this will, and to ratify and validate the orders of the probate courts of this state in regard thereto. Private Laws 1885, c. 52. The referee held that the act 'has not the effect to cure and make valid the probate of said will.' In this we think there is error. We are of opinion that the act is valid and effectual for the purpose for which it was enacted. * * * The defendants do not claim under a deed executed by the heirs at law of John Strother, before the passage of the act, and therefore no vested right intervenes. Legislation validating the probate of deeds, curing defects in privy examinations of married women and the like, has been very common in this state, and has been uniformly upheld."

This case is exactly like the one before us, and, instead of being overruled, it has been twice affirmed on the point now under discussion.

In *Weston v. Lumber Co.*, supra, Walker, J., while discussing the effect of curative acts, says:

"The statutes are highly remedial, and should be liberally construed, so as to embrace all cases fairly within their scope. It is constructive legislation; we are saving titles, and not destroying them. It has been said that 'such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power.' *McFaddin v. Evans Co.*, 185 U. S. 505. It was further held that to validate defective probates and registrations is a proper exercise of legislative power and favored by the courts."

In the *Vaught* Case a curative act was considered and its effect upon the heirs, who claimed that their interests were vested, and could not be disturbed by subsequent legislation. The decision was against the contention of the heirs, and in the course of the opinion the court quotes from *In re Patterson*, 155 Cal. 637, 102 Pac. 945, 132 Am. St. Rep. 126, that—

"The heirs had no vested right to have this law forbidding the probate of such wills con-

tinued in force. Their right to the estate of the ancestor was given by statute, and it was contingent upon the fact of there being no will in existence which could be proved."

And from *West Side Belt R. Co. v. Pittsburgh Const. Co.*, 219 U. S. 92, 31 Sup. Ct. 196, 55 L. Ed. 107:

"In *Walson v. Mercer*, 8 Pet. 88 [8 L. Ed. 876], such an act was sustained against a charge that it divested rights and impaired the obligation of a contract. The act considered made valid the deeds of married women which were invalid by reason of defective acknowledgments, and avoided a judgment in ejectment rendered against one of the parties to the action because of such a defect in a deed relied on for title. The controversy was between the successor by descent of the married woman and the grantee in the deed. It was said in the argument that the descents had been confirmed by two judgments of the Supreme Court of the state against the deed, adjudicating it to be void on points involving its validity, which judgments, it was contended, were conclusive evidence that the deed was no deed, and that the rights acquired by descent were absolute vested rights. The act was nevertheless sustained, as we have stated."

And from 6 R. C. L. 815, that—

"The heirs have no vested right in having any law relating to a pending probate continued in force."

The proviso in the act of 1913 to the effect that the act shall not apply to "vested interests" does not affect the result, as we have seen the heirs had no vested interests.

The judgment is affirmed.

Affirmed.

NOTE.—This opinion was written by BROWN, J., at last term, except that part discussing the effect of the curative act.

(181 N. C. 85)

BUTLER et ux. v. BELL et al. (No. 217.)

(Supreme Court of North Carolina. March 16, 1921.)

1. Deeds \S 177 — Remainders \S 9 — Second deed between same parties held to destroy life estate reserved in first deed and not to merge estates.

Where a grantor reserving a life estate subsequently executed another deed to the same grantees conveying the land in fee without any condition or reservation and reciting that it was for the purpose of revoking the prior deed, there was no merger of the life estate and remainder, but a destruction of the life estate and creation of a fee simple absolute.

2. Deeds \S 76 — Voidable and not void if executed by one without sufficient mental capacity.

Deeds executed by a grantor without sufficient mental capacity to execute a deed were not void, but only voidable, and were valid for

all purposes until assailed and set aside at the instance of those having an interest to impeach them.

3. Adverse possession §71(2)—Deed to one having notice that grantor's deed was voidable held color of title.

A deed to one who had notice that the deed to his grantor was executed by a person without sufficient mental capacity constituted color of title, and where the grantee entered into possession and continued in possession openly, notoriously, continuously, and adversely for seven years, he acquired a good title.

4. Equity §67—Does not aid those guilty of laches.

Equity will not aid one who is guilty of laches in prosecuting his rights or who lies by while the title of another is maturing with his full knowledge and does nothing.

5. Limitation of actions §1 — Statute held beneficial.

The statute of limitations is a wise and beneficial law, not designed merely to deprive any one of his just rights by lapse of time, but to afford security against stale demands.

6. Limitation of actions §19(3)—Applies to suit to cancel deeds and recover land.

A suit to cancel deeds and recover the land covered thereby by the devisee of the grantor is really ejectment and is barred by the statute of limitations.

7. Limitation of actions §73(5)—Coverture does not affect adverse possession subsequent to 1899.

Plaintiff's coverture does not prevent the acquisition of title by adverse possession against her under a deed made in 1905 in view of C. S. § 408, providing that the time computed as constituting adverse possession shall not include any possession against a feme covert during coverture prior to February 13, 1899.

Appeal from Superior Court, Sampson County; Connor, Judge.

Suit by Musco Butler and wife against N. A. Bell and others. From a judgment for defendants, plaintiffs appeal. No error.

It appears in the record that prior to June 26, 1903, W. A. Bell was the owner of several tracts of land in Sampson county, and, desiring to divide them among certain of his children and grandchildren, he caused them to be surveyed and then conveyed the lots, as shown in the survey, to his children and grandchildren, except the plaintiff Esther R. Butler, one of his children, who alleges that her father intended to give and convey to her the 100 acres of his land, which is the subject of this suit, and that he made his will in 1898 and devised it to her therein. He died in 1905. It further appears that on June 26, 1903, the defendant N. A. Bell, son of W. A. Bell, procured from the latter and his wife a deed purporting to convey to N. A. Bell the said 100 acres, but reserving a

life estate to themselves; and that on April 30, 1904, N. A. Bell received another deed for the same land from W. A. Bell and his wife conveying to them (N. A. Bell and wife) a fee simple absolute in the same land without any condition or reservation whatever, and with full covenants. It is expressed in this deed that it is made for the purpose of revoking the former deed to the same person for the same tract of land. Afterwards, on January 21, 1905, the defendants N. A. Bell and wife conveyed by deed to their codefendant, Nathan Barefoot, the same tract of land in fee simple and without any condition or reservation, and with full covenants of seizin, warranty, and against incumbrances.

Plaintiff brought this action to set aside said deeds, and alleged that, at the time the first two deeds were executed by W. A. Bell and wife, W. A. Bell was not mentally capable of making them, and that the defendants N. A. Bell and wife, Eva Bell, and Nathan Barefoot, well knowing that to be the case, deliberately and fraudulently conspired between themselves to take advantage of it in order to procure the first two deeds, so that the land could be conveyed to the defendant Nathan Barefoot, which was afterwards done in pursuance of the previous understanding and conspiracy between them.

Defendants denied that there had been any fraudulent conduct whatsoever on the part of the three defendants named, or any of them, and especially denied that W. A. Bell was non compos mentis or even of weak mind when the first two deeds were made, or that any advantage was taken of him by them or either of them; that all of the transactions, including the execution of the Barefoot deed, were open and above board, and the deeds founded upon a valuable consideration, and nothing was done by them, or either of them, which should impeach or impair their validity; and that the defendants were purchasers in good faith and for valuable considerations. They further aver that all of the said deeds were duly probated and registered immediately after their execution, and have been spread upon the public record ever since and until the present time, and that plaintiffs had full notice and knowledge thereof for many years before this action was commenced in 1916, and especially for more than three years, and therefore they plead that, for this reason alone, if for no other, the plaintiffs are debarred from any recovery in this case. They further aver, in denial of plaintiffs' title, and right to recover the land in controversy, that, at the time he received his deed, and ever since and for more than seven years before this action was brought, the defendant Nathan Barefoot has been in the open, notorious, and adverse possession of this land, claiming the same as his own, under the said deed, which was known

to plaintiffs, and that, even if there was originally any defect in his title under said deeds, he has acquired a good and indefeasible one by virtue of his possession, held adversely under the same, and continued, as aforesaid.

The jury returned the following verdict, upon the issues submitted to them:

"(1) At the time of the execution of the first deed from Willis A. Bell and wife to the defendant N. A. Bell, on June 26, 1903, did the said Willis A. Bell have sufficient mental capacity to execute a deed? Answer: No.

"(2) At the time of the execution of the second deed from Willis A. Bell and wife to N. A. Bell and wife, on April 30, 1904, did the said Willis A. Bell have sufficient mental capacity to execute a deed? Answer: No.

"(3) Was Nathan Barefoot an innocent purchaser for value, without notice of any lack of mental capacity of Willis A. Bell to execute the deeds referred to in issues 1 and 2, for the land described in the deed from N. A. Bell and wife to Nathan Barefoot, dated June 25, 1905? Answer: No.

"(4) Is the plaintiffs' cause of action barred by the three-year statute of limitations? Answer: Yes.

"(5) Is the plaintiff's cause of action barred by the seven-year statute of limitations? Answer: Yes."

The court charged the jury that, although an estate for their lives was reserved in the first deed by W. A. Bell and his wife, it was merged by the second deed and the Barefoot deed in the remainder, and therefore the statute of limitations began to run against plaintiffs when the merger took place, and that, as Nathan Barefoot had held the possession of the land continuously, notoriously, and adversely, under his deed, for more than three years, and also for more than seven years before the commencement of this action, the plaintiffs' cause of action, if they had any, is barred by the statute of limitations, and that, the facts being admitted, the jury should answer the fourth and fifth issues, "Yes."

Judgment on the verdict, and appeal by plaintiffs.

Grady & Graham, of Clinton, for appellants.

Fowler & Crumpler, of Clinton, for appellees.

WALKER, J. (after stating the facts as above). The admitted facts, as above set forth, justified his honor's instruction to the jury on the third and fourth issues. It will be observed that the issues did not correspond with the allegations, as stated in the complaint, and denials in the answer. There is no finding of a conspiracy to defraud the plaintiffs, nor of any actual fraud committed by defendants. The simple and only finding is that, at the time the two deeds were made by W. A. Bell, he did not have suffi-

cient mental capacity to execute them and that Nathan Barefoot purchased from N. A. Bell and his wife with notice of this fact. We need not consider this feature of the case any further, as we will base our decision on other grounds. The plaintiffs contended that there was no merger of the life estate with the remainder, and that the statute of limitations did not bar them, as they could not sue until the life estate expired. Defendants contended that there was such a merger, and therefore no life estate to prevent the statute from barring the plaintiffs.

[1] According to our view of the record, the question of merger does not arise. The first deed, or the one to N. A. Bell, alone, dated June 26, 1903, and registered in Book 126, at page 438, conveyed the fee to him, reserving a life estate to the grantors. The second deed, dated April 30, 1904, and registered in Book 130, at page 44, conveys the fee simple absolute to N. A. Bell and his wife, Eva A. Bell, without any reservation or condition, and contains the following recital:

"This deed is for the purpose of revoking prior deed for said land, which is now on record, and the land known as the Bass place, found in Book 126, page 438."

[2, 3] The deed which is revoked is the first deed, the one to N. A. Bell alone, each of the two deeds conveying the same tract of land as is alleged in the complaint and admitted in the answer. So that, instead of there being two estates, one a particular estate for life, and the other a remainder in fee, there is but one estate, the highest known to the law, as Blackstone says, and that is a fee simple absolute, and this is so, because the former deed, by consent of the parties to it, has been revoked and set aside by their solemn legal act, it being the one in which the grantors reserved a life estate, and the parties then substituted therefor a deed conveying the entire interest and estate in the land in fee simple. Both deeds conveyed the land, even though it was afterwards found that the grantor did not have sufficient mental capacity to do so. But they were not void for this reason, but only voidable, and were valid for all purposes, until assailed and set aside at the instance of those having an interest to impeach them. 13 Cyc. 591; Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827. And the deed to the defendant Nathan Barefoot stands in the same category, for, at most, it was only voidable when attacked by the interested party, the feme plaintiff, and valid until set aside at her instance. It therefore constituted color of title, and when the defendant Nathan Barefoot entered into possession under it and continued in possession openly, notoriously, continuously, and adversely, for seven years, he thereby acquired a good title as against the true own-

er. There can be no question that the deed to Barefoot was good color of title. It had the appearance of passing the title and professed to pass it, but failed to do so. *Seals v. Seals*, 165 N. C. 409, 81 S. E. 613, Ann. Cas. 1915D, 134; *Norwood v. Totten*, 166 N. C. 648, 82 S. E. 951, where the principal cases are collected by the Chief Justice; *McConnell v. McConnell*, 64 N. C. 342; *Perry v. Perry*, 99 N. C. 273, 6 S. E. 86; *Ellington v. Ellington*, 108 N. C. 58, 9 S. E. 208; *Smith v. Proctor*, 139 N. C. 324, 51 S. E. 889, 2 L. R. A. (N. S.) 172. We held in *Seals v. Seals*, supra:

"A claim to property under a conveyance, however inadequate to carry the true title, and however incompetent the grantor may have been to convey, is one under color of title, which will draw to the possession of the grantee the protection of the statute of limitations"—citing *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280; *Beaver v. Taylor*, 1 Wall. 637, 17 L. Ed. 601; *Cameron v. U. S.*, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 461.

[4] And our cases are to the same effect. *McConnell v. McConnell*, supra; *Burns v. Stewart*, 162 N. C. 360, 78 S. E. 321. So that, while Barefoot did not get the title by his deed, but acquired it, in another way and from a different source, by his adverse possession under color, this title must therefore prevail against the plaintiffs' prior right. Judge Connor charged that plaintiffs knew of the facts that Barefoot was in possession claiming to hold adversely to them under his deed, which conveyed the entire title, when taken in connection with the deed of W. A. Bell and wife to his grantors, N. A. Bell and wife, the first deed to N. A. Bell having, by consent of parties, been revoked and put out of the way, as if it had never existed. There is no room for arguing that there are two separate estates, one for life, and the other in remainder, as the last deed, or the one to N. A. Bell and wife, passed only one estate, which was a fee simple absolute and destroyed the former life estate, instead of merging it. If that is not incontrovertibly true, and the parties intended that there should be two estates, there was no use in making the last deed, and besides it clearly expresses, on its face, the contrary intention of the parties. If there had been a case of merger, equity would not keep the two estates apart, for it will not aid one who is guilty of laches in prosecuting his rights, or who lies by while the title of another is maturing with his full knowledge, and does nothing, when it was so easy to prevent the operation of laches or the statute of limitations by simple procedure. Litigation must end somewhere (interest reipublice ut sit finis litium). Equity aids the vigilant, not the indolent.

[5] Justice Story well observed that it has often been a matter of regret, in modern times, that, in the construction of the statute of limitations (21 Jac. 1, c. 16), the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light as an unjust and discreditable defense, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to deprive any one of his just rights by lapse of time, but to afford security against stale demands. The possession of the land by defendant Nathan Barefoot was, in law, notice of his claim. *Tankard v. Tankard*, 79 N. C. 54.

And as to the maxim that the law aids the vigilant and not those who sleep over their rights, Sir Wm. Blackstone said that, in all possessory actions, there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary; for, if he be unreasonably negligent, the law refuses afterwards to lend him any assistance to recover the possession, both with a view to punish his neglect, and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. And it was said by the Vice Chancellor, in *Manby v. Bewick*, 3 K. & J. 352, the Legislature has in this, as in every civilized country that has ever existed, thought fit to prescribe certain limitations of time, after which persons may suppose themselves to be in peaceable possession of their property and capable of transmitting the estates of which they are in possession, without any apprehension of the title being impugned by litigation in respect of former transactions.

[6] This is really ejectment, the remedy of cancellation being resorted to as ancillary, merely to the primary relief, or, in other words, it is in its essence a suit to remove a cloud, or obstruction out of the way of effectuating the main purpose, which is the recovery of the land. Against such a recovery the statute bars, for it is so expressly provided therein.

[7] The coverture of plaintiff will not avail her. *Consol. Statutes*, vol. 1, § 408, and note; *Carter v. Reaves*, 167 N. C. 131, 83 S. E. 248; *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565.

We therefore conclude that plaintiffs were barred by the three-year statute, and also by adverse possession under color for seven years, as held by the court below.

No error.

(181 N. C. 75)

HARRIETT et al. v. HARRIETT et al.
(No. 169.)(Supreme Court of North Carolina. March 16,
1921.)**1. Life estates §17—Life tenant believing he owned fee can recover for improvements.**

While as a general rule a life tenant is not entitled to compensation from the remaindermen for the enhancement of the property by his improvements, a life tenant, or one holding under him, who was in possession of the property with a bona fide belief he owned the fee, can recover for improvements thereon which enhanced the value of the remainder.

2. Improvements §5(4)—Rents to which improver is entitled not offset against improvements.

The right of one in possession under a bona fide but mistaken belief he owned the fee to recover for the enhancement of the property by the improvements made by him is not to be abated by the rental value of the property during his possession, where he was rightfully in possession under the life tenant, so that he was entitled to the rents.

Appeal from Superior Court, Jones County; Connor, Judge.

Suit for partition by C. P. Harriett and another against M. N. Harriett and others. From a judgment distributing the proceeds of the consent sale which allowed to the named plaintiff the value of improvements made by him without abatement on account of the rents received, defendants appeal. No error.

This was a petition originally filed for actual partition, and by consent a sale of all the property was ordered and it was sold. Enough of the proceeds of the sale was left in the clerk's office to protect the matters involved in this appeal which arise upon a petition by the plaintiff for betterments.

James Harriett was the father of plaintiffs and defendants, and died in 1877, leaving a widow, Mary E. Harriett, who died in 1917, and the plaintiffs and defendants are their only descendants as heirs at law and devisees.

Ames L. Simmons, who was then the owner, conveyed the lands known as the "home place" to James Harriett prior to his death in fee simple by description that included more than 100 acres, which was the quantity intended to be conveyed, and after James Harriett's death, while his children were young, Simmons executed to Mary E. Harriett, the widow and mother of the children, a deed purporting to convey in fee simple the 100 acres known as the home place, being 100 acres cut out of the original boundary in the deed from Simmons to James Harriett. After the deed was made to Mary E. Harriett, she occupied the land up to the bounds set out in the deed to her, and Ames L. Simmons and his descendants occupied the

remainder of the land in the James Harriett deed.

James Harriett left a will duly probated, devising the said 100 acres to his wife, Mary E., during her natural life, and then to her children. In 1904 plaintiff under an arrangement with Mary E. Harriett went on the land, and from 1905 to 1914, ten years, occupied the land, and he or his mother had the rents and profits thereof. In 1908 his mother made him a deed and delivered it to him under an agreement that it was not to be registered until after her death, and plaintiff kept possession of it till it was taken from his safe after he left the home place in 1914. The plaintiff and the defendants thought up to the time of Mary E. Harriett's death that she owned the land in fee simple. It is admitted, however, that she only owned a life estate and the remainder, subject to her life estate, was in the plaintiff and defendants.

It is alleged in the petition that the plaintiff made valuable improvements upon the land which enhanced its value under the honest belief that he would be the owner of the land upon the death of his mother.

The jury returned the following verdict:

"(1) Did plaintiff while making improvements on land described in petition have a well-grounded belief that he was the owner of the land in fee, subject to the life estate of his mother? Answer: Yes.

"(2) Was plaintiff, while making improvements on land described in the complaint, a tenant in common with defendants of said land, subject to the life estate of his mother? Answer: Yes.

"(3) In what sum, if any, was the value of the said land enhanced at the death of Mary Harriett in June, 1917, by such permanent improvements as were made during her life by plaintiff? Answer: \$1,780.

"(4) What was the clear annual value of the land during the time plaintiff was in possession of same, exclusive of the use of improvements made by plaintiff? Answer: \$125 per year."

Judgment was entered upon the verdict in favor of the plaintiff allowing him the value of the improvements assessed by the jury without abatement on account of the rents, and the defendants excepted and appealed, assigning the following errors:

"(1) In refusing to direct the jury to answer the first issue, 'No.'

"(2) In refusing to charge the jury: 'If you believe the evidence, you should answer the first issue, "No."'

"(3) In the submission of the first issue to the jury.

"(4) In the submission of the second issue to the jury.

"(5) In the submission of the third issue to the jury.

"(6) In not setting aside the verdict.

"(7) In not signing the judgment tendered that the defendants go without day.

"(8) In signing the judgment set out in the record.

"(9) In refusal to credit the \$1,780 found on the third issue with the \$1,250 for the ten years' rental at \$125 per year found under the fourth issue.

"(10) In not crediting on the \$1,780 found on the third issue with rent at the rate of \$125 per year from the beginning of the year 1905 to the date of Exhibit A, May 23, 1908.

"(11) For that the judgment as rendered did not deduct from the \$1,780 found on the third issue ^{7180/18878} of \$1,780, being the pro rata part of the land other than the home place of the unimproved value of the whole land."

Ward & Ward, of Newbern, for appellants.

W. D. McIver and R. A. Nunn, both of Newbern, for appellee.

ALLEN, J. The issues submitted to the jury are raised by the pleadings and are substantially like those approved in *Pritchard v. Williams*, 178 N. C. 110, 96 S. E. 733, and as there was evidence supporting the contention of the plaintiff that he made valuable improvements on the land, believing in good faith that he would own it in fee upon the death of his mother, under a deed executed by her, the court could not direct a verdict in favor of the defendants.

[1] The fact that there was an outstanding life estate in the plaintiff or in his mother is not a bar to the claim for betterments, since the plaintiff claimed under a deed and believed he owned the fee.

"It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements, nor can a charge upon the lands or the inheritance be made for such improvements, it being generally held that a life tenant should not be permitted to consume the interest of the remainderman by making improvements that the remainderman cannot pay for, or that he does not desire, and also that improvements are made for the immediate benefit of the life estate, and usually without reference to the wishes of the remainderman. Mere knowledge on the part of the remainderman that improvements are being made and passive acquiescence therein are not sufficient to charge him with the cost thereof. An exception has been made where the life tenant is an infant, and the income from the property is by order of the court invested in permanent improvements. Ordinarily, a third person claiming under the life tenant is entitled to no greater rights than the life tenant himself, but some courts, applying equitable principles, have allowed recovery where improvements have been made by a person who, although in fact holding under a life tenant, believed himself to be the owner of the fee." 17 R. C. L., 635.

Our court has adopted the view allowing betterments to one holding under a life tenant when made under the honest, well-grounded belief that he owns the fee. *Pritchard v.*

Williams, supra, and the same case at this term.

The cases upon the right of a life tenant to compensation for improvements are collected in the note to *Porter v. Osmun*, 3 Ann. Cas. 689.

This disposes of the first, second, third, fourth, and fifth assignments of error; the sixth, seventh, and eighth are formal; and the ninth, tenth, and eleventh present the question of the right of the defendants to set off against the improvements the rents and profits of the land during the occupancy by the plaintiff.

[2] The usual rule is undoubtedly that one claiming betterments is chargeable with the rents, even beyond the three years, as an offset against a recovery for the improvements (Con. Stat. § 700; *Whitfield v. Boyd*, 158 N. C. 453, 74 S. E. 452); but this is because generally the owner of the land at the time of its recovery also owns the rents, and the law gives to each what belongs to him. It awards to the owner the land and his rents, and to the occupant the value of his improvements; but in this case the owners were not entitled to the rents during the occupancy by the plaintiff, because of the life estate in his mother or in the son, one of whom was the owner of the rents, and consequently there can be no abatement of the recovery for the improvements in favor of the defendants on account of the rents, to which they have no claim or right.

It is upon this principle that the rights of the parties were adjusted in *Pritchard v. Williams*, which is also reported in 175 N. C. 319, 95 S. E. 570, and 178 N. C. 444, 101 S. E. 85.

No error.

(115 S. C. 437)

DERRICK v. SOVEREIGN CAMP, W. O. W.
(No. 10573.)

(Supreme Court of South Carolina. Feb. 28, 1921.)

Insurance ¶697—Sovereign Camp held liable in tort for injuries to new member during initiation.

Subordinate lodges of the Woodmen of the World are agents of the Sovereign Camp in initiating and making members of the order, and the acts of a subordinate camp are binding upon the Sovereign Camp, even though such acts are not authorized by the Sovereign Camp, and the Sovereign Camp may be liable in damages in tort for injuries sustained, both compensatory and punitive.

Appeal from Common Pleas Circuit Court of Saluda County; S. W. G. Shipp, Judge.

Action by James P. Derrick against the Sovereign Camp of the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

Metton & Belser, of Columbia, and E. W. Able, of Saluda, for appellant.

B. W. Crouch, C. J. Ramage, and J. D. Griffith, all of Saluda, for respondent.

WATTS, J. This is an action in damages in tort for injury sustained by plaintiff in course of initiation by Delmar Camp of the Sovereign Camp of the Woodmen of the World. The cause was tried before Judge Shipp and a jury, for the fall term of court, 1919, for Saluda county, and resulted in a verdict in favor of the plaintiff for the sum of \$1,000 actual damages and \$500 punitive damages. After entry of judgment defendant appeals, and by exceptions raises the point "whether the Sovereign Camp of the Woodmen of the World is to be held responsible for injuries inflicted by members of a subordinate camp, during the performance of a ceremony, in no way authorized or prescribed by the Sovereign Camp."

Appellant insists the Sovereign Camp is not responsible: First, because the evidence shows that the Sovereign Camp did not authorize the "warm reception," during the performance of which the injury occurred; second, because as a matter of law the Sovereign Camp cannot be held responsible for the acts of members of a subordinate camp, done in the course of a ceremony, which the Sovereign Camp has not authorized.

It has been decided in *Mitchell v. Leach*, 69 S. C. 420, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811, that subordinate lodges of the Woodmen of the World are agents of the Sovereign Camp, in initiating and making members of the order, and the acts of the local camps are binding upon the parent camp, if performed within the scope of the agency, even though such acts are not authorized by the Sovereign Camp. In 31 Cyc. 1582, we find the following:

"The liability of the principal for torts committed by his agent is not limited to torts which he expressly authorized or directed. He is liable for all torts which his agent commits in the actual or apparent course of his employment, and if the agent commits a tort in the apparent course of his employment, the principal is liable therefor, even though he was ignorant thereof, and the agent in committing it exceeds his actual authority or disobeyed the express instructions of his principal."

To the same end inferentially see what Mr. Justice Gary (now Chief Justice) says in *Williams v. Tolbert*, 76 S. C. 217, 56 S. E. 903, and cases therein cited.

The exceptions are overruled, and judgment affirmed.

GARY, O. J., and FRASER, J., -concur.

COTHRAN, J. (concurring). I concur in the result, and file this opinion simply from an apprehension that the principles an-

nounced in the main opinion may be invoked in cases not parallel with the exceptional circumstances of this case.

Mr. Justice WATTS declares that the injury complained of was sustained by the plaintiff "in the course of initiation by Delmar Camp." The record, however, shows that the initiation proper, according to the ritual prescribed by the Sovereign Camp, had been fully completed at the July meeting, a month before the August meeting at which the side degree was conferred.

If the statement referred to was entirely accurate, the case of *Mitchell v. Leach*, 69 S. C. 420, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811, would be absolutely controlling, and no further remark would be necessary. The fact that the injury sustained was received after the initiation had been completed and at a subsequent meeting, during the conferring of a side degree, not a part of or connected with the prescribed ceremony of initiation, differentiates the case at bar from the *Mitchell* Case, and in my opinion calls for special notice.

I do not think that there can be disagreement as to this proposition: Where the initiation ceremonies are fully completed and the initiate understands that the fantastic "stunts" in which he is to become the principal actor are not a part of the initiation ceremonies, that he is at liberty to participate in them or not as he pleases, but he is willing to assume for the time being the role of "the goat" in order to qualify himself to enjoy the discomfiture of the next victim, neither the local camp nor the Sovereign Camp would be responsible for injuries received thereby, but that his remedy would be against those alone who may have instituted that species of amusement. But there are exceptional circumstances in this case which in my opinion fix liability upon the Sovereign Camp and induce my concurrence in the judgment. It would be an interesting inquiry ordinarily, and quite material to the issue, whether the side degree was conferred by Delmar Camp as a lodge, or by the individual members for their own amusement without the authority of the local camp. We are relieved of this inquiry, however, by the argument of the appellant's attorneys. They say:

"It must be noted that the institution of this ceremony was a distinct and regular performance of the local camp; it originated in this camp; it was held in a regular way; * * * there were regularly appointed members of the camp who carried through this ceremony; * * * distinctly the exercise of a power."

Both exceptions refer to the side degree as the "action of the subordinate lodge." So that question is no longer open to inquiry. Whatever was done was the act of the local camp, and not of individual members.

In the disposition of this appeal the court must assume to be true the following statement of the plaintiff: At the July meeting when he received what now appears to have been a full initiation, he was told by the officers of the camp who conducted the initiation "to come back; that there was another one coming." "They said they wanted me back next meeting night; that they had some more degrees." He did return to the August meeting. The lodge was duly opened by the Consul Commander. After the lodge was opened, he was carried out to the ante-room and prepared for the side degree. He was then taken into the lodgeroom, and the degree conferred, during which he received the injury of which he complained.

The plaintiff of course did not know of what the initiation consisted, or that it was fully completed at the July meeting; naturally, from the directions to return for the August meeting to receive other degrees, he supposed that it was not. It does not appear that he knew that he was called upon to go through a performance for the amusement of the lodge, or that he had any other conception than that it was a deferred part of the initiation ceremony. It was conferred, according to plaintiff's statement, just after the lodge was opened and while it was in session.

Now as to the law applicable to these facts: The case of *Mitchell v. Leech*, 89 S. C. 413, 48 S. E. 290, 66 L. R. A. 723, cited in the opinion, settles the principle that a subordinate lodge is the agent of the parent organization, which is responsible in damages for the tortious act of its agent done within the scope of its agency, and that maltreatment of a candidate during the ceremony of initiation is within such scope, although the particular "stunt" he was required to perform or the instrumentality employed was not prescribed by the parent organization. "The subordinate lodges were the agents of the Sovereign Camp; the acts of the local camps were binding upon the parent camp if performed within the scope of the agency, even though not authorized by the Sovereign Camp." 89 S. C. 421, 48 S. E. 292, 66 L. R. A. 723. To the same effect see *Hutchinson v. Real Estate Co.*, 85 S. C. 75, 43 S. E. 295; and in *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678, it is thus expressed at page 16 of 13 S. C. (36 Am. Rep. 678):

"The proper enquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent."

The expressions "scope of the agency," "course of the agency," "course of the employment," are practically synonymous, and they include all acts within the apparent scope of the authority conferred on the

agents by the principal, as well as those expressly authorized or necessarily implied from express authority; all acts within the scope of the authority which the principal held the agents out to the world to possess. 21 R. C. L. §§ 34, 81. Considering that the Sovereign Camp alone had the power to prescribe the initiation ceremonies, that the local camp had no authority to depart from the ceremonial ritual, it follows that the local camp had no actual or implied authority to put on the side degree entertainment. But that is not conclusive of the question. The further inquiry must be answered: Was it within the apparent scope of its authority?

It was to the interest of the Sovereign Camp that new members be received; their introduction is the life blood of all such organizations. The election and initiation of them is confided by the Sovereign Camp to the local camp. In such initiation the local camp was "about the business" of its master. They proceeded to attend to that business; the plaintiff put his person at their disposition; suffered himself to be hoodwinked; was put through a series of ceremonials of which he was, of course, uninformed. How could he know that they had finished with him without being so told? What other inference could he draw than that they had not, when told to return in August for more degrees? That it was within the apparent scope of their authority is shown by his implicit obedience to that authority.

If as a matter of fact the side degree was not a part of the initiation, the plaintiff unquestionably was justified in thinking that it was. This presents a case of apparent authority, which is equivalent to actual authority, and so comes within the principle of the *Mitchell* Case.

The purpose of this opinion is to limit my concurrence to the facts of this particular case.

(115 S. C. 443)

WELLS v. HOLMAN. (No. 10585.)

(Supreme Court of South Carolina. March 12, 1921.)

Discovery ¶89—Plaintiff can inspect books of operations necessary to determine his share in resulting profits.

Where it was admitted that plaintiff had a right under a contract to a share in the farming and mercantile operations of defendant for specified years, he is entitled to an order permitting him to inspect such books and papers in the possession of the defendant or under his control which show the net profits of defendant from such transactions.

Appeal from Common Pleas Circuit Court of Sumter County; Mendel L. Smith, Special Judge.

Action by F. A. Wells against Dr. F. K. Holman. From an order granting plaintiff the right to inspect certain books of the defendant, defendant appeals. Affirmed.

The order referred to in the opinion was as follows:

This order is passed pursuant to a motion duly noted and made before me on behalf of the plaintiff, who seeks to procure an inspection and copy, or permission to take a copy, of the books, papers, and documents in the possession of or under the control of the defendant, the same being those kept by the defendant showing the farming operations and the mercantile operations, the storage and sale of cotton which was raised or purchased during the years 1914 and 1915. After hearing argument for and against this motion, I am convinced that in the exercise of my discretion the said motion should be granted.

It is therefore ordered that the defendant, F. K. Holman, do, within five days from the date of this order, give to the attorneys for the plaintiff an inspection and copy, or the opportunity and permission to take a copy, of such books, documents, and papers as are in the possession of or under the control of the defendant, or his attorney, that show the farming operations and the mercantile operations out of which the plaintiff was to have a percentage of the net profits for the years 1914 and 1915, including such as show the sales and other disposition of the produce raised and purchased in connection with said farming and mercantile transactions for said years; in other words, both the complaint and answer having alleged that the plaintiff was to have a certain percentage from the net profits from the farming operations and mercantile operations, including the net profits realized from the share croppers and from the purchase and sale of cotton for the years 1914 and 1915, I hold that the plaintiff is entitled to such inspection of the books, documents, and papers made by or for the defendant in the ordinary course of such farming and mercantile operations, showing the facts and figures upon which a settlement between them would necessarily be based, and not such papers as would be of a purely private nature, but rather those partaking of the nature of mutual entries of account showing the items necessarily relevant in a bona fide settlement between the parties.

The second part of the motion with regard to any possible refusal of the defendant to comply with this order will not be passed upon now, as I hold it would more properly come up when some exigency demands it.

Marion W. Seabrook, of Sumter, for appellant.

Raymon Schwartz and Epps & Levy, all of Sumter, for respondent.

GARY, C. J. For the reasons assigned by his honor the circuit judge, the order made by him is affirmed.

WATTS and FRASER, JJ., concur.

106 S.E.—15

COTHRAN, J. I concur in the judgment affirming the order of the circuit judge, but, as the appeal raises squarely the issue whether or not the documentary evidence to an inspection of which a moving party may be entitled under section 427 of the Code is limited to such as the adverse party expects to use on the trial of the case, and does not include such as the moving party may desire to obtain from his adversary for his own use, I think that this issue should be determined.

In the case of *Cartee v. Spence*, 24 S. C. 550, the court throws out a very strong intimation that it is so limited, but declines specifically to decide the question. So in *Jenkins v. Bennett*, 40 S. C. 393, 18 S. E. 929, and *Parker v. Railroad Co.*, 48 S. C. 364, 26 S. E. 669, the doubt suggested in *Cartee v. Spence* was not resolved, but passed over as not being involved, all these opinions having been written by the same great judge (Chief Justice McIver). No subsequent case has been found by me or pointed out by counsel.

Even an intimation from so profound an authority would incline me to follow it almost without question, if it were not so opposed to my preconceived conviction of the purpose of the section, the very terms of the section, and the numerous authorities upon the subject. The question is an important one of practice, and I think it should be settled in view of the doubts suggested in the cases above cited.

In the first place, the terms of the section impose no limitation upon the character of the documentary evidence other than "containing evidence relating to the merits of the action or the defense therein." This is extremely broad, and covers not only evidence which the adversary may expect to use in his interest, but such as the moving party may desire to obtain in his interest. It must be assumed that the exercise of the discretion lodged in the circuit judge will prevent an abuse of this privilege in an attempt to embark upon a "fishing excursion" or to pry into the private concerns of the adversary.

It is manifestly in the interest of a determination of a controversy according to the justice and right of the matter; it works against surprise; it is conducive to that preparation of a case which insures dispatch in the conduct of the litigation and an intelligent disposition of the real points of controversy.

The particular controversy between these parties demonstrates the utility of the proceeding. Here is an admitted contract covering extensive farming operations, the compensation of the plaintiff to be determined upon the basis of net profits; all record evidence of these operations is in the hands of the defendant; it is essential to the plaintiff's interest that he have access to these records.

That the applicant was under the circumstances entitled to the order is established by the following authorities:

"He is entitled to production or inspection only when the same is material and necessary to establish his cause of action." 14 Cyc. 370.

"A production or inspection of papers will be granted where the applicant has an interest or right in them which justifies an unlimited inspection and the right is the attendant of the relief to which he is entitled. This is the case with books * * * of an employer at the instance of his employee, where the employee is to be paid by a percentage of the business done by the employer, or of books showing the profits of a joint venture, at the instance of one of the parties interested therein. In all such cases the production of all books and documents can be compelled on the ground of common interest." 14 Cyc. 369; 18 C. J. 1117, 1119.

"The remedy can be granted only to obtain the disclosure of facts or the production of documents in his adversary's knowledge or possession or under his control, which are material and necessary to make out his own case"—that is, the appellant's. 9 R. C. L. 174.

The ruling is the opposite of the intimation in *Cartee v. Spence*, supra, and is emphasized by the immediately following declaration:

"The right does not extend to a discovery of * * * evidence which relates exclusively to the adverse party's case."

(129 Va. 418)

DIRECTOR GENERAL OF RAILROADS v. CHANDLER.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Evidence ⇨407(2)—Bill of lading prima facie evidence that carrier received goods, but may be rebutted.

Bill of lading constitutes prima facie evidence of fact that carrier received goods recited therein, but this evidence may be rebutted.

2. Carriers ⇨52(1)—No recovery from carrier under bill of lading where goods were never delivered to carrier.

Where plaintiff purchased potatoes and directed seller to bill them in his name from point of shipment to him at destination and on delivery of bill of lading paid for the potatoes, he could not recover from the carrier for loss of the potatoes, where no potatoes were ever delivered to the carrier under the bill of lading, the carrier's agent, due to the fact that seller, who operated on a large scale, presented to him for signature a number of bills of lading purporting to cover an equal number of carload shipments, all of which were signed at the same time, agent failing to detect the error in checking the bills; the recitals of the bill of lading in no way estopping the carrier from showing the true facts.

Error to Circuit Court, Northampton County.

Notice of motion for judgment brought by J. W. Chandler against the Director General of Railroads operating the New York, Philadelphia & Norfolk Railroad. Verdict and judgment for plaintiff, and defendant brings error. Reversed.

Mears & Mears, of Eastville, and Geo. R. Allen, of Philadelphia, Pa., for plaintiff in error.

J. Brooks Mapp, of Keller, for defendant in error.

KELLY, P. This was a notice of motion for judgment brought by J. W. Chandler against the Director General operating the New York, Philadelphia & Norfolk Railroad. There was a verdict and judgment for the plaintiff, and the defendant assigns error.

On July 6, 1918, Chandler purchased from Louis Distributing Company, represented by and hereinafter called Louis, 199 barrels of Irish potatoes, supposed by Chandler to have been already loaded by Louis on a car of the New York, Philadelphia & Norfolk Railroad at Eastville, Va. At the time of such purchase nothing had been done with reference to billing the car for shipment, and no freight receipt or bill of lading had been requested of or issued by the railroad company. Chandler instructed Louis to have the car shipped from Chandler at Eastville to Chandler at Chicago, thus naming Chandler as both consignor and consignee; and Louis procured from the agent at Eastville a bill of lading accordingly, which he delivered on the same day to Chandler, and the latter thereupon paid Louis \$965.15, the aggregate of the agreed price of \$4.85 per barrel for the 199 barrels covered by the contract of purchase. The bill of lading recited that the 199 barrels had been delivered to the railroad company. The plaintiff's notice of motion expressly states that the amount sued for is claimed on account of "loss of one carload of Irish potatoes containing 199 barrels shipped by me from Eastville, Va., on July 6, 1918, to myself at Chicago, Ill.," and that "this carload of potatoes had been bought by me from Louis Distributing Company"; and, while the plaintiff further says in the notice that Louis delivered to him the railroad company's original bill of lading covering the shipment, and that the plaintiff accepted the same in good faith and paid cash therefor, it is clear beyond debate, from the allegations and the proof, that what the plaintiff did was to buy a carload of potatoes from Louis at an agreed price, authorize and instruct him to ship the same in plaintiff's name to Chicago, and then settle with Louis upon presentation of the bill of lading, treating that document as evidence that the contract of purchase and

the incidental instructions had been complied with by Louis. The plaintiff was dealing with Louis so far as the purchase was concerned, and the bill of lading, when tendered to and signed by the defendant, purported to represent the property of Chandler and not the property of Louis. The plaintiff, therefore, was both in form and substance the shipper, and had clearly made Louis his agent in regard to the shipment. The bill of lading was signed for the company by its agent, and for the plaintiff by Louis, and these facts appeared on the bill when delivered to and accepted by the plaintiff.

As a matter of fact, it developed that the goods recited in the bill of lading were never delivered to the carrier. This is not conceded by the plaintiff's counsel, but it is, as we view the evidence, clearly proved. Although another car number was used in the notice of motion, there is no dispute about the fact that the claim is made on account of the contents of a certain car, known as S. A. L. No. 24053. It is shown that this car, containing 199 barrels Irish potatoes, had been already billed out by Louis on July 1, 1918, to another party at another destination, and had gone forward before the bill of lading in this case was issued. The mistake, so far as the defendant's agent was concerned, was due to the fact that Louis, who seems to have operated on a large scale, presented to him for signature on July 6th a number of bills of lading purporting to cover an equal number of carload shipments, including the one here involved, all of which were signed at the same time. The agent failed to detect the error in checking the bills that day, but made the discovery later.

[1] Of course, the bill of lading constituted prima facie evidence of the fact that the carrier had received the goods recited therein; but this evidence was conclusively rebutted by the testimony of the agent. It is true that on cross-examination he said that he did not bring with him to the trial the records of the defendant showing the facts above detailed, particularly with reference to the movement of S. A. L. car No. 24053, but he was not asked to produce them, and there was no objection to his testimony on that account. A careful examination of his evidence leaves no room to contend that any goods at all were delivered to the carrier under the bill of lading in question.

[2] The case, therefore, is simply one in which a shipper is suing the carrier to recover for loss of goods which were never deliv-

ered for carriage. As between such parties and under such a state of facts there can be no recovery, the recitals of the bill of lading in no way estopping the carrier from showing the true facts. These propositions are so well settled and so obviously sound and just that we need not recite authority for their support.

Having reached this conclusion, we need not consider the further contention of the defendant that, even if the plaintiff could claim to be a third party holding the bill of lading as a bona fide assignee for value, the fact that no goods had actually been delivered to the carrier would still defeat the liability. The decisions of various state courts are in conflict upon this question. See 4 R. C. L. pp. 25, 26, § 29, and cases cited in notes 8 and 9; 6 Cyc. 419, and notes 96 and 98. The federal courts have heretofore uniformly held with the contention of the defendant. See R. C. L. supra, and note 7; Cyc., supra, and note 97; *Friedlander v. Texas, etc., R. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991. Being an interstate bill of lading, the rule in the federal court would, in the absence of statute, perhaps control. By act of Congress now, however, the rule seems to have been materially modified. See *Barnes' Fed. Code* (1919) § 7999; Act August 29, 1916, c. 415, 39 Stat. 542, § 22 (U. S. Comp. St. § 8604kk).

Nor is it necessary to pass upon the errors assigned in respect to the instructions given and refused by the trial court. That court seems to have intended to hold as we do upon the law of the case, for it gave a number of instructions for the defendant plainly telling the jury that the plaintiff would not recover if the potatoes were not delivered to the carrier, and yet it gave one instruction for the plaintiff squarely in conflict with that proposition. If the facts as to the delivery to the carrier were such as to take the case to the jury upon that point, the judgment would have to be reversed for this irreconcilable conflict in the instructions. We are of opinion, however, that the facts as to delivery to the carrier were fully developed from plaintiff's standpoint; that the carrier was conclusively shown not to have received the goods; and that therefore the plaintiff is not entitled to recover anything. We shall therefore not remand the cause for a new trial, but shall reverse the judgment complained of, and, pursuant to section 6365 of the Code, enter final judgment in this court for the defendant.

Reversed.

(129 Va. 446)

LEVY, Director of Public Welfare, v. KOSMO.

SAME v. MANGIGIAN et al.

(Nos. 1, 2.)

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Appeal and error \S 781(7)—Execution of leases sought by mandamus held to have rendered controversy moot.

Appeals from orders, granting petitions in mandamus to require respondent to assess rentals on market property under the ordinance and to give petitioners their preference right to lease such premises, involve only moot questions, where it appears that respondent had conformed to the orders by executing the leases sought by petitioners.

2. Appeal and error \S 843(2)—Court will not construe lease where lessees are not parties.

On appeal in mandamus proceeding to compel a city official to lease market property to petitioners, which had become moot by the execution of the leases sought for, the court will not construe other leases of the same property executed by respondent with other lessees who were not parties to the proceedings.

Error to Law and Equity Court of City of Richmond.

Separate petitions by Bill Mangigian and others and by Aristea Kosmo against E. C. Levy, Director of Public Welfare of the City of Richmond. From orders granting the prayer of the petition in each case, the respondent brings error. Appeals dismissed.

These are both cases of petitions of the defendants in error to the court below praying for writs of mandamus to be issued requiring the plaintiff in error to assess the rental for the year 1920 of the two stores (one involved in the one case and one involved in the other), located at the southern end of the meat market (also known as "First Market"), facing on Main street, in said city (both unnumbered, but the store involved in case No. 1 being known and designated in the record as "Stall 101 in the First Market" and also as "Store A," and the store involved in case No. 2 being known and designated in the record as "Stall No. 100 in the First Market" and also as "Store B"), as provided for in section 14 of chapter 29 of Richmond City Code 1910, and to comply with the provisions of such section regarding the posting of the assessment in a conspicuous place, and for general relief.

The proceedings in the respective cases were instituted, matured for hearing, and heard at different times in the court below, but as they involve practically the same questions they were submitted to be and are heard and considered together on appeal.

The plaintiff in error is hereinafter refer-

red to as the respondent, and the defendants in error as plaintiffs in the respective cases, in accordance with their positions as parties in the court below.

Case No. 1 was instituted and matured for hearing in the court below on December 30, 1919, and on that day such court entered one of the orders assigned as error in that case by the respondent. That order granted the prayer of the petition in such case, the substance of which is above set forth, with respect to the store therein involved, namely, it ordered the respondent to proceed "to assess the rental value of Stall No. 101 in the First Market for the year 1920, to post said assessment, and to give to the relator the preference for the renewal of her present lease for said stall for the year 1920 at the rental value so assessed."

It appears from the record in case No. 1 that the respondent on December 30, 1919, complied with the requirements of the order just mentioned in every particular, by assessing the rental for the store known as "Stall No. 101" for the year 1920 at \$1,750, payable monthly in advance, by having the clerk of the First Market post a copy of the assessment in said market, and a copy of such notice was sent by respondent to counsel of record for the plaintiff in case No. 1, thereby giving her the preference for the renewal of her then present lease, all in accordance with the prayer of her petition and with the said order of court.

Subsequently, on January 8, 1920, the respondent filed a supplemental answer to the petition in case No. 1, and moved the court to rehear the case. This motion the court overruled and the action of court below in overruling such motion is also assigned as error in such case.

Case No. 2 was instituted and matured for hearing in the court below on January 10, 1920; and on that day such court entered an order granting the prayer of the petition in such case in precisely the same language as that employed in the above-mentioned order of December 30, 1919, in case No. 1, in granting the prayer of the petition in that case (which language is above quoted), even in the particular of referring to the store involved as "Stall No. 101." The latter reference was, however, manifestly a typographical error, "Stall 100" being intended; the order being so construed in effect by the appeal of respondent complaining of it as applicable to "Stall 100," that being the store involved in case No. 2.

The following mentioned peculiar situation of fact is developed by and shown in the records, which does not appear to have been brought to the attention of or to have appeared in any way before the court below in case No. 2 at the time the order was entered therein just mentioned, nor in case

No. 1 at the time the order was entered therein on January 8, 1920, aforesaid.

On December 30, 1919, at the same time he complied with the requirements of the order of that date in case No. 1, as aforesaid, respondent did precisely the same things in all particulars for the benefit of the plaintiffs in case No. 2 with respect to the store involved in that case, and left no doubt as to that, for the notice posted in the market as aforesaid on December 30, 1919, is dated that day and is as follows:

"Rental for the two stores at the southern end of the Meat Market, facing on Main street, has been assessed for the year 1920 at \$1,750.00 each, payable monthly, in advance." (Italics supplied.)

"Application for the rental of these stores must be made in writing on or before January 1, 1920.

"As these stores are unnumbered the eastern one of these stores is hereby designated as 'Store A' and the western one is hereby designated as 'Store B.' Applicants will conform to the above designations in submitting their applications. Bond for the amount of the lease will be required as part of the lease.

"All applications shall be addressed to Dr. E. C. Levy, Director of Public Safety, Room 408, City Hall.

"[Signed] E. C. Levy,
"Director of Public Welfare."

A copy of this notice was sent counsel of record for the plaintiffs in case No. 2 (as well as to counsel of record for the plaintiff in case No. 1, as aforesaid), with the following at the foot of it:

"For your information I am sending you this copy of the notice which I have had the clerk of the First Market post in said market, in accordance with section 14, chapter 29, Richmond City Code 1910, and in accordance with the opinion and choice of the city attorney.

"[Signed] E. C. Levy."

It is stated in the reply brief for them that the plaintiffs in both case No. 1 and case No. 2 "agreed to lease the stalls at the price fixed by the plaintiff in error, and written leases were entered into between plaintiff in error and defendants in error for the year 1920."

Respondent, by counsel, admits the correctness of this statement of fact, but takes the position that a question involved in these cases still remains undetermined, which is as follows:

It appears from the record in case No. 1 that, by written lease dated November 28, 1919, the said respondent demised both of the stores above mentioned to Dick Papazian and N. E. Darhanian, for the term of one year, commencing on January 1, 1920, and ending on December 31, 1920, with a provision in the lease:

"That a notice of ninety days, in writing only, from either party to the other shall be

necessary to terminate this lease at the end of said term, or at the end of any renewal or continuance thereof."

And in the supplemental brief for the respondent this position is taken:

"By reason of this situation it is claimed that should the judgment of the [court below] be reversed, the said lessees would be entitled to 90 days' notice of the termination of said lease, from which it is clear that should the proceedings be dismissed on the ground that the question that the record now presents is a moot question, and therefore need not be determined, the plaintiff in error desires to bring to the attention of the court, and have determined the question as to whether he would be compelled to recognize the validity of the lease, which by its express terms gave to the lessees the right to occupy the premises in question for and during the year 1921; no notice having been given by the plaintiff in error of the cessation of said lease on the 31st day of December, 1920."

No issue was made as to this matter by the pleadings before the court below, and the lessees here mentioned are not parties to either of these cases, nor before the appellate court in any way.

The following should also be stated:

It appears from the supplemental brief for the respondent that, on December 17, 1920, the aforesaid section 14 of chapter 29 of Richmond City Code 1910 was so changed as to be no longer operative, and so that any subsequent rental of the stores involved in these cases will be controlled by the new city ordinance on the subject, the construction of which is not involved in such cases.

Ordway Puller, E. V. Farinholt, and H. R. Pollard, all of Richmond, for plaintiff in error.

T. Gray Haddon, of Richmond, for defendants in error.

SIMS, J. (after stating the facts as above).

[1] As appears from the statement above, the respondent executed the leases for the year 1920, the preference of privilege of obtaining which was sought by the respective petitions of the plaintiffs in both of the cases before us, which constituted the sole subject of the orders of the court below under review, and that hence there is no longer any actual controversy between the parties to these cases over the matters in issue involved in the appeals. The cases, therefore, present merely a moot question for our decision so far as the parties to these cases are concerned. *Hamer v. Commonwealth*, 107 Va. 636, 637, 638, 59 S. E. 400; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *Garrett v. Smead*, 121 Va. 390, 93 S. E. 628; note in *Ann. Cas.* 1912C, p. 247. Further,

[2] It would seem from the facts shown

in the above statement that, prior to the time the leases aforesaid were made to the plaintiffs in the cases before us, a lease of the same property was made by respondent to two other parties, namely, one Dick Papazian and one N. E. Darbanian, and we are asked to construe a certain provision in that lease. But these lessees were not parties in the court below to either of the cases before us, and no issue was made by the pleadings in either case in the court below involving that subject. It is therefore plain that any decision we might make on these appeals with respect to the proper construction of the provision of the lease just mentioned could not be carried into effect against the lessees last mentioned. Such a decision would be merely an opinion upon a moot question not in issue in the cases before us.

The appeals in both cases must therefore be

Dismissed.

(87 W. Va. 694)

KELLEY et al. v. THOMPSON et al.
(No. 4160.)

(Supreme Court of Appeals of West Virginia.
Feb. 15, 1921. Rehearing Denied
March 29, 1921.)

(Syllabus by the Court.)

1. Equity \S 130—Judgment \S 460(1)—Caption does not determine nature of bill; bill to annul decree for fraud considered original bill.

A bill to annul a decree for fraud in its procurement, filed after the adjournment of the term at which it was entered, will be construed as an original bill, although in its caption it describes itself as a bill in the nature of a bill of review.

2. Judgment \S 460(1)—Essentials of bill to set aside decree for fraud stated.

A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached.

3. Appeal and error \S 1178(8)—Costs \S 238(2)—Equity \S 241—Decree sustaining demurrer should grant leave to amend, and on reversal leave will be granted; costs denied appellant for failure to raise question in lower court.

A decree, sustaining a demurrer to a bill deemed insufficient generally, should grant leave to amend before dismissing it, and, if upon appeal the bill appears to be amendable, the decree will be reversed, and the cause remanded, with leave to amend, but without costs to appellant; he not having asked permission to cure the defect.

Appeal from Circuit Court, Randolph County.

Suit by F. P. Kelley and others against John Thompson and others. Decree for de-

fendants on demurrer, and plaintiffs appeal. Reversed, demurrer sustained with leave to amend, and cause remanded.

W. B. & E. L. Maxwell, of Elkins, for appellants.

A. M. Cunningham, of Parsons, for appellees.

LYNCH, J. [1-3] The decree whose correctness is challenged upon this appeal sustained defendants' demurrer to the bill and dismissed it without granting leave to amend, and held the bill unamendable. Upon its face and by its prayer the pleading purports to be a bill in the nature of a bill of review, though formally it is an original bill filed to annul the decree entered in the suit of John Thompson against F. W. Smith and his wife, Creed Isner, trustee, F. P. Kelley and J. H. Lawson; Kelley and Lawson being plaintiffs in the bill so dismissed. Both suits brought in the same court had for their main purpose an adjudication of the true ownership of a 40 horse power furnace boiler, a 35 horse power engine, and a No. 4 Star feed grinder, the title to each of which is claimed by Thompson on the one part and by Kelley and Lawson on the other. Thompson, who was plaintiff in the first suit, based his right to the engine and boiler on a purchase by him and a loan of the property to the Smiths, to be used by them to furnish the necessary motive power for the operation of a grist and flouring mill owned by them in Randolph county, and to the feed grinder by a purchase by the Smiths and payment by Thompson of the purchase price therefor, and through a sale and purchase by him of the engine, boiler, and grinder at a sale by Isner, trustee, under the terms of a deed of trust executed by the Smiths to Isner covering the three items of property, the trust being to secure Thompson the return of the engine and boiler and the payment of the money so advanced by him to pay for the grinder.

The plaintiffs, Kelley and Lawson, who, together with Isner, the trustee, and the Smiths, were defendants in the Thompson suit, trace their title to the engine, boiler, and feed grinder to their purchase of the grist and flour mill, then owned by the Smiths, at a judicial sale authorized by decree of the same court entered in the suit of C. M. Hart against the Smiths and a man named Canfield, the engine, boiler, and feed grinder having, prior to the sale under the decree, been attached to or installed in and as a part of the mill, and operated in connection therewith by the Smiths. To the Hart-Canfield suit neither Thompson nor plaintiffs Kelley and Lawson were parties, but they were present when the sale was made and the mill property purchased by Kelley and Lawson, and, with the acquies-

cence or permission of Isner, who executed the decree of sale, Thompson publicly announced his ownership of the engine, boiler, and feed grinder, and accompanied the announcement with the expressed intention and purpose to enforce his lien on them under the trust to Isner, notwithstanding their attachment to the mill property, then about to be sold under the decree. This announcement Kelley and Lawson heard, as they admit, but they understood it only in a qualified sense, and not as broadly as the language used imports. The effect of the qualification need not be considered at this time, as we are dealing only with the demurrer. It is, however, important to note that the lien on the mill proper, enforced by the decree of sale entered, was superior in dignity and priority to that of Thompson under the deed of trust to Isner, because the first-mentioned lien antedated the second and existed long prior to the inception of the arrangement between the Smiths and Thompson, if there was such an arrangement.

To establish his right to enforce in his favor the lien under the terms of the deed of trust by the Smiths to Isner, Thompson brought his suit against them, Kelley and Lawson, and upon a full hearing on the merits of the controverted title to the engine, boiler, and feed grinder a decree, now questioned on the ground of fraudulent procurement, sustained Thompson's right to the property, and ordered it to be sold and the proceeds applied to the satisfaction of the liens and liability so secured. This order also appointed Isner to make the sale, and Thompson became the purchaser.

The specific ground alleged by plaintiffs in their bill for the annulment of that decree is the formation by Thompson and the Smiths of a conspiracy to defeat the right claimed by Kelley and Lawson by virtue of their purchase of the mill sold under the order of the court in the Hart-Canfield proceeding. In other words, the bill charges that Thompson and the Smiths combined to procure, and did procure, the decree in the suit of Thompson against the Smiths, Kelley and Lawson by perjury and false swearing, designed and effected by them to defraud Kelley and Lawson of their right and interest in the engine, boiler, and feed grinder.

Although not as certain and definite in its statements of the grounds of relief as a bill of the kind ordinarily should be, its allegations are not so far defective or objectionable as to warrant dismissal for that reason alone. If true, and for the purpose of the demurrer we must treat the allegations of the bill as true, they sufficiently charge, in general terms, the fraud relied on, and lack of knowledge and information on the part of the plaintiffs, Kelley and Lawson, until after the termination of the Thompson suit and the adjournment of the term at

which the decree was entered and the sale under the deed of trust therein decreed, and their inability to ascertain and discover the fraud so perpetrated until a breach of the amicable relations theretofore existing between the Smiths and Thompson occurred, followed by litigation between them due to such breach, in which each charged the other with falsehood and perjury in the Thompson-Smith suit in respect to the true ownership of the engine, boiler, and feed grinder.

Although the bill filed by Kelley and Lawson may, and perhaps does, contain sufficient allegations concerning the unlawful combination and the perjury and false swearing thereby consummated, yet they are not as definite or as specific as they should be in that respect. They are somewhat vague and uncertain, and do not state with particularity how or in what respect the fraud practiced was the efficient cause for the decree complained of. Plaintiffs do not claim to have been surprised by the perjury, though they do say they did not know of it when it was committed, and not until long afterwards. Unless there was such surprise operating as a fraud, perjury is not a ground for a new trial or a rehearing or review, unless made so by statute, and there is in this state no legislation upon that subject. But surprise alone is not sufficient; it must be coupled with other facts and circumstances of sufficient weight to justify the belief that but for the false and fraudulent testimony the litigation might have terminated otherwise than it did. Such deception usually is chargeable to the misconduct of the litigant who prevails. As such it is one of the grounds of equitable cognizance. *Anderson v. Woodford*, 34 Va. (8 Leigh) 316, 327-328; *Clark v. Sayres*, 48 W. Va. 33, 35 S. E. 882; *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617; *Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *Fulton v. Ramsey*, 76 W. Va. 45, 49, 84 S. E. 1065; 14 Enc. Pl. & Pr. 739.

"If a decree has been obtained by fraud, it may be impeached by original bill, without the leave of the court; the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. * * * A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached." 2 *Daniell's Chancery Pl. & Pr.* (6th Amer. Ed.) *1584, *1585; *Prince v. McLemore*, 108 Va. 269, 277, 61 S. E. 802.

Plaintiffs' bill, however, is not verified, nor is it accompanied by affidavits showing, or attempting to show, in what respect or to what extent there was perjury or false swearing on the part of the Smiths or Thompson, or in what way the fraud was perpetrated and accomplished the intended

purpose. The bill also is equally at fault in this respect. These omissions are not fatal, but are curable by amendment. Though the defects are such as to render the pleading demurrable, the omission may be supplied, and for this reason the court should have granted plaintiffs leave to amend, instead of holding the bill unamendable.

There is not sufficient foundation for the motion of the appellee to dismiss this appeal as improvidently awarded, as it is predicated upon the conception that less than the jurisdictional amount is involved; in other words, that the grinder alone is the subject-matter of the litigation, and that its value is less than \$100. In whomsoever may be the ownership of the engine and boiler, plaintiffs claim title thereto by purchase at the judicial sale mentioned, and the validity of their title is one of the matters adjudicated adversely to them in the Thompson suit, and it is from that decree that plaintiffs seek to purge the fraud alleged to have been committed by Thompson and the Smiths; wherefore the motion to dismiss is overruled.

For the several reasons given, our order will affirm the decree in so far as it sustains the demurrer, but reverse it in so far as it dismissed the bill, and remand the cause with leave to amend in the particulars mentioned, if plaintiffs be so advised, with direction, however, to re-enter the decree of dismissal if they do not elect to amend, but will not award appellants costs upon this appeal, as they did not pray for leave to amend; this, under the authority of *Dickinson v. Foster*, 81 W. Va. 739, and cases cited at page 743, 95 S. E. 196.

(87 W. Va. 632)

HOGAN et al. v. WARD et al. (No. 4071.)

(Supreme Court of Appeals of West Virginia.
Feb. 15, 1921. Rehearing Denied
Mar. 29, 1921.)

(Syllabus by the Court.)

1. Partition — 77(1)—When sale in partition proper stated.

Before there can be a sale of land in a partition suit, it must be ascertained and determined that partition cannot be conveniently made, and that the interests of those who are entitled to the land, or its proceeds, will be promoted by a sale thereof; but if the court, having jurisdiction of the land and of all parties interested therein, decree a sale of the land, without it appearing on the record that the interests of those entitled thereto will be promoted by the sale, the decree is erroneous, and not void.

2. Partition — 77(4)—When prayer for general relief sufficient on which to base decree of sale stated.

In a suit for partition of lands where the bill does not pray for a sale if the partition

cannot be conveniently made, and it appears in the proceedings that it is impracticable or impossible to make partition in kind, and that the welfare of the parties interested therein will be promoted by a sale, the prayer for general relief is sufficient pleading on which to base a decree of sale, especially where the rights of an innocent purchaser for value have intervened.

3. Partition — 109(6)—Purchaser's title protected notwithstanding error in decree.

When real estate is sold in such partition suit, the record therein not showing that the interests of those entitled to same will be promoted by a sale, and is purchased by a party to the suit who did not in any way bring the property to sale, was not interested therein, and in no way induced the error, and the sale is confirmed without objection, his title is protected by section 8, chapter 132, of the Code (Code 1913, § 4942), notwithstanding the error in the decree.

Appeal from Circuit Court, Randolph County.

Action by William Darius Hogan and others against Wirt C. Ward and the West Virginia Pulp & Paper Company and others. Judgment for plaintiffs, and the Paper Company and others appeal. Reversed, and bill dismissed.

Talbott & Hoover, of Elkins, for appellants.

W. B. & E. L. Maxwell, of Elkins, for appellees.

LIVELY, J. Appeal and supersedeas was obtained by the West Virginia Pulp & Paper Company, Spencer Hamrick, and George W. Hogan to a decree of the circuit court of Randolph county of the 7th day of November, 1919, setting aside, as void, deeds made to them by Naomi Hogan Vanpelt. The deed to Spencer Hamrick from her is dated July 31, 1909, that to George W. Hogan, June 26, 1907, and that to the West Virginia Pulp & Paper Company dated May 19, 1908, from John A. Innes, who received his deed from Naomi Hogan (afterwards Vanpelt) on October 10, 1905. The bill was filed at December rules, 1914, by William Darius Hogan, Esther Hogan, Charles Edmund Hogan, and William Henry Hogan, by their next friend and others against the above-named appellants, and Wirt C. Ward and others, alleging that their father, William H. Hogan, had died in 1901, intestate, and seized of two tracts of land, called the "mountain place" and "home place," respectively; that two suits were instituted shortly after his death, one by Jacob Hogan et al. against Naomi Hogan, the widow, et al. for a partition of the lands, and the other by Naomi Hogan against George W. Hogan et al. for assignment of dower to the plaintiff therein; that such proceedings were had in these cases as resulted in a sale of the "mountain place" to Wirt C. Ward and Elihu

Hutton; and that dower was assigned to the widow, consisting of the entire "home place" and in addition thereto a sum was decreed to her in lieu of her dower in the "mountain place" from the sale of that tract; that the interests of the heirs in the "home place" had been sold to Naomi Hogan, subject to her dower therein, and that she had afterwards deeded the entire "home place" to George W. Hogan and Spencer Hamrick in two separate tracts; and that before these sales to George W. Hogan and Spencer Hamrick she had conveyed the timber on the "home place" to John A. Innes, and that he had afterwards deeded the timber to the West Virginia Pulp & Paper Company. The bill prayed that the sale of the lands made to Ward and Hutton of the "mountain place," and that made to Naomi Hogan of the remainder interests in the "home place," and the subsequent deeds from her be set aside, canceled, and annulled, because the court in those two suits had no jurisdiction to pronounce the decrees of sale. The records of the two original causes in which the sales were made were exhibited and made a part of the bill. All the parties defendant either appeared and demurred to the bill or filed answers thereto. It appears that all persons interested in the lands mentioned were made either parties defendant or appeared as plaintiffs. The bill does not charge fraud or collusion in the procurement of the decrees of sale under which these lands were sold, but sets forth in a general way the proceedings had in the two original chancery causes, and alleges that the circuit court illegally assumed jurisdiction to sell the real estate, and that there were no pleadings upon which to base the decree except the report of the commissioners of partition appointed therein. George W. Hogan, Spencer Hamrick, Elihu Hutton, and Wirt C. Ward demurred to the bill; afterwards by amended bill John A. Innes and the West Virginia Pulp & Paper Company were made parties defendant, and the latter likewise demurred to the amended bill. On February 22, 1918 a decree was entered, sustaining the demurrers of Ward and Hutton, and those persons holding under them, and dismissing the cause as to them. From this decree no appeal was taken, and it is unnecessary to further consider any questions which arise as to the sale of the "mountain place." Appellees allege cross-error against this decree on this appeal; but this cross-assignment of error cannot be considered here, as these parties interested as purchasers of the "mountain place" are not before the court. It appears that an appeal was sought from this decree of February 22, 1918, but was refused. It is not important to detail the various pleadings filed in this case. The main question, and upon which all the other questions turn, is whether or not the sale of the "home place" to Naomi Hogan under the decree of October 2, 1904,

pronounced in the original suits, was without jurisdiction of the court, and void. In the original suit of Jacob Hogan and Celesta Gibson against Naomi Hogan and the heirs of W. H. Hogan, filed at September term, 1902, it was alleged that George W. Hogan and Levi H. Hogan had received their full, fair, and equal portion of the estate from their father in his lifetime, and were not entitled to anything further in the way of lands or personal estate; and it was afterwards determined upon proof that they had received their share, and a decree, finding that fact was entered, before the decree of sale of the "home place," and thereafter they had no further interest in the litigation. As before stated, commissioners were appointed to make partition of the Hogan lands and on August 16, 1904, they reported as to the "home place":

"Your commissioners would further report that said home place, after the termination of the widow's dower therein, is not, in their opinion, susceptible of partition in kind among the heirs of William H. Hogan, deceased, and the same should be sold either now, subject to the widow's dower, or after the termination of the widow's dower therein, and the proceeds divided among the heirs of the said Hogan."

On this report the decree of sale of the October term, 1904, was predicated, at which sale the widow, Naomi Hogan, bought the "home place," subject to her dower, for the sum of \$340. Exceptions were made to the report of sale to the effect that the bid was inadequate, and the court ordered a new sale thereof; but at the second sale the land was sold to her for the same amount, and a decree of confirmation entered and deed made in conformity therewith. It nowhere appeared in this partition suit that the interests of the children of William H. Hogan would be promoted by this sale. Neither was there a prayer in the bill alleging that it was impracticable to partition the lands and asking for a sale. Because of the failure of the record to show these two things, the plaintiffs in this suit assert their right to have the decree set aside as null and void, without jurisdiction of the court to pronounce, and consequently that the deeds made in pursuance thereof should be set aside as void. It is not deemed important or necessary to set out in full the various pleadings and procedure in the original suits or in this suit. Only sufficient has been stated to bring out clearly the issue here involved.

The vital question in this case is whether or not the decree of October 2, 1904, in the original consolidated suits, which directed sale of the "home place," is void or voidable. If void, the decree in this case of William Darius Hogan et al. v. Wirt C. Ward et al. must be affirmed. If merely voidable, then a different disposition must be made.

[1] There are many cases decided by this

court where the prerequisites of sale have been determined; and they consistently hold that there must be a pleading in the cause on which a decree of sale may be based; that it must appear that partition cannot conveniently be made; and that the interests of the parties entitled to the land will be promoted by a sale. Where these prerequisites did not appear, the decree of sale has been reversed on appeal. In *Hull v. Hull*, 26 W. Va. at page 30, Judge Green said that the record in that case did not show that the interests of the infant owners of the land would be promoted, and "this surely constitutes a palpable and substantial error in the proceedings and decree." In the case of *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482, the court reversed the decree of sale because the record did not show that partition could not have been conveniently made, nor that the interests of the owners would have been promoted by the sale. Judge Brannon, on page 158 of 37 W. Va., on page 487 of 16 S. E., says:

"The facts required by the statute must appear. Where the record does not show this, a sale is *erroneous*."

He does not say that the decree is *void*. The case of *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959, was purely for partition, which was made, and each heir was required to pay his part of the costs, and the case was dismissed from the docket. Buskirk afterwards gave notice to the parties that he had become a beneficiary of the parties entitled to costs in the case, and that he would, at the following term, move the court to reinstate the cause on the court docket. The case was reinstated at the October term, and afterwards at the following April term a decree was entered, directing sale of sufficient lands to pay the costs. Under this decree 99 acres of the land assigned to one heir were sold by a commissioner. The court held this decree of sale void, saying that the decree that the heirs pay costs was a judgment, and must be enforced in another suit for that purpose. The court had no jurisdiction to sell for costs; also that the decree of sale was void because the final decree, making partition and dismissing the case from the docket, ended the case, and there was no case in court for further decree. That case has little application here. In *Herold v. Craig*, 59 W. Va. 353, 53 S. E. 466, the decree for sale was not held to be void. The decree in *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014, was declared void, because the court had no jurisdiction to sell upon the bill of the widow, who had nothing but a dower interest on which to predicate her bill. There was no jurisdiction. The decree was not merely erroneous, but void. The same holding, and for the same reason, is found in *Conrad v. Crouch*, 68 W. Va. 378, 69 S. E. 888. That

case held a decree of sale of infants' timber to be void, because entered in a suit brought by a widow against the heirs for assignment of dower. She could not have the infants' land sold in such a proceeding either on account of insufficiency of personal assets to pay the debts of the estate, or on the ground that the interests of the infant heirs would be promoted by such sale.

"A sale of lands of infant heirs made in such proceedings, either for the purpose of paying debts of the estate, or on the ground that the interests of the infants will thereby be promoted, is void for want of jurisdiction." (3d pt. syl.)

The decree of sale in *Smith v. Greene*, 76 W. Va. 276, 85 S. E. 537, was reversed because it did not appear from the record that partition could not be conveniently made, and that the interests of the co-owners would be promoted by sale. The court said the decree was *erroneous* for want of proof. It did not say the decree was *void*.

Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223, an especially well-considered case, reiterates that before a sale of land can be made in a partition suit, before the decree can be entered, it must appear from the record that the partition thereof cannot be conveniently made. In that case there had been no report from commissioners that the land could not be conveniently partitioned, nor was it shown that partition could not be made. There was no recital to that effect in the decree. The decree recited that the interest of the two infants would be promoted by sale of their interests in the tract as shown by evidence adduced at the bar of the court; but the other necessary requirement of the statute, that partition could not be conveniently made, nowhere appeared in the record, and the opinion said that the decree was erroneous for these defects. In that case, as in this, it was insisted that the decree was void under the authority of *Hoback v. Miller*, supra, and Judge Poffenbarger said there was a great dissimilarity in these two cases. In *Hoback v. Miller* the plaintiff had no right to file any sort of bill upon which the sale of infants' land could be predicated; therefore the court was without jurisdiction and its decree void. But in *Stewart v. Tennant* the plaintiffs were tenants in common with the infant and entitled to partition, and upon their right of partition could force a sale, it appearing that partition in kind could not be made, and that it was to the best interests of the parties thereto that such sale be made. The necessary parties were before the court as well as the subject-matter, and the jurisdiction of the court was proper for sale. But one of the statutory requirements was not shown, and the decree was held to be erroneous, and not void. Judge Poffenbarger said:

"After that [jurisdiction of subject-matter and proper parties], in the exercise of its jurisdiction, the court departed from the rules of law governing the proceedings, which amounts to an error in the exercise of jurisdiction, but not to an act without jurisdiction. Whether the decree is erroneous and therefore voidable or actually void, having no force or virtue for any purpose, is not very material or important, but it seems to be voidable only."

[2] But it is insisted that there was nothing in the pleadings in the partition suit of Jacob Hogan and Celesta Gibson against Naomi Hogan et al. on which to base a decree of sale of the "home place"; the prayer of the bill being for partition only. We do not so hold. In a suit for partition, the statute expressly says that if partition cannot be conveniently made and the interests of those who are entitled to the subject or its proceeds will be promoted by a sale, a sale may be made. It necessarily follows that in every suit purely for partition the question of sale may arise by virtue of this statute, and if the facts required by the statute are shown on which to base a sale, it must be so done. It would be a remarkable situation if upon a bill for partition, purely, it should appear in the proceedings that partition could not be made, that then the bill should be dismissed because there was no alternative relief by sale prayed for in the bill. The report of commissioners of partition would be sufficient. It would bring the whole matter to the attention of the parties, and to the court for adjudication. The possibility and advisability of a sale necessarily enters into every suit for partition by virtue of this statute. A sale in a partition suit could not be made at common law. In *Croston v. Male*, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. Rep. 918, the suit was instituted, not for a partition, but for a sale, and the court held that under the prayer for general relief a partition might be made. We cannot see why the converse thereof should not be true. No relief can be granted under a general prayer which is entirely distinct from and inconsistent with the special prayer. But the sale is not entirely distinct from and inconsistent with the prayer for partition, as above intimated. *De Camp v. Carnahan*, 26 W. Va. 839.

"Although a suit is for the sale of the property it has been said that the prayer should be for the partition as well as the sale, but the position is absurd, and cannot be maintained where the allegations show that division by allotment is impracticable. Plaintiff's relief, at least when the judgment is not by default, is not restricted by his prayer. Thus, although he prays for partition by allotment, it may be made by sale; and generally the court may grant any relief proper on the facts alleged and established, whether or not it be other, or in addition to, the relief in fact prayed for in the complaint." 30 Cyc. 219, 220.

The commissioners of partition reported that in their opinion the "home place" was not susceptible of partition in kind among the heirs of W. H. Hogan, deceased, after the termination of the widow's dower therein, and that the same should be sold. But the record is silent as to whether or not it would be to the best interests of the heirs to have a sale instead of partition. Here was a very patent defect in the proceedings, and the court should not have entered a decree upon this status of the pleadings and proof. But it did so. It was a very glaring error, and upon appeal there would have been no question of reversal. Possibly the judge may have had evidence before him sufficient to meet the requirement of the statute which the record does not disclose. Possibly he considered that the interest of the eleven heirs in the "home place," burdened as it was by the widow's dower, would be so insignificant to each that the costs of partition would not justify the division in kind, and that it would be to their interest to decree a sale. The land, after being twice advertised, brought in \$340 only. The record does not disclose the age or health of the widow. She was a second wife. She is still living, married to Vanpelt. The propriety of the sale must be tested by the circumstances then existing. But we should not wander into the realm of speculation, and it is at once conceded that the facts sufficient to meet the requirement of the statute should appear in the record. The statute does not so require, but all our decisions so state. But the court had jurisdiction of the property, and of all the persons in interest, and if the court made a mistake, however palpable and egregious, it would not render the decree void, but voidable only. In the often cited case of *Zirkle v. McCue*, 26 Grat. (Va.) 517, which was a suit for partition, the commissioners after assigning the widow dower, including the mansion house and improvements, did not partition the residue among the eight heirs. They reported the facts to the court, but did not recommend a partition, and did not intimate that it could be conveniently done. They clearly saw the difficulty of partitioning so small a tract among so many, with due regard to wood and water and places of residence. After that report was returned to the court, it was suggested by counsel that it would promote the interests of all concerned to sell the residue of the tract in three parcels rather than to make an assignment of any particular parcel to any one or more of the heirs. A decree was entered for sale, and the appellate court confirmed that sale, inasmuch as the rights of an innocent purchaser had intervened.

[3] Another important principle enters into this case. Naomi Hogan (afterwards Naomi Hogan Vanpelt) purchased the re-

mainder interests in the "home place," which "home place" she held for life under her assignment of dower. What are her rights? If the decree is erroneous and voidable only, then she is protected in her title by section 8 of chapter 132, Code 1918 (Code 1913, § 4942), which reads:

"If a sale of property be made under a decree or order of a court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled."

A sale in partition is a judicial sale. The purchaser is protected by the judgment of the court as fully as in any execution or judicial sale. The various matters necessary to authorize the sale have all been made subjects of judicial inquiry and determination.

"If the court acted erroneously in deciding upon the sale, or committed any other error, this should have been corrected by appeal, or by some other appropriate proceeding in the partition suit. Not being so corrected, the parties interested have acquiesced in and ratified it; and they cannot employ it in any collateral matter to defeat the purchaser's title." Freeman on Cotenancy and Partition, § 548.

Formerly a purchaser at a judicial sale was charged with notice of every reversible error in the proceedings leading up to the sale, and if the decree of sale was reversed his title was lost. This holding made the title of purchasers at judicial sales so uncertain that few persons had the temerity to risk the investment of money in such sales, and it had a marked tendency to cut off bidders and prevent property from bringing anything like its true value. This became unbearable, and hence the statute, first enacted by the mother state, and afterwards incorporated in section 8, c. 132, of our Code. But it is insisted that Naomi Hogan Vanpelt was a party to this suit, and for that reason is not protected by this section of the Code. It does not follow that every purchaser who is a party to the suit is not so protected. If she moved the error she could not take advantage of her own act. If she had any interest in the proceeds of the sale, and caused the sale to be made, she would not be protected. But she did not have such interest, and she did not move for the sale. The proceeds went to the heirs, not one penny to her. It is true that in her answer she suggested that it would be better to have a sale of the "mountain place" of 393 acres, but she made

no suggestion and was silent as to what should be done with the interests of the heirs in the "home place." The distinction between the status of purchasers who are parties to a suit is made in *Childers v. Loudin*, 51 W. Va. at page 568, 42 S. E. at page 641. That was a partition suit, and Johnson, one of the cotenants, purchased the land at a judicial sale, and Judge Poffenbarger, said:

"While Johnson, the purchaser, is a party to the suit, it does not appear that he, in any way, encouraged or sought to bring about the sale of the land, and it cannot be said that he was the moving cause of the sale. The sale is not more beneficial to him than to his cotenants, and he does not stand in the situation of a creditor who has caused the land to be sold for the satisfaction of his debt and purchased it at the sale. Although a defendant and one of the owners, he did not even file an answer in the partition suit. This being true, the principle announced in *Martin v. Smith*, 25 W. Va. 585, *Dunfee v. Childs*, 45 W. Va. 155, *Buchanan v. Clark*, 10 Grat. 164, and *Galpin v. Page*, 18 Wall. 350, does not apply. In all those cases the purchasers whose titles were held not to be within the protection of the statute were persons who were benefited by the erroneous decrees and who had been instrumental in procuring the sale. In *Dunfee v. Childs*, it is said: 'Merely being a party would not alone disturb his purchase, but, if the decree goes to his benefit, it is otherwise. The same reason does not exist for protecting him as an innocent third person. He moves the proceeding.'"

George W. Hogan would also be protected by section 8 of chapter 132, Code, although he was a party to this suit, for, before the decree of sale of the "home place" was entered, it had been determined by decree that he had received his patrimony from his father in his father's lifetime and had no interest whatever in the partition of the land or distribution of the personal property, and he and one other of the heirs were dismissed from the suit. Moreover, it must be remembered that he did not purchase at the judicial sale, but took his title from Naomi Hogan Vanpelt several years after the judicial sale. We sustain the title of Naomi Hogan Vanpelt to the "home place," and it necessarily follows that the deeds from her to Spencer Hamrick, George W. Hogan, John A. Innes, and his vendee, West Virginia Pulp & Paper Company, must also be sustained.

We therefore reverse the decree of the circuit court of Randolph county, entered on the 7th of November, 1919, and dismiss the plaintiff's bill.

Decree reversed, and bill dismissed.

(88 W. Va. 54)

RICE v. RICE. (No. 4127.)(Supreme Court of Appeals of West Virginia.
Feb. 22, 1921. Rehearing Denied
March 29, 1921.)*(Syllabus by the Court.)***1. Divorce** ⇨27(6)—Divorce from bed and board properly granted for cruel and inhuman treatment.

A divorce from bed and board will be granted where it appears by a fair preponderance of the testimony that the defendant has on various occasions violently assaulted and beat the plaintiff, his wife, and compelled her, to save herself from further indignities, to flee from their home at night in inclement weather, and remain all or a part of the night unprotected from the violence of the elements.

2. Appeal and error ⇨1009(4)—Decree reversed when against preponderance of evidence.

While great weight will be given to the findings of the chancellor upon conflicting oral evidence, still if the testimony of one of the parties is fully supported by circumstances which could not be changed or falsified, it substantially preponderates over the oral evidence of the adverse party in conflict with such circumstances, and this court will reverse a decree entered against the party in whose favor the evidence so preponderates.

3. Witnesses ⇨347—Acts by party inconsistent with testimony at trial will be considered.

Acts done by one of the parties to a suit prior to its institution, which are entirely inconsistent with the testimony given by him upon the trial, will be given great weight in determining what credence should be given to his oral testimony in conflict with the testimony of his adversary.

4. Divorce ⇨51—When evidence as to condoned cruel and inhuman treatment may be introduced stated.

It is competent in a suit for divorce upon the ground of cruel and inhuman treatment to prove acts upon the part of the defendant amounting to such cruel and inhuman treatment, even though the same may have been conditionally condoned, for after the condition upon which they were condoned has been broken they are again brought into existence as grounds for divorce, and even though not of themselves so relied upon, evidence touching them is competent to characterize the subsequent acts of the defendant which are set up as entitling the plaintiff to relief.

5. Divorce ⇨287—Appellate court will not on reversal of decree fix alimony but will remand cause.

Where, in a suit for divorce and alimony the relief prayed for is denied by the lower court, this court will not, upon reversal of such decree, fix the amount of such alimony, but will enter a decree of divorce, and remand the cause to the circuit court for the entry of a

decree for alimony that will do justice between the parties.

Appeal from Circuit Court, Monroe County.

Suit by Martha C. Rice against William V. Rice. Decree for defendant, and plaintiff appeals. Reversed, decree for plaintiff, and case remanded.

R. L. Clark, of Union, for appellant.

J. A. Meadows, of Athens, for appellee.

RITZ, P. In the year 1908, the parties to this suit launched their bark upon the matrimonial sea, and after a more or less tempestuous voyage the craft was wrecked in the month of December, 1916, plaintiff contends because of the defendant's cruel and inhuman treatment of her, and as alleged by the defendant, because of the plaintiff's willful desertion and abandonment of him. Both of the parties had had the misfortune to be bereft of their respective former spouses, and the plaintiff was left with one daughter about 16 or 17 years of age, while the defendant, as a result of his former marriage, was the father of nine children, eight of whom were living at home at the time of the second marriage, and some of whom were of comparatively tender years. After the marital relations of the parties were permanently broken off in the month of December, 1916, the plaintiff lived part of the time with her daughter, who was then married, and supported herself as well as she could by the earnings of her labor. It appears that her health was not good, and at times she had been compelled to subsist upon the charity of her neighbors and friends, while the defendant is the owner of a farm with considerable live stock and farming equipment thereon, from which he derives a comfortable living for himself and his remaining family.

The plaintiff in September, 1918, instituted this suit praying for a divorce from bed and board from the defendant, and for alimony. The ground of her complaint is cruel and inhuman treatment. The court below referred the cause to a commissioner to take the evidence and report upon other questions submitted to him. Upon consideration of the evidence submitted by the commissioner the court below declined to grant any relief, and dismissed the plaintiff's bill, and this appeal is prosecuted to reverse that decree.

[1] The plaintiff testifies in her own behalf that almost from the time she and the defendant were married until the time she finally left him his conduct toward her was inhuman and brutal. She testifies that on many occasions he beat her, whipped her, and excluded her from the house in the winter time, and compelled her to spend the nights

out in the cold; that on at least one occasion, when he was under the influence of liquor, he attempted to procure one of his grown children to whip the plaintiff, and upon the refusal of this child to do so he did it himself. Many of the acts of cruelty and inhumanity testified to by the plaintiff are likewise testified to by her daughter. It further appears from the evidence introduced on behalf of the plaintiff that the defendant was addicted to the immoderate use of alcoholic drinks, if indeed it can be said that there is any such thing as a moderate use of such liquors, and that during the times he was so under the influence of liquor he was very violent. It appears that during their marital life on as many as a half dozen occasions the plaintiff left the defendant's home and lived away from him during intervals of varying lengths, as she contends, in order to escape his violent attacks and to prevent him from further abusing and beating her. The defendant in his own behalf testifies that he never treated the plaintiff harshly or abusively, and if his testimony is to be believed there was nothing in his conduct that should have caused a breach of the ordinary calm of their matrimonial life. Some of his children testify likewise that their father never abused their stepmother. According to the testimony of the plaintiff a few days before she finally left the defendant's home in the month of December, 1916, he, in addition to brutal attacks upon her, made an indecent assault upon her daughter, who was then visiting at their home; that she then, as soon as she could get her clothing together and make her arrangements, left the defendant's home and went to the home of her brother in Raleigh county, and since said time she has never spoken to or had any direct communication with him. This charge is also denied by the defendant, and he contends that when she left on this occasion she told him she was going on a visit to her brother in Raleigh county; that their relations at the time were entirely amicable; that he furnished her the money to make the trip; and that when she returned and went to live at another relative's he sent one of his sons to her to request her to come home, which she refused to do. In this he is corroborated by several of his children. The oral evidence as to the conduct of the defendant towards the plaintiff in the particulars complained of is highly conflicting. It is necessarily in large part confined to the testimony of themselves, because of the intimate personal relations existing between man and wife, and were it not for some things appearing in this case independent of the testimony of either of the parties we would hesitate to disturb the findings of the lower court upon this conflicting state of the evidence.

[3] To these things we will now advert.

It appears that in the summer of 1915 after the plaintiff had left the defendant, as she claims because of excessive abuse and extreme cruelty toward her, she at his instance agreed to return upon his executing a writing promising that in the future his former conduct would not be repeated. By this writing he binds himself not to again break the peace toward the plaintiff, and while it is true that the plaintiff likewise signed this writing, the only thing that she agreed to do by it was not to reproach him with his past conduct. This writing is a clear admission upon his part that he had been guilty prior thereto of breaches of the peace toward the plaintiff, and is a solemn admission by him of the falsity of the evidence he has given upon this hearing.

Another item of evidence of very great weight is the fact that some time prior to the execution of this writing, acting upon the advice of some of her relatives and friends, the plaintiff caused a warrant to be issued for the defendant charging him with assault and battery committed upon her; that upon this warrant he was taken before a justice of the peace, and, upon a trial, was found guilty and fined for the offense. The justice of the peace who conducted this trial was introduced as a witness, and he testified that at the time of the trial there was still evidence upon the plaintiff's person of acts of violence committed upon her.

It further appears that the defendant is a man in moderate circumstances, and has a farm from which he derives a comfortable living for himself and his family; that the plaintiff has nothing, and is compelled to make her living by working in the kitchens of other people, or doing such other domestic labor as she is able to obtain, and as the condition of her health will allow. Under these conditions, is it at all probable that the plaintiff would have left the defendant if, as he contends, there was nothing out of the ordinary in their marital life? It is significant that the plaintiff on at least a half dozen occasions prior to December, 1916, left his home, as he claims without any reason or excuse, and that overtures were always made by him to have her return. It seems at no time did she ever forgive the offense with which she claims he was guilty until after he had repeatedly importuned her and made promises of reformation. He introduced some evidence tending to show that the plaintiff was unable or unwilling to get along with his children, but there is no substantial showing that the plaintiff had any more trouble with the defendant's children than is ordinarily incident to the rearing of a family of this size.

The defendant contends that while it is true that the paper writing is an admission upon his part of cruel treatment toward the plaintiff, she condoned all of his past acts

at that time, and cannot now complain of them, and that this is likewise true of the acts of violence which resulted in his conviction of assault and battery upon her, as above referred to. The condonation by the terms of the writing was conditioned, however, upon his future good conduct, and, of course, if his contention is true that his conduct has since been reasonably free from adverse criticism, then no cause of action would exist here, but the fact that he now denies that he ever was in any wise cruel or brutal in his treatment of the plaintiff, contradicted as it is by a writing over his own signature, convinces us that his testimony as to his subsequent conduct is entitled to little weight. There is no doubt, nor is it questioned, that if the defendant has been guilty of the assaults upon the plaintiff, and of the conduct toward her of which she complains, and as to which she testifies, she is entitled to the relief for which she prays. Such acts clearly bring the case within the rule laid down by this court justifying divorce upon the ground of cruel and inhuman treatment. *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083; *Maxwell v. Maxwell*, 69 W. Va. 414, 71 S. E. 571.

[2, 4] The only question is whether or not the evidence proves that the defendant was guilty of the conduct charged against him. It is true the court below has found in his favor, and while great weight will be given to the conclusions and findings of the chancellor in a case like this, still when we find that there is a fair preponderance of the evidence in favor of the cause of action alleged, we will not refuse to give relief. In this case we are of opinion that the circumstances which we have above pointed out are of such controlling force, and so fully corroborate the oral testimony of the plaintiff, that they compel us to hold that the defendant's denials, inconsistent therewith, are not effective to bar the relief prayed for. While it may be true that the acts of cruelty and inhumanity of which the defendant was guilty prior to the execution of the writing of June, 1915, and which were condoned conditionally by that writing, of themselves would not be cause for divorce, but as we said in *Deusenberry v. Deusenberry*, 82 W. Va. 135, 95 S. E. 665, the condonation was only conditional, the condition being that the defendant's conduct would be good in the future, and upon his failure to comply with this condition the plaintiff's condonation can no longer be relied upon by him as excusing these acts. Then, too, even though his former conduct had been unequivocally condon-

ed, still it would be admissible in evidence as characterizing his later conduct, of which complaint could be properly made, and would be an instructive aid to the court in interpreting subsequent acts which the conflicting testimony might render equivocal.

The defendant insists that his efforts at reconciliation, both before and since the institution of this suit, have an important bearing. The plaintiff had repeatedly yielded to such offers in the past, but notwithstanding defendant's promises of reformation there seems to have been little difference in his manner of treating his wife. He evidently believed that because he was the head of the household—

"Therefore God's universal law
Gave the man despotic power
Over his female in due awe,
Not from that right to part an hour,
Smile she or lour."

Even if we concede that his attempts at reconciliation were in entire good faith, she was under no obligation to condone his transgressions. She had repeatedly done so in the past, and it would seem that the point had been reached where forgiveness ceases to be a virtue. If his conduct gave her ground for divorce, she could stand upon it and reject any proposals coming from him, the acceptance of which, as indicated by past experience, would only result in her further humiliation and ill treatment.

Our conclusion is that the plaintiff has shown herself entitled to relief, and we will reverse the decree of the circuit court, and enter a decree of divorce from bed and board.

[5] But how about the prayer for alimony? The circuit court has not yet considered this question. Ordinarily the question of what alimony is to be allowed is one resting in the sound discretion of the trial court, which will not be reviewed unless it appear that injustice has been done to one or other of the parties. That the plaintiff is entitled to alimony there can be no doubt. *Kittle v. Kittle*, 102 S. E. 799. Ordinarily, however, this court will not pass upon a question upon appeal which has not been passed upon by the court below, but will remand the cause for the purpose of having such question determined, with the right, of course, to either of the parties to review by appellate process such determination, should they conceive themselves to be aggrieved thereby. *Nuzum v. Nuzum*, 77 W. Va. 202, 87 S. E. 463.

For the purpose of entering a decree for alimony which will do justice between the parties, we will remand the cause to the circuit court.

(87 W. Va. 673)

STICKLEY v. THORN et al. (No. 4155.)

(Supreme Court of Appeals of West Virginia.
February 15, 1921. Rehearing Denied
March 29, 1921.)

(Syllabus by the Court.)

1. Reformation of Instruments \S 29, 45(4)—Deed will not be reformed unless mistake was mutual; denied if rights of bona fide purchaser have intervened.

Equity will not reform and correct a deed on account of a mistake unless it is shown by clear, convincing, and unequivocal evidence that the mistake was mutual; but, if the rights of an innocent bona fide purchaser for value have intervened, the reformation and correction will not be made.

2. Reformation of Instruments \S 29—Deed may be reformed as to one not a "bona fide purchaser," but who has knowledge of mistake.

A purchaser of land who has knowledge of a mistake in the deed of his grantor, and of the true intent and design thereof, is not a bona fide purchaser for value, and stands in no better position than the original parties. The deed may be reformed as to him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bona Fide Purchaser.]

3. Appeal and error \S 1011(1)—Decree on conflicting evidence not reversed.

A decree of a circuit court based on conflicting evidence will not be reversed by this court, unless it is clear that the finding of the lower court is unwarranted by the facts.

Appeal from Circuit Court, Randolph County.

Action by Thomas B. Stickley against W. R. Thorn and others. Decree for plaintiff, and defendant named appeals. Affirmed.

A. M. Cunningham and James A. Bent, both of Elkins, for appellant.

W. B. Maxwell and H. G. Kump, both of Elkins, for appellee.

LIVELY, J. This appeal and supersedeas, obtained by W. R. Thorn, brings here for review a decree of the circuit court of Randolph county, entered on June 1, 1920, reforming and correcting a deed from T. B. Stickley and wife to A. P. and Virginia Flanagan, dated December 7, 1916, and estopping W. R. Thorn from claiming any of the land described in a deed from said Flanagans to him, dated September 27, 1917, except such as is described in the deed from Stickley to the Flanagans as reformed and corrected, and enjoining Thorn from trespassing upon the lands of Stickley east of the eastern line of the deed from Stickley to the Flanagans, as reformed and corrected.

Thomas B. Stickley owned about 44 acres of land in Randolph county near the city of

Elkins, and on December 7, 1916, conveyed to Virginia and A. P. Flanagan 4 acres and 158 poles lying in the interior of the 44-acre tract. A survey was made and stakes set in the presence of vendor and vendee at three corners of the land. There are only four corners, and the northwestern corner was on a hickory, about which there is no dispute. Afterwards Purkey, the surveyor, prepared the deed, and in drawing it made the mistakes complained of by the plaintiff. Some time prior to this transaction Stickley had made a deed to a portion of his lands lying on the south of the Flanagan lot to E. J. Evans. In surveying the Flanagan lot, prior to the making of the deed to him, Stickley, Flanagan, and the surveyor began, as the southwest corner of the Flanagan lot, at a stake 16½ feet from and north of the line of the Evans land, and ran a line parallel to the Evans tract and 16½ feet therefrom easterly 27.32 poles to a stake 16½ feet north of the Evans line; thence a northerly course 35.35 poles to a stake 1.9 rods west of a maple at the Stickley boundary line; thence northwest 27.7 poles to a hickory; thence southwest to the beginning. In drawing the deed, which he says he drew from memory, Purkey began at a stone, a corner in the Evans line; thence southeast and running with the Evans line 27 poles to a stone 16½ feet from Thorn's line; thence northeast 35.85 poles to a stone, a corner one rod west of a maple, a corner in Stickley's boundary line; thence with said line west 29.7 poles to a hickory; thence southwest 25 poles to the beginning. This deed granted to Flanagan a right of way over and through the grantor's lands to the land then conveyed. On September 27, 1917, the Flanagans deeded the land to Thorn, using the same calls in the deed made to them by Stickley. At the maple corner and running along the northern boundary of the Flanagan tract a roadway had been procured and opened by Stickley, leading to the city of Elkins, after he had sold to the Flanagans; and some time after Thorn had purchased the lot he began opening a road from the maple corner south along his eastern line, evidently for the purpose of having a road to the east of his eastern line to connect with the Stickley-Nestor road on the north at the maple corner, and to connect with another opened road which extended to the southern portion of his lot along the eastern boundary of the Evans land, and known as the Stickley road. This work of opening the road consisted of cutting the brush and timber, and, if extended south as started, would have taken and destroyed a "potato patch" on the land in the possession of and claimed by appellee. Stickley then, on May 16, 1919, presented his bill to the judge of the circuit court, supported by affidavits, asking for a reformation and correction of his deed to the Flanagans and for an

injunction against Thorn to prevent trespass and irreparable damage. The potato patch seems to have been the "proximate cause" of the litigation. The bill set out the mistakes in the calls of the deed to the Flanagans and how they occurred, that said mistakes were mutual, and all the facts leading thereto, charged that Thorn knew of the mistakes fully before the purchase by him from the Flanagans, that he was shown the boundary lines and stakes set, marking the corners, and all knew the circumstances under which the mistakes occurred, and Thorn was not, therefore, an innocent purchaser, that he (Thorn) was committing trespass on plaintiff's land, destroying his timber, potatoes, etc., and causing irreparable loss, etc., and prayed for a reformation and correction of the deed to the Flanagans, and for an injunction against Thorn, and for general relief. The Flanagans and Thorn were made defendants; and the Flanagans answered on July 7, 1919, admitting the mutual mistake in the deed to them, corroborated the allegations of the bill, and admitted that the provision for right of way given in the deed had been performed and accepted by the opening of the Stickley-Nestor road on the northern boundary by Stickley, and that Thorn was so informed when he purchased from the Flanagans, and that there was no road or right of way along the eastern line of the lot at any time before or after his purchase. Thorn demurred to and answered the bill on August 2, 1919. The answer denies all of the material allegations of the bill, and sets up a claim of right of way along the eastern line of the lot purchased by him from the Flanagans down to the Stickley-Nestor road, under the provision in the deed from Stickley to the Flanagans reading:

"Said Stickley hereby grants unto said Flanagans a right of way over and through his lands to the land herein conveyed."

On September 3, 1919, plaintiff filed an amended bill, setting out that it was the intention and agreement when the Flanagan deed was made that the beginning corner (the southwest corner) should begin 16½ feet north of the Evans line, and that there should be a strip 16½ feet wide between the northern line of the Evans tract and the southern line of the Flanagan tract, but that the scrivener in making the deed had made the mistake of beginning at a stone on the Evans line; that the mistake was not noticed by either party and was mutual; and that Thorn, when he purchased, was fully advised of the true boundary, and knew of the mistake in the calls of the deed when he purchased. Thorn demurred to and answered the amended bill. Flanagan answered, and general replications were made. Upon this state of the pleadings the parties went to proof.

The lower court properly overruled Thorn's

demurrer to both the original and amended bill. The bill shows that Stickley could neither read nor write. He and the Flanagans and Purkey, the surveyor, went on the land, and by actual survey measured the land and set stakes at each of the three corners; that in drawing the deed the scrivener made the mistakes complained of, and the mistakes were unknown to both the plaintiff and the Flanagans, and were mutual mistakes between them; and that the deed did not therefore carry out the true intent and agreement of the parties. It is charged that Thorn, before he purchased, was fully advised of these mistakes in the deed to the Flanagans. The amended bill seeks to correct and reform another line in the same deed for the same reasons. It was not foreign to the matters set out in the original bill, in fact, is closely and intimately linked therewith, and cannot be considered as a new suit. These bills allege facts sufficient for reformation of a deed for mistake of the scrivener, and as not conforming to the actual agreement of the parties. *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762. The bills being sufficient, it is at once apparent from the pleadings that the case depends upon the proof.

[1] There can be no question that equity has jurisdiction to reform and correct a deed so as to make it conform to the agreement of the parties, where the scrivener in writing the deed has made a mistake. *Melott v. West*, 76 W. Va. 739, 86 S. E. 759; *Hertzog v. Riley*, 71 W. Va. 651, 77 S. E. 138; *Knowlton v. Campbell*, 48 W. Va. 294, 37 S. E. 581. Nor can it be questioned that a writing will not be reformed and corrected so as to express the true agreement and intent of the parties unless the proof that it does not do so is conclusive and unequivocal; for the writing itself is evidence so strong that only direct, positive, convincing, and unequivocal evidence will be sufficient to reform it. *Jarrell v. Jarrell*, 27 W. Va. 743; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798. Has the plaintiff met these strict requirements of the law? Purkey, the surveyor, Stickley, and Flanagan all swear positively that they began at a stake 16½ feet from the Earle corner; thence to a stake 1.9 rods west of a maple, still standing; thence in a northwestern direction to the hickory; thence to the stake at the beginning corner. They also say that the deed was to be made to the land within these stakes and hickory corner, and this was understood and agreed to by all of them before the deed was made. This is not disputed. Purkey says he made the mistakes in drawing the deeds, giving as an excuse therefor that he drew the deed from memory; that he did not refer to his field notes, which showed the true corners as agreed upon by all (the field notes were in evidence); that in drawing deeds he usually called for a stone where there was no fixed monument. These three witnesses also testify that it was

the intention and agreement that a strip 16½ feet wide was to be left between the lot to be conveyed to the Flanagans and the Evans lot. The stakes were actually placed at the corners as surveyed, and many witnesses testify that the stake placed at the corner 1.9 rods west of the maple was still standing within three or four months before their depositions were taken. The suit was begun in May, and the depositions were taken in September. Other witnesses testify to seeing the stakes at the corners after the sale to the Flanagans. In short, there is no conflicting evidence as to the true boundary of this land and of the intention and agreement in that regard between Stickley and the Flanagans. The proof is clear, unequivocal, and convincing, and meets the strictest test of the law. As between Stickley and the Flanagans there could be no hesitancy in reforming the deed. If they were the only parties concerned, there would be no lawsuit. They agree. But the rights of Thorn have intervened, and, if he is an innocent bona fide purchaser for value, the deed cannot be reformed so as to affect him. Is he an innocent purchaser? Are there any equities between him and Stickley?

The rights of a purchaser depend upon whether he has had notice, and one purchasing land with knowledge of a mistake in the deed stands in no better position than if he had been one of the parties to the deed.

"A bona fide purchaser of land is one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry." *Carpen-ter Paper Co. v. Wilcox*, 50 Neb. 659, 70 N. W. 228.

Mistakes in the description of land may always be corrected against a party who buys with full knowledge of another's prior purchase of land from the same grantor.

"One who purchases with full knowledge of prior equitable or legal rights is not a purchaser in good faith." *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696.

"A. bought two lots of land, a larger and a smaller, from B., but, by mistake, the deed conveyed only the large lot. C., knowing that A. had bought the two lots, and that the deed to him had not been recorded, took a deed from B. of the small lot, and put it on record before A. recorded his deed. Held, that A. could maintain a bill in equity against B. and C. to have the mistake in the deed to him corrected." *Rumrill v. Shay*, 110 Mass. 170.

"It is sufficient to authorize the reformation of a deed for a mistake as against a subsequent grantee that he had notice of the first deed, and the fact that by a mistake it failed properly to describe the land will not aid such subsequent purchaser, and he will not be allowed to profit by the mistake." *Preston v. Williams*, 81 Ill. 176; *Haynes v. Seachrest*, 13 Iowa, 455; *Adams v. Stevens*, 49 Me. 363.

[2, 3] We have examined the evidence touching the notice to Thorn of the mistakes

in the Flanagan deed before he purchased from the Flanagans, and have come to the conclusion that he is not an innocent purchaser, and that he had sufficient notice to put him upon strict inquiry and investigation. The learned judge of the lower court analyzed the evidence on this point, and it may not be amiss to quote his summary here:

"Different witnesses say that defendant Thorn had been shown the lines and stakes which marked the boundaries of the lot sold by Stickley to Flanagan, before he (Thorn) became a purchaser. Several witnesses say they showed him the stake 1.9 rods from the maple, and others say that they showed him the stakes along the Evans line, and that they told him that a road 16½ feet was intended to be reserved along the Evans line. Thorn denies all this, but we think the proof is overwhelming that he did have such knowledge. There is an answer in Mr. Thorn's own testimony which we think shows he had been informed that a road was to be reserved along the Evans line, and which shows that he had been shown all the corners, just as Flanagan, his grantors swears he did. On page 91 of his testimony he was asked: 'Q. I want to know whether or not before you purchased this tract of land you had any talk with the plaintiff, T. B. Stickley, as to the roadway to and from that land and adjoining about it. Just state whether you had or not. A. Had not at that time. You see I want to explain it. I stated it was before the talk I met him. When I came to buy this land, Mr. Flanagan came to me in the winter and wanted to sell this tract of land, and he said that Mr. Stickley told him that I had land adjoining it and that I might buy this land. Mr. Flanagan brought me the deed the same evening. No; Flanagan went and (1) showed me the corners, and I told him to bring me the deed, and (2) he showed me the roadway that was in the deed and showed me the corners of the tract, and I asked him to bring me the deed, and when he brought me the deed, I saw there was (3) no reservation for a road given—that is, saying where there was to be a road.'

"This answer upon analysis shows:

"(1) That Thorn had been shown the corners to the land before he bought from Flanagan.

"(2) That he had been shown the road 'that was in the deed,' meaning the right of way to and from the land granted by Stickley to Flanagan.

"(3) When Flanagan brought Thorn the deed, he 'saw there was no reservation for a road given—that is, saying where there was to be a road.' And his seeing there 'was no reservation for a road given in the deed' implies knowledge on his part that such a reservation was claimed on the part of Stickley, and Flanagan says he told Thorn that such a right existed in favor of Stickley.

"Counsel suggested to Thorn, when he made the above answer, that he was getting ahead of his question, that he did not believe witness intended to state that (as contained in the answer), and then witness in response to a question states that neither Flanagan or Stickley nor any one else told him about the right of way along the Evans line. But the answer above quoted was made after plaintiff's amend-

ed bill was filed particularly alleging that there should be a right of way along the Evans line, and when the deed was brought to defendant he states that there was no reservation for a road given. This undoubtedly had reference to right of way along the Evans line. That Thorn was looking at the deed to ascertain whether a road was reserved is plain from his answer, because he admits he had been shown the lines by Flanagan, and is not disputed that the stakes showing the line along the Evans land stood 16½ feet away from the Evans fence. This Thorn could plainly see, but he evidently wanted to know what the deed contained in this respect, and after inspecting the deed he says, 'There was no reservation for a road given.' Evidently he was looking for reservations in the deed, and not for grants. That clause which says, 'Said Stickley hereby grants unto the said Flanagan a right of way over and through his lands to the land herein conveyed,' could have no reference to a reservation of a road in favor of the grantor. Thorn repeats in his answer above quoted that Flanagan showed him the corners to the land. This evidence shows that defendant Thorn had been shown the corners before he purchased, that he had been told that a roadway was intended to be reserved along the Evans line, and after having seen the deed from Stickley to Flanagan it was easy with the knowledge he had for him to discover the mistake, and with such knowledge he cannot stand upon the deed made to him; it would be inequitable to permit this to be done.

"While the evidence to reform a deed must be established by evidence clear, convincing, and free from doubt, and not conflicting, relief will not be denied in a clear case made out by overwhelming evidence simply because one of the parties in his evidence controverts the fact of the mistake. *Melott v. West*, 76 W. Va. 739, 86 S. E. 759. Here in the present case the testimony of other witnesses, together with the admission of the defendant, show he had notice of the real boundaries of this tract before he purchased. Under such circumstances, he is not an innocent purchaser such as would allow him to rely strictly upon the calls in his deed. Besides, this evidence clearly shows that Thorn requested Flanagan to make the deed to him with the exact calls in it as were contained in the deed from Stickley to Flanagan, and Flanagan swears that he told Thorn before his purchase that Stickley had excepted 'a strip up there,' meaning a road along the Evans line. Stickley distinctly stated that he also told Thorn before he purchased that he had excepted a road along the Evans land. See *Holland v. Vaughan*, 120 Va. 324, 91 S. E. 122."

We do not find that Thorn has established his claim to a right of way along the eastern boundary of the Flanagan lot out to the Stickley-Nestor road. Counsel for Thorn insist that the decree vested in Stickley exclusive use, title, and control of the strip of land one rod wide along the Evans line and between the defendant's lot as reformed and corrected, and that the court erred in enjoining appellant from entry on or use of it

as a roadway. We do not so understand the decree.

On consideration of the petition for rehearing, which insists that Thorn should be expressly given the right to use the strip of land one rod wide between the Evans line and the line of Thorn lot 2 as reformed, in order to reach the Stickley road, and which insists that the decree of June 1, 1920, prevents him from so doing, we have again examined the record, and do not find that the use of this strip by Thorn is in controversy. Thorn averred, and sought to prove, that no such strip was intended to be reserved or that a mistake was made by the scrivener in drawing the deed. He asked no affirmative relief, if perchance he failed in his contention and the deed should be reformed and corrected. The decree does not enjoin Thorn from the use of this strip. It prohibits him from trespassing on lands of Stickley "east of a line beginning at a stake 16½ feet north of E. J. Evans line and 16½ feet from a parcel of land conveyed to W. R. Thorn by L. D. Wees and wife; thence north 14° 45' E. 35.35 poles to a stake 1.9 rods west of a maple, a corner in said Stickley's boundary line." This prohibition has no reference either by terms or implication to the one rod wide strip north of the Evans line and south of the Thorn lot 2 as reformed, and surely Thorn would not be in contempt of this decree, as intimated, if he should use that strip. We repeat that we do not so understand or construe the decree. It is stated by counsel for Thorn that he (Thorn) has the right to use this strip, and that the plaintiff, Stickley, his counsel, and the court admit that he has. If that be true, there is no controversy over the use, and no basis for litigation concerning it.

We affirm the decree of the lower court entered on the 1st day of June, 1920.

Decree affirmed.

(87 W. Va. 710)

GIBSON v. STALNAKER. (No. 4075.)

(Supreme Court of Appeals of West Virginia.
Feb. 15, 1921. Rehearing Denied
March 29, 1921.)

(Syllabus by the Court.)

1. Frauds, statute of §72(3)—Sale of growing trees must be in writing.

Growing trees are part of the realty, and a sale of them, to be valid under the statute of frauds, must be in writing.

2. Frauds, statute of §129(3)—Oral sale of growing timber unenforceable except in so far as executed.

An oral sale of growing timber, in the absence of equitable considerations justifying removal of the bar of the statute, is unenforceable and revocable at the option of the vendor; but in so far as the contract has been executed,

prior to revocation, by severance of the timber, the lumber so cut and removed belongs to the purchaser.

3. Frauds, statute of §129(3) — Part performance must be clearly shown to entitle purchaser of growing timber to relief.

To entitle a purchase to relief under a parol sale of growing timber, within the statute of frauds, the right sought to be enforced or safeguarded must be clear and definite, and evidenced by such part performance as will justify a court of equity in deviating from the strict statutory bar.

4. Frauds, statute of §129(5)—Payment of purchase money not part performance as to sale of growing timber.

The payment of purchase money is not of itself such part performance as will take the case out of the statute of frauds.

5. Frauds, statute of §129(4)—When possession sufficient to constitute part performance stated.

Possession, in order to constitute part performance, must be taken under and by virtue of the contract, and must be referable solely to such contract; possession that is not exclusive and does not indicate the existence of the contract or agreement sought to be enforced is not sufficient.

6. Frauds, statute of §129(4) — Defective possession may amount to part performance in connection with improvements.

Possession which is defective in this regard may, when accompanied by valuable and permanent improvements in reliance on such contract, amount to part performance.

7. Frauds, statute of §129(9)—Slight and temporary improvements insufficient to aid defective possession as part performance.

Improvements that are merely temporary, of relatively slight value, and of little substantial benefit to the property, are not valuable improvements in this sense.

8. Frauds, statute of §143(3)—Second valid sale held a repudiation of former invalid sale, so that subsequent purchaser may invoke statute.

When a vendor of property by a contract unenforceable because of the statute of frauds makes a subsequent valid sale to a third person, he thereby repudiates and avoids the former contract, and the subsequent purchaser may invoke the statute for his own protection.

9. Frauds, statute of §143(3)—Notice of unenforceable contract held not to avoid subsequent valid purchase.

Notice, actual or constructive, of a contract which is unenforceable under the statute of frauds, will not prevent the person having such notice from becoming a purchaser of the property from the original owner unincumbered by the invalid contract.

Appeal from Circuit Court, Randolph County.

Suit by John Alexander Gibson against French Stalnaker for an injunction. From a

decree dissolving an injunction, plaintiff appeals. Reversed, injunction reinstated and perpetuated, and cause remanded.

W. B. & E. L. Maxwell, of Elkins, for appellant.

A. M. Cunningham, of Parsons, for appellee.

LYNCH, J. Complaining of a decree dissolving an injunction, theretofore awarded, restraining defendant from cutting certain timber on plaintiff's lands, the latter seeks reversal of that order and reinstatement of the injunction. On May 24, 1918, plaintiff, John Alexander Gibson, by deed purchased from Virginia S. Gibson and her husband, John Alonzo Gibson, a tract of land containing about 220 acres, known as the Varner place, the right to the timber on said tract being the question now in dispute. About a quarter of a mile distant from the Varner tract, and separated from it by a 400-acre farm, ownership of which is not disclosed by the record, is a second parcel known as the Parsons place, also owned by the grantors. Defendant, Stalnaker, the son-in-law of Virginia S. and John Alonzo Gibson claims to have purchased from them, by verbal contract, during the fall of 1916, all the timber on both tracts of land, for which he agreed to pay \$1,500 in cash and in addition to cut therefrom and furnish to his grantors from 12,000 to 15,000 feet of lumber for their own use, they to pay some of the expenses connected with the latter. Stalnaker and his wife had formerly resided on the Varner tract, but about a year prior to entering into the alleged agreement they had moved onto the Parsons place, where he was engaged in cutting and logging lumber for his father-in-law. It was while they were living on the latter tract that the verbal agreement of sale was entered into. Shortly thereafter defendant commenced cutting the timber on the Varner tract, and in the spring of 1917 they moved back into the house which they had formerly occupied on that tract. The cutting and logging continued thereafter without serious interruption, and was in progress in May, 1918, when plaintiff purchased the tract.

The deed from the Gibsons to him makes no reference to the prior oral sale of the timber thereon to defendant, but it is admitted by plaintiff and established by abundant testimony that his grantors informed him thereof at the time of or prior to the date of his purchase. He claims, however, that they assured him the agreement of sale expressly excluded the locust timber on the tract which is sufficient to furnish posts to be used in fencing the land, and for which purpose plaintiff now desires to use it. The Gibsons support him in this statement, but defendant and several witnesses introduced

by him testify that it included all the timber on both tracts, irrespective of kind or quality.

Defendant continued to remove the timber from the Varner tract until August, 1918, when, owing to an extremely dry summer and the resulting inability to obtain water to run his mill, he removed his plant from that tract to another, where operating conditions were more favorable. Before leaving, however, he notified plaintiff of his intention to return and complete the removal of the timber on that tract when conditions should improve.

Up to this time defendant had not cut any of the locust timber on either parcel, a fact tending to support plaintiff's construction and understanding of the oral agreement, and, indeed, not until receipt of a letter dated November 11, 1918, did plaintiff know that Stalnaker was asserting any claim to it. The following spring when defendant was about to return to the Varner tract to cut what little timber remained, plaintiff filed a bill in equity, praying that an injunction should issue to restrain him from cutting and removing any of the locust trees, but expressing a willingness that he should remove all other kinds, upon the giving of a bond conditioned to protect plaintiff against injuries to his farm and stock resulting from defendant's operations. A preliminary injunction was awarded by the court, but later was dissolved upon final hearing of the cause.

[1] We deem it unnecessary to review the conflicting testimony with regard to the inclusion of the locust timber within the terms of the oral sale to Stalnaker, for under either construction the agreement is unenforceable. Growing trees are part of the realty on which they stand, and a sale of them must be in writing under the sixth clause of the statute of frauds, found in chapter 98 of the Code. *Ftuharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Brown v. Gray*, 68 W. Va. 555, 70 S. E. 276, 2 Page on Contracts, § 1276. There is no dispute as to this principle of law, but defendant contends that there has been such performance of the oral agreement as to remove it from the terms of the statute. The consideration promised by him has been almost, if not wholly, paid. He was permitted to enter into possession of the Varner tract, and in reliance upon the agreement constructed a mill and proceeded to cut the timber. Down to the date of cessation of work in August, 1918, he had removed about 500,000 feet of timber from the tract, leaving thereon yet to be cut from 50,000 to 75,000 feet, other than locust.

The statute of frauds was founded in wisdom and sound policy. Its main purpose was to prevent the setting up of pretended agreements and supporting them by perjured testimony. The importance of recording in writ-

ten form contracts affecting real estate and interests therein, as well as those relating to other forms of property, is emphasized by the frequency with which valuable rights of that character are lost as a result of misunderstanding, uncertainty, mistake, and unprincipled and vicious conduct, when the only evidence available to establish and support such rights consists of oral testimony. The wisdom of any departure or deviation from the strict rule expressed by the statute has frequently been questioned, but courts of equity, nevertheless at times depart therefrom in attempts to do justice between litigants, in order that a law designed to prevent fraud shall not itself become an instrument of fraud. *Wright v. Pucket*, 22 Grat. (Va.) 370.

[3] The first and most essential prerequisite justifying and warranting such deviation is that the terms of the alleged agreement be clearly proven. *Gallagher v. Gallagher*, 81 W. Va. 9, 5 S. E. 297; *Smith v. Peterson*, 71 W. Va. 364, 76 S. E. 804. The right sought to be enforced or safeguarded must be clear and certain. *Meadows v. Meadows*, 60 W. Va. 34, 53 S. E. 718. Such is not the state of the testimony with regard to the locust timber on the Varner tract. The conflict is irreconcilable, and it is difficult to say that a preponderance favors either contention, though it must be recognized that the failure of defendant to cut any locust timber during the entire period he was engaged at work on the tract tends strongly to support the position of plaintiff and the Gibsons in that regard. In other words, the uncertainty of the agreement is such as to warrant a court of equity in declining to depart from the statute by way of enforcing defendant's claim to the locust timber.

[4, 5] Of course, the mere payment of the purchase money by the vendee is not sufficient part performance to take the case outside the statute. *Gallagher v. Gallagher*, cited; *Summers v. Hively*, 78 W. Va. 53, 88 S. E. 608. Nor are the taking of possession by the vendee and his construction of a mill on the premises sufficient of themselves in that regard. Possession and other acts relied on as constituting part performance must be taken under and by virtue of the contract and referable solely to the existence of such an agreement. *Gallagher v. Gallagher*, cited; 2 Page on Contracts, §§ 1381-1383. Defendant's intimate family relations with the Gibsons at that time presuppose a wide latitude of privileged access to their lands. He and his wife resided on the Varner tract until they moved to the Parsons place to log lumber for the latter's parents, and a year later, after making the oral agreement of sale, they returned to the Varner place to cut and remove the timber thereon under their contract. The timber thus verbally sold covers both parcels, both owned by the Gibsons, one

of which defendant already was in possession of, and had been in possession of the other only a year before. Indeed, the ease of access and communication between the two, and defendant's position in the family as son-in-law, make his re-entry upon the Varner tract under the oral agreement of 1916 in effect one of retention of possession, which under the authorities cited is not sufficient. *Ellison v. Torpin*, 44 W. Va. 414, 422, 30 S. E. 183; 1 *Williston on Contracts*, § 494. He already was, and for a long time prior thereto had been, living on portions of the property owned by his wife's parents, and cutting and logging timber thereon for them, and his return to the Varner tract to continue the same character of employment cannot therefore be said to be explainable solely upon the theory of some contract existing between him and the Gibsons, for it could easily be interpreted as a return under the same conditions as a year previous when there was no contract involved. Nor was his possession sufficiently exclusive of that of the Gibsons to create an inference of an independent agreement with them. Though the latter did not reside on the Varner tract at that time, but lived near the city of Elkins, yet defendant's wife admits that her father spent most of his time upon the tract while the cutting was in progress, doubtless exercising concurrent control over it. Possession, to avail under the statute of frauds, must be exclusive of that of the vendor. *Gallagher v. Gallagher*, cited; 2 *Page on Contracts*, § 1383.

[8, 7] Moreover, defendant made no such permanent and valuable improvements as, taken and considered in conjunction with his possession, justify setting aside the bar of the statute. *Gallagher v. Gallagher*, cited; 2 *Page on Contracts*, § 1384. He built no home or residence in which to live, but continued to reside in the house already on the tract. Though he constructed a mill for the cutting of the timber, it apparently was only a portable one, which he removed in August, 1918, when he left to cut on another parcel until working conditions should improve at the Varner place. There was nothing permanent or essentially valuable added to the premises; no improvements of any other character made, so far as the evidence discloses. He already has removed all but a minor portion of the timber, and hence there are no independent equities warranting violence to the plain letter of the statute. For these reasons we are of opinion that the contract falls within its terms and is therefore unenforceable.

[2] But can plaintiff, who was not a party to the oral agreement of 1916, assert its unenforceability under the statute? We think he can. Until the execution of the deed of May 24, 1918, conveying the land to plaintiff, the prior verbal contract of sale of the timber thereon was merely unenforceable, not

void. The operation of the statute of frauds goes only to the remedy; it voids not the contract. The vendor may consent to be bound thereby. If so, acts done voluntarily thereunder pursuant to its terms are valid and of as full force and effect as if the agreement had been one specifically enforceable. Hence such timber as defendant has already cut and removed was validly severed and lawfully taken away. *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521.

[8, 9] However, although the contract still subsists, the vendor may elect to rescind and annul it and pass title to the subject-matter thereof to another not a party to or interested in the prior agreement. For when the owner lawfully may refuse to perform the contract, he may lawfully sell and convey to another, and by so doing repudiate the same. That the new grantee had notice of the prior verbal agreement creates no legal objection to the second conveyance, for there were no enforceable equities attaching under the former contract. *Van Cloostere v. Logan*, 149 Ill. 588, 36 N. E. 946; *Pickerell v. Morss*, 97 Ill. 220; *Asher v. Brock*, 95 Ky. 270, 24 S. W. 1070; 1 *Williston on Contracts*, § 529. He is protected by the statute to the same extent as his vendor. In *Shelton v. Thompson*, 96 Mo. App. 327, 70 S. W. 256 the defense was raised that, as the statute of frauds affected only the remedy of the parties, its benefits could not be invoked by one who was not a party to the contract; but the court said:

"We hold that the defendants are not within the above rule, for the reason that their vendor * * * voided the contract in the first instance by refusing to let plaintiffs have the hogs in dispute. It would be illogical to hold that after a vendor had repudiated an oral contract like the one in question, he could not thereafter sell the goods and give good title. That is to say, that thereafter he must keep the goods because a purchaser could not be found, for the reason that they could be taken from him by the original vendee, which would destroy their character as articles of merchandise. But it is plain that when the vendor voids a sale under said statute and retains the goods, his title is as if no such sale had ever been made, and he can resell and give as good a title as his own to the purchaser, who can, at a suit by the first vendee for the same goods, plead the action of the vendor, as a bar to such suit."

See, also, *First National Bank v. Blair State Bank*, 80 Neb. 400, 114 N. W. 409, and valuable monographic notes annotating that and similar cases in 127 Am. St. Rep. 756, 772, et seq., and 16 Ann. Cas. 412; *Collins v. Lackey*, 31 Okl. 776, 123 Pac. 1118, and note 40 L. R. A. (N. S.) 883, Ann. Cas. 1913E, 507; *Hunter v. Bales*, 24 Ind. 299; *Ugland v. Bank*, 23 N. D. 536, 187 N. W. 572; 25 R. O. L. title, Statute of Frauds, § 383. It follows, then, that plaintiff has succeeded to the full

rights and privileges of his vendors in and to the Varner tract.

Our order, therefore, will reverse the decree of the court below, reinstate and perpetuate the injunction, and remand the cause.

(88 W. Va. 4)

REES et al. v. EMMONS COAL MINING CO. OF WEST VIRGINIA. (No. 4171.)

(Supreme Court of Appeals of West Virginia. Feb. 22, 1921. Rehearing Denied March 29, 1921.)

(Syllabus by the Court.)

1. Equity §273—Rule as to amendments of bill stated.

The rule of equity pleading, inhibiting departure from the subject of an original bill in an amended bill, does not forbid the introduction by amendment of what are technically known as cases or causes of action different from that set up in the original bill, but it does preclude introduction of causes of action foreign to the subject-matter of the original bill, or the act, agreement, or transaction out of which it arose. Causes of action clearly germane to the subject-matter of the original bill may be introduced or added by way of amendment.

2. Equity §273 — Right to accounting held germane to bill for injunction to restrain trespass.

Right to an accounting for coal or other minerals, taken from land to which a plaintiff has good title by a trespasser, is germane to the subject-matter of a bill seeking an injunction to restrain such trespass, and may be united with the cause of action stated in the original bill, by an amendment thereof.

3. Equity §273—Amendment of bill praying accounting for minerals removed and showing pendency of action of assumpsit therefor not demurrable.

Even though an action of assumpsit is pending in a court of law for recovery of the value of the mineral so removed, an amendment to such bill, praying an accounting therefor in such suit, is permissible, and an admission in the amended bill of the pendency of such action is not tenable ground of demurrer.

4. Abatement and revival §5—Pendency of action at law for cause asserted in equity may not be set up in the equity court.

Pendency of an action at law for a cause of action asserted in a court of equity cannot be set up by plea or otherwise, either in bar or in abatement of the equity suit. It merely affords ground of requirement of an election in such suit, as to which proceeding the plaintiff will dismiss.

5. Equity §232—If bill in equity justifies any relief sought thereby, general demurrer properly overruled.

If a bill in equity is sufficient for any relief sought thereby, it is proper to overrule a general demurrer to it.

6. Appeal and error §171(3) — Demurrer, treated as general in trial court, will be so treated on appeal.

If a demurrer to a bill states several grounds or reasons for insufficiency of the bill, specifying some of its parts as being objectionable, and has been disposed of by the trial court, as a general demurrer going to the bill as a whole, without objection, it will be regarded as such a demurrer in the appellate court on an appeal.

7. Injunction §36(2)—Question of title does not justify exclusion from court of equity.

A controversy involving a claim of equitable title to real estate cannot be excluded from a court of equity merely because it involves a question of title.

8. Mines and minerals §62(1)—Right to remove coal held not title to coal in place.

Right to mine and remove coal from a tract of land, on payment therefor at an agreed price per ton, without limit, restriction, or obligation as to quantities or duration, is not title to the coal in place, legal or equitable.

9. Mines and minerals §63—Miner of coal on land of another held a tenant from year to year.

If, under such an arrangement effected by a verbal agreement between the owner of a tract of land and the party upon whom such right is conferred, mining operations are conducted on the land and royalties paid at the stipulated rate for several years, the possessor of such right and occupant of the mine is a tenant thereof from year to year, and cannot be prevented from proper mining in the land, by injunction or otherwise, at the instance of the landlord, until after termination of the tenancy, in some way.

10. Landlord and tenant §74, 79(2)—Tenancy from year to year assignable.

A tenancy from year to year, not terminated in any of the ways authorized by law, is assignable, and an assignee thereof has the same estate and right therein as his assignor had.

11. Landlord and tenant §116(2)—Statutory notice necessary to terminate tenancy from year to year.

In the absence of an agreement dispensing with the requirement of notice, provided by section 5 of chapter 93 of the Code (sec. 4131), a landlord cannot terminate such a tenancy against the will of the tenant otherwise than by the giving of such notice, which must be in writing and antedate expiration of the tenancy year, by at least three months, and express intention to terminate it at the end of such year.

12. Landlord and tenant §109(1, 2)—Proof of termination of tenancy by surrender must be clear; unexecuted agreement held not a surrender by operation of law.

To establish termination of such a tenancy by surrender in fact, the proof must be clear and unequivocal. An agreement to surrender, not executed, does not effect a surrender by operation of law.

13. Appeal and error \Rightarrow 1175(7)—On reversal of decree for injunction and accounting for coal mined, bill dismissed with right to bring other actions.

A bill and an amended bill seeking an injunction restraining the mining of coal and an accounting for coal mined, on the theory of total lack of right in the defendant to mine the coal, and prosecuted to a decree in favor of the plaintiff, settling the principles of the cause, will be dismissed, on reversal of the decree, upon a finding that the defendant had right, as tenant of the plaintiff, to mine the coal and still has it, with a saving of right in the plaintiff to prosecute any proper suit at law or in equity, to obtain compensation for coal mined and not paid for, at the agreed price per ton.

Appeal from Circuit Court, Mineral County.

Suit by George S. Rees and others against the Emmons Coal Mining Company of West Virginia for an injunction and an accounting. Decree for plaintiffs, and defendant appeals. Reversed, injunction dissolved, and bill dismissed.

L. J. Forman, of Petersburg, Wm. MacDonald, of Keyser, and Conlen, Brinton & Acker and J. T. Manning, Jr., all of Philadelphia, Pa., for appellant.

Chas. N. Finnell and Taylor Morrison, both of Keyser, for appellees.

POFFENBARGER, J. The decree brought up for review by this appeal, as one settling the principles of the cause, is predicated, for the most part, on an amended bill to which a demurrer was interposed on the ground that the matter set up in it constituted a departure from the original bill and the further ground that such matter constituted a cause of action set up in an action of assumpsit previously instituted against the defendant and pending at the date of the amendment. Other incidental or collateral allegations thereof were relied upon as grounds of demurrer. There was also a demurrer to the original bill. Overruling the demurrers, at the hearing on answers, replications, and evidence, the court entered a decree affirming the right of the plaintiff to the relief sought, and referred the cause to a commissioner for the taking of an account.

The litigation involves claims and contentions respecting title to the coal in a tract of land and mining rights therein. On the original bill, a temporary injunction was sought and obtained, inhibiting, restraining, and enjoining the defendant from mining the coal. At or about the date of the filing of that bill and the award of the injunction thereon, the plaintiff instituted an action of assumpsit for the recovery of the value of coal mined, removed, and sold. About seven months later, the defendant moved the court for a modification of the injunction order, permitting it

to enter the mines and remove therefrom the rails, spikes, ties, electric wires, and other property it had placed and installed therein for mining purposes. At the same time, the plaintiffs tendered and were permitted to file the amended bill, and the defendant filed its demurrer thereto. The motion was overruled and the cause continued, but the plaintiffs were required to execute an injunction bond in the penalty of \$2,000, in addition to the bond previously given in the penalty of \$1,000. Answers to both the original and amended bills were filed, depositions taken, the cause submitted upon the bills, answers, replications, motions to modify the injunction and to dissolve it, and depositions taken, filed by both parties, and a decree entered as above stated.

Sufficiency of the original bill is apparent, and it may be conceded in the argument submitted, which is general and does not seem to be limited in any instance to that bill standing alone. The bill alleges perfect and complete title in the plaintiffs and a mere verbal license in the defendant to mine coal from the property, and revocation of such license, in conformity with the agreement under which it was granted. It then alleges that, notwithstanding the revocation, the defendant had continued its mining operations in the land. All of these facts, the demurrer concedes for its purposes, and no authority need be cited for the elementary and universally recognized proposition that equity will enjoin acts of trespass, working injury to the inheritance, and destruction thereof. In such cases, the legal remedy is wholly inadequate.

[1] In so far as the demurrer to the amended bill is based upon the theory of a departure from the original bill or the making of a new case, it was properly overruled. The purposes of the two bills are closely allied. They pertain to the same general subject-matter. Each seeks vindication of the right of the plaintiffs to the coal in the particular tract of land in question. The original bill invokes a measure of protection against the severance and removal thereof. Its purpose is conservation and preservation of the remaining rights of the plaintiffs. The amended bill pursues the same general purpose. It seeks compensation for the coal already taken out. Both pleadings have the same basis or foundation, the right of the plaintiffs to the coal in question. The rule against departure in equity pleading does not preclude the introduction of a new cause of action in the technical sense of the term. Stated with fair and reasonable accuracy, it forbids only the introduction of foreign causes of action. A cause of action different from that originally set up, but allied with it and closely related to it, in subject-matter, may be added or introduced by way of amendment. Belton v.

Apperson, 26 Grat. (Va.) 207, a leading case on the subject, clearly propounds this doctrine. In the opinion delivered in that case, Judge Staples, after having reviewed a number of English and American decisions, tersely stated his conclusion in the following terms:

"If these cases do not show that the plaintiff is permitted to make a new case, they at least show that he may by his amendment so alter the frame and structure of his bill as to obtain an entirely different relief from that asked for originally. This is founded upon good reason. Why should the plaintiff be put to a new bill for different relief upon the same transaction when the object can be accomplished by an amendment? If there is danger that the defendant will be injuriously affected by the amendment, it will be refused, and the suit will be considered as pending only from the time of the amendment."

In *Lamb v. Cecil*, 25 W. Va. 288, the bill stated one cause of action and the proof disclosed an entirely different one, but closely related to that stated in the bill, and the plaintiff was permitted to amend his bill so as to make the cause of action therein stated conform to that proved. In *Doonan v. Glynn*, 26 W. Va. 225, the rule is stated thus:

"But if in such case the proofs show that the plaintiff has a cause which entitles him to relief, that it is of a similar nature to that alleged in his bill, and such as might be made available by proper amendments of his bill, the court on the hearing should not dismiss his bill without giving him an opportunity to amend within a reasonable time."

That the rule precludes the introduction of foreign causes of action rather than merely different ones is asserted in *Tidball v. Shendoah National Bank*, 100 Va. 741, 42 S. E. 867, in these terms:

"If the amendment seeks to assert rights and to enforce claims arising out of the same transaction, act, agreement, or obligation, however great may be the difference in the form of liability as contained in the amendment from that stated in the original bill, it will not be regarded as for a new cause of action."

To limit the right of amendment to the case or the cause of action stated in the original bill would give it a scope much narrower than our decisions have accorded it. Exclusion of matters merely foreign to the general subject-matter of the original pleading affords room for amendment, and yet does not permit the litigation to spread beyond reasonable bounds. "Case" and "cause of action" have technical meanings, and the right of amendment goes beyond them. Procedure in one suit, for an injunction to prevent extraction of minerals and for an accounting for minerals already taken out, is both permissible and usual. *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; 43 W. Va., 562, 27 S. E. 411, 38 L. R. A. 604, 64

Am. St. Rep. 891; *South Penn Oil Co. v. Haught*, 71 W. Va. 720, 73 S. E. 759.

[2, 3] Our conclusion that the subject-matter of the amended bill is germane to that of the original bill has important bearing upon another ground of demurrer, namely, that the amended bill sets up a cause of action for which an action at law is pending. This is not the case of an effort merely to transfer from a law court to an equity court a cause of action for a legal demand. If it were, it would be necessary to allege the necessity and indispensability of discovery to the maintenance of the action. *Dudley v. Niswander*, 65 W. Va. 461, 64 S. E. 745; *Prewett v. Bank*, 66 W. Va. 184, 66 S. E. 231, 135 Am. St. Rep. 1019; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795. In such case, the necessity and indispensability of discovery constitute the only ground upon which the cause of action, after assertion thereof in the law court, can be transferred to and prosecuted in the equity court. Here the situation is different; there is an equitable cause of action pending in the equity court, and the additional cause of action set up by the amended bill is germane thereto. In other words, the parties are already in litigation in a court of equity, concerning the general subject-matter of the two causes of action. The amendment is not tantamount to the institution of a new suit, nor does it amount to a transfer of a single cause of action from one court into another, by way of election. The transaction amounts only to a permissible broadening of the scope of a suit pending in a court of equity.

[4] Though the amended bill discloses the pendency of an action at law for the principal cause of action therein set up, it is not ground of demurrer. At law, the pendency of a former action for the same cause of action and between the same parties, both actions being at law, is matter of abatement, and, to be available, must be pleaded in abatement. *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366; *McAllister v. Harman*, 97 Va. 543, 34 S. E. 474. But the rule is different when one suit is at law and the other in equity. The pendency of an action at law for the same cause of action as that set up in a suit in equity does not abate the latter. It merely affords the defendant ground for an application to the court for a rule against the plaintiff requiring him to elect whether he will prosecute the action at law, or the suit in equity. *Williamson v. Paxton*, 18 Grat. (Va.) 475; *Priddy v. Hartsook*, 81 Va. 67; *Warwick v. Norvell*, 1 Rob. (Va.) 308. Actions at law and suits in equity are so dissimilar in character that the pendency of one cannot be pleaded either in abatement or in bar of the other. *Risher v. Wheeling Roofing & Cornice Co.*, 57 W. Va. 149, 49 S. E. 1016; *Williamson v. Paxton*, cited.

[6, 8] Other grounds of demurrer relied upon in the argument submitted are prayers for discovery and for a mandatory injunction to require the defendant to permit the plaintiff to enter the mine, through and over its property, for the purpose of ascertaining, by measurement, the quantity of coal taken from the mine, and to aid in such work, by the running of its fan to supply fresh air throughout the workings. Lack of merit in these grounds is perfectly obvious, if the demurrer is general, going to the whole of the amended bill. In such case, it is only necessary to ascertain that the pleading demurred to sets up sufficient ground for some relief. If it is sufficient in one respect, it is immaterial that it may not be good in others. *City of Wheeling v. Chesapeake & Potomac Telephone Co.*, 82 W. Va. 208, 95 S. E. 653; *Trough v. Trough*, 59 W. Va. 464, 53 S. E. 630, 4 L. R. A. (N. S.) 1185, 115 Am. St. Rep. 940, 8 Ann. Cas. 837; *Miller v. Hare*, 43 W. Va. 647, 28 S. E. 722, 39 L. R. A. 491; *Shoe Co. v. Haught*, 41 W. Va. 279, 23 S. E. 553; *Gay v. Skeen*, 36 W. Va. 582, 15 S. E. 64. We have already demonstrated its sufficiency for an accounting. In the written demurrer filed, there is no expression of intention to challenge the sufficiency of any particular part of the bill and eliminate it. Without objection, it was treated as a general demurrer in the order disposing of it. It specifies objectionable purposes and prayers of the amended bill, but only by way of criticism of the pleading in its entirety. The references to the prayer for a mandatory injunction and the allegation of right to discovery are mere statements of grounds of a general demurrer.

[7] Equity jurisdiction of the cause as developed by the pleadings and evidence is denied on the ground of dispute or controversy as to the title to the coal in question, under principles enunciated in *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895, and subsequent decisions adhering to the doctrine of that case. The defendant is the successor in title of another corporation known as the Buffalo Creek-Cumberland Coal Company. At some past date not disclosed, mining operations were started on what is known as the Hatfield-Hilles property at Bayard, W. Va. Prior to the year 1917, the Buffalo Creek-Cumberland Coal Company owned and operated the property which was composed of the Hubbard tract and the James B. Rees tract, or one of them. It did not own the adjoining Job Aronhalt tract, which is the tract here involved, but it had a verbal arrangement with the owners thereof, George S. Rees and David A. Arnold, the plaintiffs in this cause, under which they were mining in that tract and paying the owners thereof 7 cents per ton for the coal mined and taken therefrom. The defendant, directly or indirectly, took over the properties from the Buffalo Creek-Cumberland Coal Company early in the year

1917, by a conveyance thereof and an assignment of all of the stock of the latter company. On or about the date of the defendant's acquisition of the property, which seems to have been in February, 1917, negotiations were opened between it and the plaintiffs for a lease or purchase of their coal in the Aronhalt tract, and also for the coal in another tract known as the Woods land, on which the plaintiffs claim to have had a lease. Pending these negotiations, which finally failed, the defendant continued its mining operations in the Aronhalt tract with the consent of the plaintiffs. After the failure of the negotiations as to the Aronhalt tract and the Woods tract, the plaintiffs, according to their pleadings and evidence, revoked this permission, on the 15th day of October 1917, by a notice served upon the defendant, and they say it agreed to stop its operation after that date, and for a long time they supposed the mining had ceased. But some time in the year 1919, prior to the month of August, they discovered that the defendant had never discontinued its operations, but had continued its mining of the coal, without having ever rendered any account thereof or paid for it. The answers do not deny the legal title of the plaintiffs. On the contrary, they impliedly, if not expressly, admit it. They expressly aver a contract of purchase of the coal from the plaintiffs and a breach of the contract on the part of the latter. There is no claim that it was ever conveyed to the defendant. In view of this situation, it is hardly necessary to observe that the decision in *Freer v. Davis*, which merely excludes from equity jurisdiction issues of fact as to legal title, has no application. Upon its own showing, the defendant could have had nothing more than an equitable title.

[8, 9] The adjudication of equitable as well as legal title in the plaintiffs upon the pleadings and evidence is challenged. The Buffalo Creek-Cumberland Coal Company, owned and managed by Hatfield and Hilles, mined the coal under a verbal agreement, permit, or license for a period of years, probably three, four, or five, paying a royalty of 7 cents per ton. They were under no obligation or restriction as to the quantity to be mined yearly or otherwise. There is no proof of any written contract, memorandum, or permit signed by the owners. They say they verbally assented to a loose proposition made to them by Hatfield and Hilles or their company. Under it, the mining commenced and the royalties were paid. Admitting this in substance, but calling their right a lease, Hatfield and Hilles say, however, they engaged in the mining and incurred the expense of preparation and equipment, under the belief that they were purchasers of all the coal in the tract, or lessees with right to take all of it out, and would not have done so, except for such belief, and that, in their sale of the Buffalo Creek Company's property, they in-

cluded such right as they or it had in the Aronhalt land. The Emmons, acting for their company, claim likewise that they understood the sale included such right, and that it amounted to title to the coal. The contract between the Buffalo Creek-Cumberland Coal Company and J. Grey Emmons does not specifically mention the coal in the Aronhalt tract. It specifies leasehold interests acquired from the McCullough Coal & Coke Company and the Rees Coal Company a seven-acre tract of land owned in fee by the vendor, its mining plant, contracts for the sale of coal, certain accounts receivable, and then adds "all other property real and personal belonging to it," except certain accounts receivable. The Emmons deny that they took a mere verbal permit from the plaintiffs to continue mining in the tract of land in question, pending negotiations for a formal lease or a conveyance of the coal. They say no objection to continuance of the mining was made, but that negotiations were suggested or started for sale of the coal to them at a flat price per acre, and that, pending such negotiations, they continued to mine as of right; and that, believing their title to be indefeasible, they installed better and more expensive equipment in the mine. The testimony of the plaintiffs to the effect that there were negotiations respecting a lease, soon after the Emmons Coal Company took charge of the mining operations, has some support, however, in correspondence. Letters dated in July, 1917, and written on behalf of that company, admit the advisability of some kind of a contract, and suggest a lease at 7 cents per ton, without a minimum royalty. Plaintiffs say they stood for that rate with a minimum royalty, and that they rejected a counter proposition for a 6-cent rate with such a royalty. These negotiations ended about October, 1917, when the notice to cease mining was given. As to whether the defendant agreed to quit, there is square contradiction in the evidence. After that, if not before, there were negotiations for purchase of the property by the defendant, and a formal contract of sale of the coal in the Aronhalt and Woods tracts, bearing date August 2, 1919, was prepared but not executed, and the temporary injunction was obtained August 9, 1919.

[10] Some of the more important claims and contentions made on each side, respecting the substantive rights of the parties, are wholly untenable, and have a decided tendency to obscure and conceal the real merits of the controversy. Neither the defendant nor its predecessor in right ever had any title, legal or equitable, to the coal in the Aronhalt tract of land. The plaintiffs clearly have both. But it does not necessarily follow that the defendant was a tenant at will or a trespasser after October 15, 1917. Upon the admitted facts, the law pronounces the defendant's predecessor a tenant from year

to year, and it suffices, without argument, to give the authorities so holding. *Drake v. O'Brien*, 83 W. Va. 678, 99 S. E. 280; *Sheets v. Allen*, 89 Pa. 47; *Moore v. Miller*, 8 Pa. 272; *Ganter v. Atkinson*, 35 Wis. 48. One of the incidents or qualities of that tenancy was assignability, and the defendant took it over by its contract and stood in the shoes of the Buffalo Creek Company. *Austin v. Thomson*, 45 N. H. 113; *Cody v. Quarterman*, 12 Ga. 386; *Pleasants v. Benson*, 14 East. 234; 18 Am. & Eng. Ency. L. 207.

[11] Unless the tenancy has been terminated in some one of the modes provided by law, it still continues, and the defendant is in no sense a trespasser, and cannot be enjoined from further operation, until it has been terminated. *Drake v. O'Brien*, cited. Neither the verbal notice, given October 12, 1917, for immediate cessation, or cessation October 15, 1917, nor the written notice later mailed, was sufficient to terminate it, since the statute requires notice in writing to be given three months prior to the end of the tenancy year. *Coffman v. Sammons*, 76 W. Va. 13, 84 S. E. 1061; *Arbenz v. Exley, Watkins & Co.*, 57 W. Va. 580, 50 S. E. 813, 4 Ann. Cas. 625.

[12] Nor was it terminated by surrender. While the evidence is conflicting as to what was said, October 12, 1917, about cessation of mining, that of the plaintiffs is indefinite. It does not say the tenant offered to surrender its term, and the offer was accepted. The purport of it is that there was a verbal notice to quit, acquiesced in by the defendant, and that the plaintiffs did not rely upon that alone. They deemed it advisable to give a written notice and did. Moreover, they were not dealing with the tenancy as one from year to year. They regarded it as a tenancy at will, wherefore they could not have treated the transaction as a surrender of a tenancy for a year. The law of surrender by agreement is strict. To comply with it, there must be an actual surrender in present. An agreement to surrender does not effect it. *National Union Bldg. Ass'n v. Brewer*, 41 Ill. App. 223; *Donahoe v. Rich*, 2 Ind. App. 540, 28 N. E. 1001. This conversation occurred in Philadelphia, and the mining was then going on in West Virginia. If there was a mere agreement to quit three days later, as seems to have been the case, there was no surrender in fact. Of course, there was none by operation of law, for the defendant never vacated the mine nor ceased to operate it.

[13] From this conclusion, it results that the plaintiffs have entirely misconceived their rights and remedies. They are not entitled to enjoin further operation until they shall have terminated the tenancy of the defendant. Their right to compensation and an accounting arises under the contract of tenancy, the former being limited to 7 cents per ton, and not out of a trespass. For that they may or may not have an adequate remedy at

law, if it shall become necessary for them to invoke any remedy. Now that the basic rights of the parties have been determined and fixed, there may be a settlement without further litigation. At any rate, the rights of the plaintiffs stand upon a basis entirely different from that set up in their bills. Presumptively, there will be no occasion for resort to a court of equity. Under these circumstances, we deem it proper to reverse the decree complained of, dissolve the injunction, and dismiss both the original and amended bills, without prejudice to the right of the plaintiffs hereafter to prosecute any proper suit, either at law or in equity, to recover the unpaid royalties on the coal mined by the defendant from the Aronhalt tract of land, and a decree will be here entered accordingly. Costs in the court below, as well as in this court will be decreed to the appellant.

(88 W. Va. 76)

NORMAN v. WILLIS. (No. 4184.)

(Supreme Court of Appeals of West Virginia.
March 1, 1921.)

(Syllabus by the Court.)

1. Attachment \S 250 — Motion to dismiss properly overruled after attachment and order of publication against defendant quashed.

First point in the syllabus in *Danser v. Mallonee*, 77 W. Va. 28, 86 S. E. 895, reaffirmed and applied.

2. Attachment \S 103—Affidavit held sufficient to state nature of plaintiff's claim.

An attachment affidavit, which states that plaintiff and defendant entered into an agreement, jointly with others, on a given date, for drilling certain oil and gas leases in Pleasants county, by which each person was to share in the profits and bear the expenses according to his interest in the leases, that the defendant had a one-eighth interest, and became liable by reason of the operations being unsuccessful and of his agreement to pay \$338.60 (a one-eighth part of the aggregate expense) and being so liable, requested the plaintiff to pay said sum for him, promising to repay, and the plaintiff did on that day pay off and discharge said indebtedness for defendant, which sum constitutes plaintiff's claim and which defendant refuses and fails to pay, and which affidavit also details the time, place, and circumstances surrounding the contraction of said debt, sufficiently states the nature of plaintiff's claim under section 1, chap. 106 (sec. 4455), of the Code.

Error to Circuit Court, Roane County.

Action by W. H. Norman against W. C. Willis. Judgment for plaintiff, and defendant brings error. Affirmed.

Pendleton, Mathews & Bell, of Spencer, for plaintiff in error.

Harper & Baker, of Spencer, for defendant in error.

LIVELY, J. W. H. Norman, plaintiff below, and W. C. Willis, defendant below, became jointly interested with others in sinking a test well for oil and gas in "wild cat" territory leased by them, and in the transaction Willis became indebted to Norman in the sum of \$338.60 as of the 17th day of March, 1914. The latter instituted action in assumpsit on March 13, 1919, in the circuit court of Roane county, and process thereon was returned by the sheriff on that day indorsed, "Not found in my bailiwick." On March 15, following, Norman filed affidavit for attachment with the clerk on the ground that Willis was a nonresident of the state, and thereupon an order of attachment was issued and levied upon certain oil and gas interests of the defendant in lands in Roane county, and an order of publication, notifying Willis of the object of the suit and requiring him to appear and protect his interests, was issued at the April rules and duly published. The declaration was filed at the following May rules. At the May term of court defendant appeared by counsel only for the purpose of moving, and did move, to quash the affidavit, and to dismiss the attachment, and the court sustained the motions. The plaintiff excepted, and upon motion of the plaintiff the case was remanded to rules for further process and the issuance of a new attachment. On June 10, 1919, another summons against the defendant was issued, returnable at July rules, another affidavit for attachment filed, and other attachment issued and levied on said real estate interests of the defendant, likewise followed by order of publication duly published. On September 25, 1919, defendant again appeared specially by counsel and moved to quash the new affidavit and dismiss the new attachment, which motions being overruled, and excepted to, he again appeared for the purpose of moving the court to strike the case from the docket because it had abated upon the return of "not found" or "no inhabitant" on the original process commencing the suit and the quashing of the original affidavit. He also objected to the trial of the case because it had not matured for trial. The court overruled the motion and objection. Thereupon the defendant pleaded the general issue and the statute of limitations. On May 27, 1920, the case went to trial, which trial resulted in a verdict of \$464.45 for the plaintiff, on which judgment was that day entered. This writ of error brings up this judgment for review.

The main error relied upon is that the court could not remand the case to rules after the first affidavit was quashed and the attachment based thereon dismissed. It is asserted that the case went out of court when this affidavit was quashed, and all subsequent proceedings were void and of no effect. To sustain this proposition we are cited to *Miller v. Zeigler*, 44 W. Va. 484; 29 S. E. 981,

67 Am. St. Rep. 777; *Millar v. Whittington*, 77 W. Va. 142, 87 S. E. 164; *Flint v. Coffin*, 176 Fed. 872, 100 C. C. A. 342; and *Wade on Attachments*, § 161. The first two cases cited were equity suits for debts which were purely legal, and the first case for a debt that was not due. The only ground for equity jurisdiction in these cases was the attachment, and when that was dismissed the equity cause went with it. *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135; *Hogg's Equity Prin.* § 37; *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451. Section 161 of *Wade on Attachment* is on the subject of debts not due, to secure which attachments may be issued under statute. *Flint v. Coffin*, supra, was a proceeding under the North Carolina attachment statute, where there was a defective affidavit and process, which was the basis of a judgment and which the circuit court of appeals reversed because of these defects.

This suit is for a purely legal demand, in a law court of general jurisdiction, and is instituted under section 1 of chapter 123 of the Code (sec. 4734), which provides in part that any action at law may be brought in the circuit court of any county (4) "if it be against a nonresident of the state wherein he may be found, or may have estate or debts due him." If the defendant, being a nonresident, had no estate or debts due him in the county, then the case would be abated for want of jurisdiction, upon return of the process showing the nonresidence of the defendant. The attachment issued on March 15, 1919, was levied that day on property of the defendant in the county of Roane. This gave the court jurisdiction. If no property could have been found, and the summons was returned on the return day showing that the defendant was a nonresident and could not be found, no service on him, then the suit would have abated. Under section 8 of chapter 125 of the Code (sec. 4762), a suit against a nonresident cannot be maintained simply on the ground that the cause of action arose in the county. There must be some other ground, and if it appears that the nonresident defendant has property or debts in the county, then that fact is sufficient to maintain the jurisdiction. In order to make the jurisdiction effective, that property or those debts must be brought within the control of the court by proper process in order to respond to a judgment, if, perchance, a judgment be rendered. If the attachment be released because of a defective affidavit, it does not remove the property from the county, and a new attachment may be issued in the same suit upon a proper affidavit. Is not the return of the officer on the attachment, showing that he has found property or debts of the defendant in the county, sufficient to justify the pendency of the suit, the jurisdiction of the court, even though that particular attachment be released? The attachment and return thereon are still a part of the rec-

ord. We held in *Danser v. Mallonee*, 77 W. Va. 26, 86 S. E. 895, that in an action at law to recover a debt by attachment, and on substituted process against a nonresident, where the attachment and process has been quashed by defendant's motion on special appearance, the plaintiff has the right to retain the case on the docket for new process and new attachment, if so advised, citing *Park L. & I. Co. v. Lane*, 106 Va. 304, 55 S. E. 690; *Goolsby v. St. John*, 25 Grat. (Va.) 146. In the case of *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931, the Supreme Court said:

"Now in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, * * * and if it is by the proper officer levied upon the property liable to the attachment, when such a writ is returned into court, the power of the court over the res is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of jurisdiction acquired by the writ levied upon defendant's property."

The plaintiff filed his affidavit for attachment on March 15, 1920, before the return day of the summons, alleging the nonresidence of the debtor, and this, together with the return of the sheriff on the attachment showing property in the county, prevented the suit from being abated on the return day of the summons; although that return only disclosed that the defendant was "not found" in the county. *Chapman v. Maitland*, 22 W. Va. 329; *Steele v. Harkness*, 9 W. Va. 13.

[1] We conclude that plaintiff's case did not abate upon the order quashing his attachment on May 22, 1919, and that it was proper for him to retain the case on the docket for further process, "to have dismissed the action from the docket without according to him this right would have been error." *Danser v. Mallonee*, supra.

[2] Willis contends that the second affidavit for attachment, made and filed on June 10th, was void as not being filed in a pending suit, and besides that it is insufficient because it does not adequately state the nature of the plaintiff's claim. As the remedy by attachment is harsh and likely to be abused, purely statutory and summary, it is essen-

tial that the nature of the plaintiff's claim be so described that the court, as well as the debtor and all other persons interested, can see that the plaintiff has a just and valid claim against defendant. A careful inspection of this affidavit shows that plaintiff, defendant, and others entered into an agreement on August 23, 1913, to drill certain real estate in Pleasants county for oil and gas, each to pay his part of the expense and each to participate in the profits; that Willis owned a one-eighth interest; that the drilling proved unprofitable, and afterwards in March, 1914, was abandoned, when the aggregate expense amounted to \$2,708.81, of which defendant owed \$338.60. This he agreed to pay, but on March 17, 1914, requested plaintiff to pay said sum for him, which plaintiff then did, and which sum defendant then promised to repay to plaintiff. This he never did. The affidavit with minuteness details how the claim arose, and dates thereof, the amount, when and how contracted, and the promise to pay. Specific objection is made that the affidavit should have shown (but did not) the names of the others interested with plaintiff and defendant in the oil and gas explorations, as well as the persons to whom the sum of money became due by reason thereof, one-eighth of which sum the plaintiff paid at the instance and request of the defendant; also, that the boundaries of the oil and gas leases should have been shown, including the exact location of the lands. We cannot see how these facts can make clearer the "nature" of the plaintiff's claim. It would serve no purpose to set out the affidavit at large. The facts vary in each case, and it would likely be no precedent in other cases. We think the affidavit sufficiently states the nature of the plaintiff's claim. Surely neither the defendant nor any creditor could be misled. Upon the refusal of the court to strike the case from the docket, and to quash the second affidavit and dismiss the second attachment, defendant appeared generally, pleaded non assumpsit, the statute of limitations, and went to trial. It was held in *Danser v. Mallonee*, supra, that the entry of the motion to dismiss the case from the docket operated as a general appearance, and would sustain a personal judgment. That question is not material here. The only other question raised by the record is whether the plaintiff's debt was barred by limitation. There was no effort to bring the case within any of the exceptions contained in the statute; no special replication to the plea, and no proof offered. At the date when the defendant left the state and became a nonresident, the running of the statute stopped, but there was nothing to show when he departed, and no special replication on which such evidence could have been based. *Laidley v. Smith*, 32 W. Va. 387, 9 S. E. 209, 25 Am. St. Rep. 825. But it is clear from the evidence

that the debt became due and payable on March 17, 1914, and as we decide that the suit began on March 13, 1919, and did not abate, the limitation had not expired. It was a live debt at the time of judgment.

There is no reversible error in the record, and we affirm the judgment.

Affirmed.

(88 W. Va. 97)

STATE v. HARRIS. (No. 4161.)

(Supreme Court of Appeals of West Virginia.
March 1, 1921.)

(Syllabus by the Court.)

1. Husband and wife \S 303—Indictment and information \S 2(4)—Criminal nonsupport statute not unconstitutional.

Properly construed, what is popularly known as the nonsupport statute, chapter 51, Acts 1917, secs. 16c(1)—16c(8), chapter 144, Barnes' Code, 1918 (Code Supp. 1918, c. 144, §§ 16e[1]—16e[8], secs. 5179a—5179h), making it a criminal offense for a husband to desert, or willfully neglect or refuse to provide for the support and maintenance of, his wife in destitute or necessitous circumstances, does not contravene section 4 of article 3 of the Constitution of this state, nor the Fifth Amendment of the Constitution of the United States, and is not void by reason of anything in said constitutional provisions contained.

2. Husband and wife \S 303—Criminal nonsupport statute held not to vest jurisdiction to try offense on complaint therein authorized.

But said statute does not vest jurisdiction in any court to try, convict, or sentence any person accused of such offense, on the complaint therein prescribed and authorized.

3. Husband and wife \S 316—Complaint held sufficient to support award of support pendente lite.

Such complaint is sufficient process for an award of support to the wife, pendente lite, on a petition filed therefor and notice thereof to the accused.

4. Husband and wife \S 303—Motion to quash complaint under nonsupport statute held properly overruled.

A motion to quash a complaint filed under said statute and in the form prescribed by it, on the ground of conflict between the statute and the constitutional provisions above mentioned, is properly overruled.

5. Husband and wife \S 305—Defensive pleas to complaint under nonsupport statute held premature.

As such complaint is not a charge of the offense therein named, for the purposes of trial respecting it, but only for the purposes of such temporary support and preliminary examination and commitment or bail to answer an indictment for the offense, defensive pleas thereto are premature.

6. Husband and wife \S 316—Order for payments to wife under nonsupport statute without petition and notice held erroneous.

An order requiring the husband to make monthly payments to the wife, entered in such a proceeding without a petition therefor and without notice of an application therefor, after trial and conviction on such a complaint, and incorporated in the judgment rendered, is not an order providing for support pendente lite, authorized by section 3 of said act (Code Supp. 1918, c. 144, \S 16e[3], sec. 5179c), and, even though it might be within the jurisdiction of the court, and, if properly made, might stand as such an order, on reversal of the judgment and finding in other respects, it is at least erroneous, and will be reversed and set aside, along with the judgment and the finding of guilt of the offense.

7. Husband and wife \S 320—On reversal of conviction under nonsupport statute case may be remanded.

Upon such reversal, it is proper to remand the case for such procedure on the complaint and warrant, within the scope and limits of the statute, as may be available to the complainant.

Error to Circuit Court, Mason County.

Proceedings by the State against Z. L. Harris for nonsupport of complainant wife. Judgment requiring defendant to pay complainant a monthly sum and committing him to the county jail in default of a recognizance for personal appearance and for compliance with the order for support, and he brings error. Reversed except in so far as it overruled the motion to quash the complaint, and remanded for further proceedings.

Musgrave & Blessing and J. E. Beller, all of Point Pleasant, for plaintiff in error.

E. T. England, Atty. Gen., R. Dennis Steed, Asst. Atty. Gen., and Somerville & Somerville and B. H. Blagg, all of Point Pleasant, for the State.

POFFENBARGER, J. The judgment complained of on this writ of error was rendered in a proceeding by a wife against her husband, on the ground of nonsupport, under the provisions of sections 16c(1) to 16c(8) of chapter 144 of Barnes' Code of 1918 (Code Supp. 1918, c. 144, $\S\S$ 16e[1]–16e[8], secs. 5179a–5179h), and, in addition to a requirement that the defendant pay the complainant \$15 per month, for her support, until the further order of the court, it committed him to the custody of the sheriff and imposed upon him a sentence of imprisonment in the county jail with hard labor on the public roads, for a period of one year, unless he should enter into a recognizance in the penalty of \$800 with good and sufficient sureties, to make his personal appearance in court, when ordered so to do, and to comply with the terms of the

order respecting support and any subsequent modification thereof.

[1] An argument founded upon section 4 of art. 3 of the Constitution of this state and the Fifth Amendment to the Constitution of the United States, and submitted in support of one of the assignments of error, assails the validity of the statute on which the proceeding is based. Properly construed and applied, it does not conflict with any constitutional provision. It was carefully examined and analyzed with reference to the constitutional inhibition of prosecution for major offenses, otherwise than upon presentment or indictment, and its validity affirmed, in *Fisher v. Sommerville*, 83 W. Va. 160, 98 S. E. 87.

[2] It was held in that case, however, that the complaint by which the proceeding is initiated performs a double function. For enforcement of the duty to render support, it suffices as process. Its sufficiency in that sense for the purposes of prosecution for the offense created by the statute was not necessarily intended. The Legislature could have intended to make it operate only for purposes of arrest and preliminary examination and commitment, in respect of the criminal offense; and we held that it had so intended, and therefore had not attempted to vest power and jurisdiction in any court, to entertain a prosecution for the offense, otherwise than upon presentment or indictment.

In its procedure on the complaint and warrant, the trial court has gone beyond what we so held could have been and was intended by the Legislature and done what that body did not necessarily intend to vest jurisdiction to do. It tried and convicted the accused on the complaint and without a presentment or indictment. If such jurisdiction could have been vested, the trial and conviction are void, under the interpretation put upon the statute in *Fisher v. Sommerville*, because it did not vest it. If, on the other hand, the Legislature had not power to vest it, by reason of constitutional limitations, but nevertheless attempted to do so, the trial and conviction are void.

It is unnecessary to inquire whether the limitation of the Constitution of the state, saying, "No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury," is to be tested, in respect of its scope, by the jurisdiction of justices as it was at the date of the adoption of the Constitution, or by such jurisdiction as has been or may be subsequently fixed and determined by legislative action. The offense here involved did not exist at the date of the adoption of the organic law and it is not now cognizable by a justice. It was first created by chapter 13, Acts 1901, which made it an offense cognizable by a justice. That act was repealed by chapter 51, Acts

1917 (Code Supp. 1918, c. 144, §§ 18e[1]-18e[8], secs. 5179a-5179h), which vested the jurisdiction of the offense in the juvenile, circuit, intermediate, and criminal courts.

The interpretation put upon the statute by the trial court cannot be sustained. As so interpreted, it would be manifestly unconstitutional, because it would attempt to do what the Constitution expressly forbids. The clearly permissible construction put upon it in *Fisher v. Sommerville* avoids this consequence and effectuates the legislative purpose and intent. Repetition and elaboration of the reasoning upon which the conclusion expressed in that case is based are unnecessary. We perceive nothing of value that can be added.

It follows that, in so far as the order complained of finds the plaintiff in error guilty of an offense under the statute and sentences him to imprisonment and labor on the public roads, and provides for his release from such imprisonment and labor, by entry into a recognizance in the penalty and with the sureties and condition therein prescribed, it must be reversed, set aside, and annulled.

[3] The court had jurisdiction and power, however, to inquire, preliminarily, whether there was probable cause for holding the accused, by proper procedure, to answer an indictment for the offense, and to enter an order "providing for the support" of the complainant, "pendente lite." The procedure for accomplishment of the latter purpose includes a "petition of the complainant" and "notice to the defendant." Barnes' Code 1918, ch. 144, sec. 18c(3), Code Supp. 1918, c. 144, § 18e(3), sec. 5179c. But the order providing for support entered in this case, does not purport to be one for support "pendente lite." Although it requires payment of \$15 per month, until changed or modified, it is carried into and made part of the judgment, and security of performance thereof is made a condition of release from the imprisonment and labor imposed by the judgment. Hence, it obviously provides for permanent support. Besides, the court made no inquiry as to the propriety of an order for mere temporary support. No petition therefor was filed nor was any notice of an application therefor served on the defendant. At any rate, the record discloses none. Two special pleas tendered by the defendant were rejected by

the court, and his notice to quash the complaint overruled. Then issue was joined on his plea of not guilty, and he was tried and found guilty. The order for support followed all of this, wherefore it could not have been one for support "pendente lite." The litigation had come to a final order and judgment, when it was entered. It was part of the judgment.

Inasmuch as the judgment was void, the order might be within the jurisdiction of the court, since it heard the evidence relating to the status of the parties, and the complaint was sufficient to bring them into court, and has not been finally disposed of in the manner contemplated by law; but, if so, it was clearly erroneous, for lack of proper procedure, there having been no petition for it, no notice of an application for it, nor any inquiry as to the propriety of such an order.

[4] The motion to quash the complaint and warrant and special plea No. 1 were both founded upon the theory of unconstitutionality of the statute. A conclusion already stated sustains the overruling of the motion and rejection of that plea.

[5, 6] Special plea No. 2 would have set up an adjudication of permanent alimony payable monthly at the rate of \$15 per month in favor of the complainant, by a court of the state of Arkansas. It was properly rejected. It did not aver payment of the alimony. If the complaint was true and the alimony not paid, disclosure of the judgment or decree was matter of aggravation rather than defense. A better ground of justification of its rejection, however, is that there was no indictment, no sufficient charge of an offense, for the purpose of trial, to which it could be interposed, if it would have been a proper plea to an indictment. Nor was there any petition for an order for support pendent lite to which it could have been interposed, if allowable in such case.

[7] Upon these principles and conclusions, the judgment complained of will be reversed, except in so far as it overruled the motion to quash the complaint, and the case remanded for such procedure on the complaint and warrant, within the scope and limits of the statute, as may be still available to the complainant, if she shall be advised to demand it.

(151 Ga. 317)

BATES et al. v. BURDEN. (No. 2049.)

(Supreme Court of Georgia. March 5, 1921.)

(Syllabus by Editorial Staff.)

1. Executors and administrators \Leftrightarrow 199 — Where judgment setting aside year's support was void, infant, who did not ratify agreement, held entitled to recover undivided interest.

Where a judgment setting aside land as a year's support for the widow and minor children of a decedent insufficiently described the land, and it was subsequently agreed between the widow and children, two of whom were still minors, for whom the widow was guardian, that the proceeding should be amended, and a definite sum paid by the widow to each of the children, a minor, who received no part of the estate after his attainment of majority, and did no other act tending to ratify the acts of his mother, was entitled to recover an undivided interest in the part of the land which the mother had sold.

2. Appeal and error \Leftrightarrow 195(1)—Former decision is law of the case.

The decision on a former appeal is the law of the case.

Hill, J., dissenting.

Error from Superior Court, Elbert County; W. L. Hodges, Judge.

Suit by S. A. Burden against J. H. Bates and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Geo. C. Grogan, of Elberton, for plaintiffs in error.

W. D. Tutt, of Elberton, for defendant in error.

ATKINSON, J. When this case was before the Supreme Court on a former occasion, the judgment refusing a new trial was reversed on account of error in rejecting an amendment to the answer. The decision rendered by this court was in the following language:

"Appraisers to set apart a year's support for a widow and minor children made a return, setting apart, among other things, 358 acres of insufficiently described land, and declaring that the widow should pay off specified debts of the deceased. She took possession of the property and paid off the debts. Subsequently the point was made by some of the children, after attaining majority, that the judgment setting apart the land as year's support was void on account of the failure to sufficiently describe the same. After obtaining legal advice, an agreement was entered into between the widow and all of the children, only two of whom were minors at the time (the widow having been appointed guardian for the minors), that proceedings be had in the court of ordinary for the purpose of amending the judgment, by adding an adequate description of the land. Accordingly proceedings were instituted, and an

order was passed by the ordinary purporting to amend the judgment in accordance with the terms of the agreement. The agreement fixed a definite sum of money to be paid by the widow to each of the children, it being acknowledged that the widow was entitled to receive credit for the amount she had paid in settling the debts of the estate. For the purpose of obtaining the money to make the settlement with the children portions of the land were sold by the widow. On attaining his majority one of the minor children, the defendant in error, received property to the value of \$150 under said settlement, and afterwards filed suit in ejectment against the purchasers of a portion of the land for a one-seventh undivided interest. The equitable amendment to the answer alleges that the sums of money agreed upon were accordingly paid to all of the children, the widow, as guardian for the minors, receiving the sums due them. The defendants, in addition to the general denial, offered an amendment setting out all of the facts above stated. The court rejected the amendment on the ground that the original judgment setting aside a year's support was void and could not be amended. After introduction of evidence by the plaintiff the court directed a verdict in his favor. The defendants filed *pendente lite* exceptions to the rejection of the amendment offered by them, and in the bill of exceptions assigned error thereon. They also moved for a new trial, and excepted as to the judgment overruling the motion. *Held*, that it was erroneous to reject the amendment. The rights of the parties rest upon the agreement between the widow and all of the children, and not upon the judgment. The parties owning the entire interest agreed that the mother should have all of the property upon payment of the debts and of a fixed sum to each child. This agreement was not attacked for fraud, and is binding upon all of the adult parties, and upon the defendant in error because of his ratification after attaining his majority. In this connection see *Winn v. Lunsford*, 130 Ga. 436, 442, 61 S. E. 9. The rejection of the amendment deprived the defendants of a defense, the evidence of which they were entitled to submit to a jury. The court erred in overruling the motion for a new trial." *Bates v. Burden*, 148 Ga. 157, 96 S. E. 178.

[1, 2] After the remittitur was made the judgment of the trial court, the defendants were allowed to amend their plea in accordance with the decision of the Supreme Court, and they introduced evidence in support of the plea as amended. The only evidence tending to show payment to the plaintiff for his part under the decision was payment to his mother as his guardian. There was no evidence that he received any part of the estate after his attainment of majority, or that he did any other act tending to ratify the act of his mother. There was no evidence that the widow elected to take a share of her deceased husband's estate as an heir at law. The decision by this court above set forth is the law of the case, and the

judge did not err in directing the verdict for the plaintiff for an undivided one-seventh interest in the land.

Judgment affirmed.

All the Justices concur, except HILL, J., dissenting.

(151 Ga. 241)

ROBERTS et al. v. GEORGIA RY. & POWER CO. (No. 1885.)

(Supreme Court of Georgia. March 4, 1921.)

(Syllabus by the Court.)

Nuisance ¶42—Alienee not liable for damages accruing before notice to abate.

A grantee or alienee of property causing a nuisance is not liable for damages caused by its continued maintenance and accruing prior to a notice or request to abate.

Certiorari from Court of Appeals.

Suit by I. M. Roberts and others against the Georgia Railway & Power Company. A judgment for defendant was affirmed by the Court of Appeals (24 Ga. App. 664, 101 S. E. 813), and plaintiffs bring certiorari. Affirmed.

Vickery's creek, known also as "Big Creek," is a tributary to the Chattahoochee river, and approaches the river at the town of Roswell from the north side. The Laurel Mills Manufacturing Company owned several tracts of land forming one body at and near the confluence of the two streams. This body of land bordered the river above and below the mouth of the creek, and included the bed of the latter stream. On this land was a water power supplied by waters from the creek. In 1862 the Laurel Mills Manufacturing Company developed the water power, and erected and equipped a factory near the juncture of the two streams. As a part of the manufacturing plant there were certain buildings located along the river front and on both sides of the creek. The natural fall in the bed of the river was sufficient to carry the water off without overflow or injury to the buildings, machinery, or other property of the manufacturing plant or interference with its operation. In 1902 the Atlanta Water & Electric Power Company, a chartered public service corporation, constructed a dam across the river at Bull sluice, about three miles below the mouth of Vickery's creek, which was of such height and character as to elevate or cause back water in the river at and above the Laurel Mills property. Subsequently the Atlanta Water & Electric Power Company sold its property to the Georgia Railway & Power Company, another public service corporation, and executed a deed, dated March 8, 1912. The Georgia Railway & Power Company took possession under that deed, and continuous-

ly maintained the Bull sluice dam in carrying on the work for which it was incorporated. On August 5, 1911, I. M. Roberts, G. W. Wing, and J. P. Brooke became purchasers of the Laurel Mill property, and received a deed therefor from the trustee in bankruptcy of the Laurel Mill Company. Subsequently G. W. Wing sold his undivided interest in the property to his cotenants, and executed a deed to them, dated June 9, 1917. On June 26, 1917, I. M. Roberts and J. P. Brooke instituted an action for damages against the Georgia Railway & Power Company, on the basis of injury to their said property by a continuing nuisance. In stating the nuisance and its injurious effects, the petition alleged, among other things:

"On or about the year 1902, there was constructed a dam across the said Chattahoochee river approximately 50 feet high at a point known as Bull sluice about three miles below the properties above described, thereby creating a large reservoir which extends up to, alongside of, above, and beyond the properties of petitioners, and which is used by the defendant, in connection with its power house and machinery, in generating electricity. * * * That the erection of said dam and the creation of said reservoir, and the continued maintenance by the defendant of said dam and reservoir, has created a nuisance, and is a continuing nuisance, which has been a nuisance [since] the same was built and constructed, and which is now a nuisance, and has been maintained by the defendant since on or about March 6, 1912, and is now being maintained by the defendant as a permanent and continuing nuisance to the injury and damage to the petitioners to the amount herein alleged. * * * The defendant acquired title to said dam and reservoir on or about March 6, 1912, since which time defendant has continued to maintain, and is now maintaining, the same as a continuing nuisance as herein set out, and to the great injury and damage to the petitioners in the amounts specified herein. * * * The erection of said dam and the construction of said reservoir, and the continued maintenance of the same by the defendant, has been and is a continuing nuisance, for the reason that it has caused and is causing the waters in said river to pond up, and to deaden the flow and retard the velocity, and to back water up to, alongside of, above and beyond the properties of the petitioners, and into the railway and up to and into the power house, and over the turbine wheels used in driving the machinery in petitioners' factory, causing large deposits of sand, dirt, logs, rafts, drifts, and brush and [to?] accumulate and be deposited in the bed of said stream, forming in places islands consisting of several acres. * * * Said conditions have been gradually growing worse from year to year and from time to time, especially so since the acquisition of said property by the defendant, and are gradually continuing to grow worse all the time. * * * Since the erection of said dam and reservoir and its maintenance by the defendant, the bed of said stream, which was formerly rock, clear of sand, is now covered with mud and sand to a depth of several

feet in places below petitioners' properties and alongside of petitioners' properties, and the water in said stream has been elevated and raised several feet, which is shown along the banks of petitioners' properties and the tailway of petitioners' power house, which said deposits of sand and mud and the elevation of said waters have checked and impeded the flow in said tailway and impaired the value and affected and injured petitioners' power plant and the properties of petitioners as herein set out."

Special damages attributable to the continuance of the nuisance, sustained by plaintiffs, were alleged to arise from reduction of power of plaintiff's water power, rendering it inefficient, and necessitating an abandonment of the operation of the factory; from flooding the factory and certain buildings along the river front in time of high water, causing injury to the factory machinery and the several buildings and depreciating their market value; from the creation of "foul odors and obnoxious stenches, causing miasma and malaria," thereby rendering certain houses uninhabitable and decreasing their market value; from enforced shutting down of the factory, causing certain houses occupied by employees of the factory to become useless and of less market value. The petition alleged a right of the plaintiffs to recover all such damages as flowed to them from the causes stated above, within the four years preceding the institution of the suit. It is also alleged that on the 8th day of June, 1917, petitioners gave written notice, as required in Civil Code, § 4458, to the Georgia Railway & Power Company, as owner by assignment of the Bull sluice dam and reservoir, to abate the same as a nuisance. No demurrer was filed, but the defendant answered. On the trial there was no evidence of damage on account of "foul odors" and "obnoxious stenches," but there was evidence tending to show title in the plaintiffs as alleged, and injury to their property as described in the petition; but there was no evidence to show any change in the dam after the defendant purchased the property, or any special damages or injury to the property during the 18 days intervening between the date of the notice and the date of the suit. There was evidence as to certain flashboards on top of the dam; but the deed to defendant shows that this equipment was part of the dam at the time of the purchase by it. At the conclusion of the plaintiffs' evidence, the judge granted a nonsuit. The plaintiffs excepted. The judgment of the trial court having been affirmed by the Court of Appeals, the case is here for decision on certiorari.

Richard B. Russell, of Atlanta, Richard B. Russell, Jr., of Winder, and Fred Morris and Campbell Wallace, both of Marietta, for plaintiffs in error.

Colquitt & Conyers, of Atlanta, for defendant in error.

ATKINSON, J. As shown by the allegations of the petition, the action is based on continuance of a nuisance created by the defendant's grantor in 1902. There is no allegation that the defendant made any change in the dam after its purchase. The evidence as to occasional use of certain flashboards on top of the dam did not show a change in the use of the dam, because the deed to the defendant shows that the flashboards constituted a part of the dam at the time of its purchase. Such being its character, the case is not one for application of the ruling in *Middlebrooks v. Mayne*, 96 Ga. 449, 23 S. E. 398, to the effect that a notice is not "essential to the maintenance of an action against the alienee for injuries occasioned by changes made by himself in the character or structure of the nuisance."

The controlling question in this case is whether the grantee or alienee of property causing a nuisance is liable for damages caused by its continued maintenance and accruing prior to a notice or request to abate the same. The cause of action in the case of *Bonner v. Welborn*, 7 Ga. 296, may be summarily stated thus: In 1843 Alfred Welborn erected a milldam on his own land, adjoining the property known as the "Meriwether Warm Springs," then the property of Seymour R. Bonner. In 1845 Seymour R. Bonner sold and conveyed this property to Robert Bonner. In 1847 Robert Bonner instituted an action for damages against Alfred Welborn on the basis that the millpond formed by constructing the dam across the stream was a nuisance, and that its continuance during the year 1846 had rendered the vicinity unhealthy, which injuriously affected the plaintiff's hotel business at Meriwether Warm Springs and caused him pecuniary loss. A verdict for the defendant was returned. The plaintiff excepted, assigning error on certain rulings of the court on the admissibility of evidence, and upon an excerpt from the charge to the jury. The judgment was reversed, one of the judges dissenting. Separate opinions were rendered by each of the three judges. The defendant Welborn was not an assignee, but was the original builder of the dam and the owner of the same when the action was brought; and consequently the exact case now for decision was not involved. However, the controlling question involved was learnedly discussed by each of the judges, and the seventh headnote of the opinion is as follows:

"The alienee of the person who erected the nuisance is liable for the continuance of the nuisance, but only on request to abate it."

After citing a number of English cases and enunciating certain pertinent principles, Judge Nisbet in his opinion said:

"The conclusion from these principles is irresistible that he who does hurt or damage to another in the use of his own property is

liable without notice or request. There is but one exception to this rule, and that is where the assignee of him who erected the nuisance is sued. This exception, to my mind, is not altogether consistent with the principles upon which this kind of action is founded. The authorities, however, recognize it, as will appear, and I yield to authority."

Further he said:

"As to the exception, that request is necessary where the action is against the alienee of him who first erected the nuisance, I have to say that it is sustained in the case of Penruddock, 5 Coke, 100, also in 2 Greenl. Rep. 38. I do not question this rule on authority. The alienee is liable, because he continues the nuisance, which is the same as a new wrong."

Judge Lumpkin concurred in the general views and reasons of Judge Nisbet, and proceeded to deliver an elaborate opinion in the course of which he referred to the question of notice to abate. After discussing a number of English cases, he said:

"Up to this period, we find nothing in the books of notice, as between any parties. But Penruddock's Case (5 Coke, 101) established the doctrine that where suit is brought against the feoffee of the person who erected the nuisance a previous request to abate it was necessary; and from that time this distinction seems to have been generally followed, both in England and in this country."

After discussing other cases it was again said:

"Thus it is manifest that whenever and wherever the doctrine has been discussed the principle in Penruddock's Case has been constantly cited, and always adhered to, without variability or shadow of turning, *which is, that in an action for a continuance of the nuisance, against the feoffee of the wrongdoer, whether at the instance of the original proprietor of the property injured or his assignee, request must first be made, but that as against him that committed the wrong, the original erector or promotor of the nuisance, no notice is necessary, no matter who sues.* [Italics ours.] And, as was rightly said in Winsmore v. Greenbank, 'The law is certainly so, and the reason is obvious.' And hence we conclude that the present action is properly brought against Welborn, who erected the nuisance, and who continued to keep it up, without notice."

It thus appears that Judge Nisbet and Judge Lumpkin both were of the opinion that the principle announced in Penruddock's Case was the law. The reversal, under application of that principle, was on the ground that Welborn was the original constructor of the nuisance, and not entitled to notice, under the principle of Penruddock's Case. Judge Warner delivered an elaborate dissenting opinion, in the course of which he dealt with the same question. He also agreed that the principle announced in Penruddock's Case was the law, but, applying that principle, said in effect that, inasmuch

as Robert Bonner did not own the Warm Springs property at the time Welborn constructed the dam, he was not injured by the original construction of the nuisance, and that relatively to him, an alienee acquiring the Warm Springs property to 1845, and suffering consequential damage to his business in 1846, Welborn could only be held liable on the basis of his being a continuor of the original nuisance, and that he would not be guilty of any wrong, as against Robert Bonner, until notice or request from him to abate. In the course of his discussion of this subject the judge said:

"When, in the eye of the law, could the defendant be considered as a wrongdoer, as against the rights of the plaintiff, with regard to the Warm Springs property? From the time he became the owner of the property, and notified him that his milldam was injurious to such property, and requested him to remove it."

It thus appears that the principle of Penruddock's Case was recognized by the entire bench of three judges, and that under application of that principle there was no disagreement as to the necessity of giving to an alienee notice to abate the nuisance, before such alienee would become responsible for injuries resulting from such nuisance. The only point of difference was as to the necessity of notice to abate, given to the creator of the nuisance, where the person injuriously affected was himself an alienee and did not own the property injured at the time the nuisance was created. The opinions rendered by the judges, sanctioning as authority the decision in Penruddock's Case, pronounced a principle declaring the responsibility of an alienee for continuing a nuisance created by another. These opinions cannot be read without reaching the conclusion that the judges rendering them contemplated that such responsibility of an alienee would commence with the giving of notice to abate the nuisance. More than 10 years after the rendition of that decision the first Civil Code of this state was adopted by the General Assembly, within which appeared the following section (Code of 1863, § 2943):

"The alienee of a person owning the property injured, may sue for a continuance of the nuisance; so the alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case, there must be a request to abate before action brought."

This language has appeared in every subsequent Civil Code of the state, and is now section 4458 of the Civil Code of 1910. This is a codification of the common law as interpreted in the decision of Bonner v. Welborn, supra; and it now has the force of statute law.

The great contention of the plaintiffs is that the words, "before action brought," as employed in the Code section, denote merely a

remedial requirement that notice be given before institution of a suit, rather than that such notice is a requirement before responsibility for continuance of the nuisance will attach to the alienee of the nuisance. In support of such contention counsel cite and discuss the case of Penruddock and decisions of courts and text-writers that preceded and followed it, including the several opinions of the judges in Bonner v. Welborn, supra, and other decisions of this court. In Central Railroad v. English, 73 Ga. 366, it was held:

"Where one railroad company erected a nuisance, and was subsequently leased to another company, which continued to maintain such nuisance, if the owner of the property on which it was situated notified the president and officers of the lessee company of it, and his tenant also notified the section master of the company, this was sufficient notice and demand for abatement, and the tenant could bring an action for injuries resulting to him without more. Notice of the nuisance is sufficient."

This ruling that notice to the alienee of the existence of the nuisance is a sufficient compliance with the law is incompatible with the contention that the "request to abate," referred to in the Code section, is a mere remedial requirement.

In Southern Railway Co. v. Cook, 106 Ga. 450, 453, 32 S. E. 585, 586, it was said:

"If, however, a person come into possession of property upon which there is an existing nuisance, before an action can be maintained against such person for continuing the nuisance, it is essential that there should be a request to abate it before any liability for maintaining the same would arise"—citing Bonner v. Welborn, supra, 7 Ga. 314; W. & A. R. Co. v. Cox, 93 Ga. 561, 20 S. E. 68; Middlebrooks v. Mayne, supra.

So in Blackstock v. Southern Railway Co., 120 Ga. 414, 416, 47 S. E. 902, 903, it is said (immediately after quoting the Code section):

"If before an action can be brought against the alienee of the property causing the nuisance, there must be a request to abate the nuisance, then it is evident that no cause of action arises against such alienee until such request is made. The cause of action against him is continuing a nuisance after having been notified of its existence and requested to abate it."

What is quoted from the two last cases was necessarily said in showing the difference in the two causes of action under discussion, and therefore was not obiter, as counsel contends. See, also, 20 R. C. L. 392, § 16, and cases cited under note 8. The request to overrule Southern Railway Co. v. Cook and Blackstock v. Southern Railway Co., supra, is denied.

Giving to the Code section the construction that the notice to abate, therein referred to, is not merely remedial, but is a provision that must precede responsibility of such

alienee, the Court of Appeals did not err in affirming the judgment granting a nonsuit. Judgment affirmed.

All the Justices concur.

(151 Ga. 267)

DUMAS et al. v. RIGDON, Tax Collector,
et al. (No. 2088.)

(Supreme Court of Georgia. March 4, 1921.)

(Syllabus by the Court.)

1. Schools and school districts \S 107—Taxpayers not intervening in proceeding to validate bonds or suit to enjoin issuance not entitled to injunction against collection of tax.

This being an equitable petition to enjoin the collection of a tax to pay the principal and interest of bonds issued for the purpose of building a schoolhouse in a designated school district, and it appearing that the bonds, the legality of which had been attacked, had been duly validated, and after they had been validated a petition was brought by certain taxpayers to enjoin their issuance, and the petitioners in this case having failed to intervene either in the proceeding to validate the bonds or in the subsequent proceeding to enjoin their issuance, the petitioners will not now be heard to attack the legality of the bonds. The court did not err in refusing an injunction.

(Additional Syllabus by Editorial Staff.)

2. Schools and school districts \S 107—In suit to enjoin collection of tax to pay bonds, held, that it might be assumed that they had passed into hands of innocent purchasers.

Where school district bonds were validated in August, 1918, and in a suit to enjoin collection of a tax for their payment it is not alleged that they have not passed into the hands of innocent purchasers, it may be assumed, from the length of time since their issuance and the failure to deny the fact, that they have passed into the hands of innocent purchasers.

Error from Superior Court, Tift County; R. Eve, Judge.

Suit by B. F. Dumas and others against T. S. Rigdon, tax collector, and others. An injunction was refused, and plaintiffs bring error. Affirmed.

B. F. Dumas and others, citizens and taxpayers of the county of Tift, and who reside in and own property within that portion of said county which is alleged to be contained in the Chula school district, as defined by the county board of education, brought their petition against T. S. Rigdon, tax collector of the county, R. E. Hall and the other members of the board of commissioners of roads and revenues, J. D. Cook and others composing the board of education of the county, and A. J. Ammons, county superintendent of education, praying for injunction to restrain the enforcement of a tax levy made for the year 1919, for the purpose of paying the

principal and interest upon a bond issue of the school district for the purpose of building and equipping a schoolhouse, and for other equitable relief. It is alleged that the levy of the tax referred to is illegal and void, because the Chula school district, within which the taxes were levied and which will be collected unless enjoined, is not now and has not been at any time heretofore a legally created school district within the meaning of the statutes relating to the subject of taxation for the purposes indicated; that the entire territory of Tift county has never been laid off into school districts, nor have the district lines been defined and marked as required by law, nor have the school districts been laid off according to law; but they have been laid off in disregard of the provisions of the statutes upon that subject; that no map of the county showing the school districts, as required by law, has been made; that certain specified lots were illegally transferred to the Chula school district; that several lots in the county were not in any school district, and that some four or five lots, containing an aggregate of some 2,000 acres of land, were illegally taken from the Chula district; that, upon other grounds specified, a division of the county into school districts, if ever made, was illegally made, without reference to best interest and the convenience of those who were included in and excluded from the district; that the territory from which the tax is to be collected is incapable of exact determination, never having been exactly laid out, marked, and defined, as required by law; that the board of commissioners of roads and revenues are without authority to levy and assess the tax complained of; and that for other reasons the levy is illegal. The defendants filed an answer and a demurrer and also a plea of *res adjudicata*. The court, after considering the case and the evidence submitted, refused the injunction.

Bussey & McNicholas, of Cordele, and R. L. Tipton, of Ashburn, for plaintiffs in error.

Fulwood & Hargrett, of Tifton, for defendants in error.

BECK, P. J. (after stating the facts as above). [1] Under the pleadings and the evidence in the case the court did not err in refusing the injunction. The bonds in question were duly validated in accordance with the provisions of the Civil Code 1910, § 445 et seq., relating to bonds and their validation. Questions of whether the law in regard to laying off the county into school districts had been complied with, and whether other steps were taken by the proper county authorities to make this laying off and division of the county into school districts conformable to law, as embodied in section 1531 et seq. of the Civil Code, upon the subject of school districts and local tax for public

schools, could and should have been made in the proceedings to validate the bonds, the legality of which is now challenged.

The school district here in question was created in June, 1918. Shortly thereafter an election to determine whether bonds should be issued was held, and in due course the bonds were validated, the order validating the bonds having been passed on August 17, 1918. On June 13, 1919, A. W. Whiddon, a citizen and taxpayer of the Chula school district, filed his petition against I. M. H. Fletcher, L. W. Whiddon, and A. E. Whiddon, trustees of the district, in which the legality of the issuance of the bonds in question was attacked, alleging that they had not then been sold, but the trustees of the school district were then negotiating for their sale and were about to sell them, and praying for an injunction to prevent the sale. The judge refused the injunction. The petitioner sued out a writ of error to this court, and it was held, in deciding the case:

"Where an election, held to determine whether bonds should be issued for the purpose of building and equipping a schoolhouse in a local school district, resulted in favor of such issuance, and the bonds were duly validated in accordance with the terms of the Civil Code of 1910, § 445 et seq., a citizen and taxpayer of the district who could have made himself a party to the proceedings to validate the bonds, but failed to do so, was concluded by the judgment rendered, and could not thereafter enjoin the levy and collection of a tax to pay the interest and principal of the bonds, and the issuance and sale, on the ground that there had never been levied in said district as a unit, distinguished from other districts of said county and from the county itself, a local tax for school purposes as provided by the act of 1912. Acts 1912, p. 176; Park's Ann. Pol. Code, § 1545 (a)." *Whiddon v. Fletcher*, 150 Ga. 39, 102 S. E. 350.

[2] The illegality of the bonds in that case was urged upon different grounds, it is true, from that taken here; and the plaintiffs in error insist that it was a friendly suit. Nevertheless the petitioners could have joined in that suit and have raised the grounds of illegality here set forth, and could have carried on the litigation in a manner entirely serious and not open to the charge that it was a friendly suit. We do not rule that the suit of *Whiddon v. Fletcher* and the decision in that case would sustain the plea of *res adjudicata*; but it should be taken into consideration in passing upon the question as to whether the judge properly refused the injunction in the present case, and the decision rendered in the *Whiddon Case* is directly applicable to the question presented here. And it is not amiss to state here that there is no allegation that the bonds in question have not been passed into the hands of innocent purchasers. And that such is the case, the length of

time since their issuance and the failure upon the part of the petitioners to make denial authorize us to assume.

Judgment affirmed.

All the Justices concur.

(151 Ga. 306)

LATIMER v. BRUCE. (No. 1844.)

(Supreme Court of Georgia. March 5, 1921.)

(Syllabus by Editorial Staff.)

1. Ejectment \S 69—When land described in petition, answer describing it as "premises in dispute" held sufficient.

Where the petition, in an action to recover the possession of land, described the land minutely, an answer which, after responding to the allegations of the petition, set up an equitable title under a parol contract with plaintiff's remote grantor, sufficiently described the land as "the premises in dispute."

2. Ejectment \S 69—Answer held to allege contract for land on valuable consideration notwithstanding use of word "give."

In an action to recover land, an answer alleging a parol contract by plaintiff's remote grantor to give defendant the property if she would occupy the house and furnish him with table board for the rest of his life did not use the word "give" as denoting a technical gift, but alleged a contract on a valuable consideration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Give.]

3. Ejectment \S 69 — Answer alleging parol contract of sale with plaintiff's grantor held not demurrable.

In an action to recover land, an answer alleging a parol agreement by plaintiff's remote grantor that, if defendant would occupy the house and furnish him with table board for the rest of his life, he would give her the property, to take effect immediately, was not subject to general demurrer.

4. Trial \S 191(3)—Instruction to determine what contract meant and whether it was meritorious held to assume its existence.

In an action to recover land in which defendant pleaded a parol agreement by plaintiff's remote grantor to give her the property if she would occupy it and board him for the rest of his life, an instruction to take the case and see what the truth was and see what the contract meant and whether it was meritorious and complied with, etc., was erroneous as assuming the existence of the contract, and thus intimating or expressing an opinion on the facts of the case.

5. Trial \S 236(1)—Instruction held inaccurate as requiring jury to believe witnesses unless discredited.

An instruction that, when a witness had not been attacked or impeached or his credibility impaired and had not been contradicted, the jury was authorized, and it was their duty to believe him, and that they could not capriciously disregard the testimony of a witness not

contradicted, rebutted, impeached, or attacked according to law, was inaccurate as absolutely requiring the jury to believe the witness, if not discredited in one of the ways pointed out.

Error from Superior Court, Cobb County; Moses Wright, Judge.

Action by P. B. Latimer, Jr., against Marietta Bruce. Judgment for defendant, and plaintiff brings error. Reversed.

Mozley & Gann and Anderson & Roberts, all of Marietta, for plaintiff in error.

McElreath & Scott and Geo. F. Gober, all of Atlanta, and C. M. Dobbs, of Marietta, for defendant in error.

PER CURIAM. 1. In an action of complaint for land the petition, described the land minutely. The answer admitted that the defendant was in possession of the land, but denied that the plaintiff owned it. After responding to the allegations of the several paragraphs of the petition, the answer proceeded to set up an equitable title under a parol contract with the plaintiff's remote grantor. This part of the answer as amended described the land as "the premises in dispute." The alleged parol contract was, in substance, that if the defendant would occupy the house and furnish the plaintiff's grantor with table board for the rest of his life, he would give her the property, the gift to take effect immediately, and would himself continue to pay the taxes and insurance. Held:

[1] (a) Construing the answer as amended in connection with the allegations of the petition specifically describing the property in dispute, the answer sufficiently described the property.

[2] (b) The word "give," as employed in the answer, when considered in connection with the context, does not denote a technical gift. The answer alleges a contract upon a valuable consideration.

[3] (c) The court did not err in overruling the general demurrer to a part of the answer setting up the contract.

[4] 2. Upon the ground that it assumed the existence of "the contract," thereby intimating an expression of opinion by the court, error is assigned, in one ground of the motion for new trial, upon the following charge of the court:

"So, under the rules of law I have given you in charge, take this case and see what the truth is; see what the contract meant, whether it was meritorious and complied with, whether she has what we call in law an equity; and, if you find she has, you ought to find in favor of the defendant."

The exception to this charge is well founded. The existence of the contract is assumed, and this fact was a contested one involving a controlling question in the case;

and under the positive provisions of the statute inhibiting an intimation or expression of opinion by the judge upon the facts of the case, the error requires the grant of a new trial. This necessarily results from the charge quoted; for it stands separate and distinct from those parts of the charge in which the court had properly submitted to the jury a question of fact to be determined by them, whether the contract had been made or not, and is in the last paragraph of the court's charge.

[5] 3. Error is also assigned upon the following charge of the court:

"I charge you, in connection with witnesses, that you can't capriciously disregard testimony. Where a witness has not been attacked or impeached, or his credibility impaired, and has not been contradicted by other evidence, the jury would be authorized and it becomes their duty to believe such witness. They can't capriciously disregard the testimony of a witness unless the same has been contradicted, rebutted, impeached, or attacked in some of the ways known to the law."

This charge is not entirely accurate, in that it absolutely requires the jury to believe a witness if he is not discredited in one of the ways pointed out in immediate connection with this requirement; but, when this charge is considered in connection with what preceded it, it will not in itself require the grant of a new trial.

4. No other assignment of error shows cause for the grant of a new trial, and the case is returned for another hearing upon the grounds indicated. No opinion is expressed as to the sufficiency of the evidence.

Judgment reversed.

All the Justices concur.

(151 Ga. 312)

THORNTON v. GERMANIA FIRE INS. CO.
(No. 1979.)

(Supreme Court of Georgia. March 5, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error \S 1123—Case returned without instructions, when court equally divided on question certified.

Where the Justices of the Supreme Court are evenly divided on a question certified by the Court of Appeals, the case will be returned to the Court of Appeals without instructions, under Const. art. 6, \S 2, par. 9 (Civ. Code 1910, \S 8506).

Certified Question from Court of Appeals.

Action by M. E. Thornton against the Germania Fire Insurance Company. Judgment for defendant, and plaintiff brought error to the Court of Appeals, which certified a question to the Supreme Court. Question not answered.

G. R. Nottingham, of Sylvester, and E. E. Cox, of Camilla, for plaintiff in error.

Passmore & Forehand, of Sylvester, and King & Spalding, of Atlanta, for defendant in error.

PER CURIAM. This case came before this court on a question certified by the Court of Appeals, as follows:

"The policy of fire insurance sued upon contained a provision that, subsequent to the burning of the property insured, the insured 'shall, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.' Following this and other provisions, the policy contained the following stipulation: 'No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire.' By an amendment to her petition the plaintiff admitted that before suit she did not furnish the required certificate of the magistrate or notary public referred to above, but in paragraph B of her amendment she set up the following reason why the certificate was not furnished: 'B. That the magistrate or notary public not interested in the claim as a creditor or otherwise nor related to the insured, living nearest the place of fire, was — Sheppard, and he, the said Sheppard, declined and refused to make any statement or furnish any certificate stating he had examined the circumstances and believed the insured had honestly sustained loss to the amount claimed by her or to any amount to be stated by such magistrate, for the reason, as given by him, that he had not seen the plaintiff's property that was so destroyed by fire as above set forth, that he knew no facts upon which he could base an opinion to be expressed in such certificate, and therefore declined to make any statement whatever concerning the same, though requested so to do by the plaintiff herein for the purpose of furnishing said certificate to the defendant herein. * * * The plaintiff further alleged in her amendment, in effect, that she made a bona fide effort to furnish the required certificate, but that, as the magistrate refused to give it when requested; it was impossible for her to comply with this provision of the policy, and that under such circumstances this provision is not binding upon her and should not operate to defeat her right to bring suit upon the policy. Under these circumstances did the court err in striking, on the motion of the defendant, paragraph B of the amendment to the petition, on the ground that it was irrelevant and immaterial, and afforded no valid excuse for the plaintiff's failure to furnish the required certificate?'"

The question certified being for decision by a full bench of six Justices, who are

evenly divided in opinion, FISH, C. J., and HILL and GILBERT, JJ., being of the opinion that the court did not err in striking the amendment to plaintiff's petition, and BECK, P. J., and ATKINSON and GEORGE, JJ., being of the opinion that the court did err in striking the amendment to plaintiff's petition, it is considered and adjudged that the case be returned to the Court of Appeals without instructions, as provided in article 6, section 2, paragraph 9, of the Constitution (Civil Code, § 6506).

(151 Ga. 240)

JONES v. JONES. (No. 2123.)

(Supreme Court of Georgia. March 8, 1921.)

(Syllabus by the Court.)

Executors and administrators ~~¶~~544—Petition against one fraudulently representing herself as widow as executor de son tort held to state cause of action.

According to the principles ruled in *Allen v. Hurst*, 120 Ga. 763, 48 S. E. 341, the plaintiff's petition as amended set out a cause of action under Civ. Code 1910, § 3886, and accordingly the court did not err in overruling the general demurrer.

Error from Superior Court, Troup County; J. R. Terrell, Judge.

Suit by Mary Jones, for herself and as next friend of Bertha Jones, against Nancy Jones and another. Judgment for plaintiff, and defendant named brings error. Affirmed.

Mary Jones, for herself and as next friend of her minor daughter, Bertha Jones, brought an equitable petition against Nancy Jones and La Grange Savings Bank, alleging that Mike Jones, the husband of Mary and father of Bertha Jones, died on December 10, 1918, owing no debts, and leaving an estate of the value of \$2,000, consisting of cash on deposit in bank, wheat, corn, hogs, and other personal property; that he had deserted petitioners several years prior to his death, and they did not know of his death until some time after it occurred; that upon making inquiry they learned that Nancy Jones, fraudulently representing herself to be the widow of Mike Jones and the mother of two minor children by him, had procured from the court of ordinary of Troup county a judgment setting apart to her as year's support \$700 in cash and all of the household and

kitchen furniture; that petitioners were ignorant, uneducated negroes, residing outside of Troup county and in Carroll county, and they had no knowledge of the application for year's support until after the judgment had been entered; that the \$700 in cash was withdrawn by Nancy Jones from La Grange National Bank and placed by her on deposit in La Grange Savings Bank; that Nancy Jones was never married to Mike Jones; that any children born to them were not born in lawful wedlock, and neither she nor they were entitled to inherit from him; that Nancy Jones had taken possession of and converted to her own use the entire estate, and was wasting and dissipating the same; that she was insolvent and unable to respond in damages upon any judgment which might be obtained against her; that there had been no administration on said estate, and no one had the legal right to take charge of the same; that Nancy Jones had fraudulently procured possession of the proceeds of a policy of insurance upon the life of Mike Jones, made payable to Bertha Jones; that Nancy Jones is an executrix de son tort, and as such liable in double the value of the property which she has wrongfully taken possession of and converted to her own use. The prayers are that Nancy Jones be enjoined from changing the status of the estate, from disposing of any of the property, and from withdrawing the money on deposit in La Grange Savings Bank, and that the bank be enjoined from paying the same out, that a receiver be appointed to take charge of the estate and collect the assets, for judgment, and for special lien on the funds on deposit with La Grange Savings Bank.

The defendant demurred to the petition on the grounds: (1) It does not entitle plaintiff to the relief prayed. (2) The cause of action, if any, vests only in the administrator of the deceased, and not the heirs at law. (3) The allegations of fraud are not sufficient to authorize a court of equity to set aside the judgment of the court of ordinary. (4) No cause of action is set forth. Exception is taken to the overruling of the demurrer.

M. U. Mooty, of La Grange, for plaintiff in error.

W. T. Tuggle, of La Grange, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(151 Ga. 249)

WELLS v. FIRST NAT. EXHIBITORS' CIRCUIT, Inc., et al. (No. 1959.)

(Supreme Court of Georgia. March 4, 1921.)

(Syllabus by Editorial Staff.)

1. Contracts \S 323(1)—Between lessee of moving pictures and third person held not to show inability to perform obligations to lessor.

Where the evidence warranted a finding that plaintiff, under a contract with defendant leasing certain moving pictures, had an exclusive right to exhibit the pictures, contracts between plaintiff and a third party, by which plaintiff agreed to permit the third party to use the pictures so far as he was able to do so, and another contract providing that the third party agreed to give plaintiff the use of its theaters for the exhibition of the pictures *held* not to show as a matter of law such change in conditions as disabled plaintiff from complying with his obligations to defendant and waived performance by defendant of the contract.

2. Parties \S 59(2)—Amendment to substitute as plaintiff one obtaining interest in contract pending suit properly disallowed.

Where, pending a suit by a lessee having an exclusive right to exhibit moving pictures to prevent the exhibition of such pictures by others, plaintiff made contracts with a third party for the exhibition of the pictures in its theaters, proposed amendments to the petition, substituting such third party as plaintiff alone or jointly with the original plaintiff, *held* properly disallowed.

Hill, J., and Beck, P. J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by Jake Wells against the First National Exhibitors' Circuit, Incorporated, and others. Judgment for defendants, and plaintiff brings error. Reversed.

The basis of the litigation is a contract entered into between First National Exhibitors' Circuit, Incorporated, and Jake Wells, under which Wells claimed he had acquired the exclusive right to exhibit within the city of Atlanta, during a given period of time, certain moving pictures, and which contract he alleged the other party had breached by permitting the exhibition of one of the pictures by Criterion Theater Company, in Atlanta, during the period covered by his contract. A full statement of the contentions will be found in the report of the case when it was here previously. *Wells v. First National Exhibitors' Circuit*, 149 Ga. 200, 99 S. E. 615. The clause of the contract under which the plaintiff claimed the exclusive right to exhibit the pictures in question is as follows:

"Undersigned exhibitor hereby leases from First National Exhibitors' Exchange eight Charlie Chaplin special releases six days on

each such release on — of each week, first week after release date, and agrees to keep and perform the terms herein provided and pay the amounts specified herein. Each subsequent release after the first to be used on the same day or days of the week at the same number of days after release date. Theater owner, Jake Wells. Theater name, —. Seating capacity, —. Street address, —. City of Atlanta. Population, 175,000. State, Georgia. Price of the entire series of eight releases, \$2,000 to be paid in installments as per contract below and on reverse side."

Upon the final trial of the case the plaintiff introduced in evidence a contract made between himself and Carolina Amusement Company, dated December 12, 1919, as follows:

"Witnesseth: That whereas, Jake Wells has heretofore contracted with the First National Exhibitors' Circuit for certain moving picture films to be exhibited in the cities of Atlanta and Augusta, Georgia, especially one series known as the Charlie Chaplin releases, and several others; and whereas, litigation has been instituted by the said Jake Wells with the said First National Exhibitors' Circuit and the Criterion Theater Company, now pending in Fulton superior court; and whereas, the Carolina Amusement Company desires to obtain the use of such pictures as may have been contracted for by the said Jake Wells from the said First National Exhibitors' Circuit: Now, therefore, in consideration of the payment by said Carolina Amusement Company of the sum of four hundred ninety-one and $\frac{65}{100}$ (\$491.65) dollars, the receipt whereof is hereby acknowledged, and the agreement on the part of said Carolina Amusement Company to pay all expenses of said litigation which may have been incurred, and which may hereafter be incurred, including court costs, and the further agreement of said Carolina Amusement Company to execute any and all bonds which may be required during the course of such litigation, and to hold the said Jake Wells harmless from any liability growing out of the execution of any such bonds, even if the said Wells be a party thereto, the said Jake Wells hereby agrees to permit, so far as he is able to do so, the Carolina Amusement Company to use such pictures as may be released to him under any and all said contracts pertaining to the cities of Atlanta and Augusta, the said Carolina Amusement Company paying to him the release price as provided in said contracts, and the said Wells further agrees that upon the termination of said litigation; or its settlement, which settlement shall be controlled by said Carolina Amusement Company, to execute transfers of such contracts, conveying any and all the interest that he may have therein to said Carolina Amusement Company, without recourse on him. It being distinctly understood and agreed that, until the final determination of said litigation, the title to said contracts and all rights thereunder shall remain in the said Jake Wells, except as herein stated. And the said Carolina Amusement Company further agrees to hold the said Jake Wells

harmless against any claims growing out of said contracts, or the actions now pending or hereafter instituted, by any person or concern whatsoever."

He also introduced a subsequent contract made between the same parties on January 19, 1920, as follows:

"Whereas, the undersigned, Jake Wells and the Carolina Amusement Company, entered into a certain agreement dated the 12th day of December, 1919, covering the exhibition, etc., of certain films known as Charlie Chaplin releases, a copy of which contract is hereto attached and made a part hereof; and whereas, certain rights therein sought to be given by Jake Wells to the Carolina Amusement Company may be subject to objection by the owners or distributors of such films: Now, therefore, in order to obviate any possible objection of the parties to said agreement as aforesaid, for and in consideration of \$5 each to the other in hand paid, do now mutually agree to this supplemental agreement, to wit: That in lieu of that part of the original agreement wherein Jake Wells agrees to permit, so far as he is able to do so, the Carolina Amusement Company to use such pictures as may be released to him under the contracts therein referred to, and the said Carolina Amusement Company agreeing to pay him the release price as provided in said contracts, the Carolina Amusement Company now agrees to give Jake Wells the use of the Forsyth or Rialto Theaters in Atlanta, Georgia, and the Augusta Theater in Augusta, Georgia, and Jake Wells agrees to use said theaters for the purpose of exhibiting any and all of the said Charlie Chaplin releases. The Carolina Amusement Company is to have and receive 66% per cent. of the net receipts arising from the exhibition of each of such pictures, and the balance of the net receipts to belong to Jake Wells, the said Wells to pay all charges of the First National Exhibitors' Circuit, Incorporated. It is further mutually agreed that the control of the litigation referred to in said original agreement shall be exclusively in Jake Wells, and that the title and all interests in said lease contracts shall remain in him."

At the conclusion of the introduction of the plaintiff's evidence, the Criterion Theater Company moved for the grant of a nonsuit on the ground that no conspiracy had been proved against it, which motion was overruled. It then moved for the grant of a nonsuit on the ground that under the contracts between Wells and Carolina Amusement Company, above set out:

"The plaintiff, having sold the contracts and his interest in the litigation, had no right to proceed in the case and was entitled to no remedy because of said contracts, and that there was no mutuality of remedy as between plaintiff and defendants."

Thereupon the plaintiff offered the following amendment to his petition:

"Plaintiff asks that said case proceed for the joint use of himself and of the Carolina Amuse-

ment Company, a corporation, for the reason that said Jake Wells has entered into contracts with the Carolina Amusement Company"

—being the contracts set out above, which amendment having been disallowed, he offered the following amendment:

"Plaintiff asks that said case proceed for the use of Carolina Amusement Company, a corporation, for the reason that said Jake Wells has entered into contracts with Carolina Amusement Company"

—being the contracts above set out. This amendment was also disallowed, and a nonsuit was awarded. Exception is taken to the judgment disallowing the two amendments to the petition, and to the award of a nonsuit.

Dodd & Dodd and Rosser, Slaton, Phillips & Hopkins, all of Atlanta, for plaintiff in error.

J. A. Branch, Herbert J. Haas, E. A. Neely, and McDaniel & Black, all of Atlanta, for defendants in error.

PER CURIAM. 1. When this case was first before this court, the contract forming the basis of the suit was construed to be ambiguous, and it was held:

"Where the true meaning of such a contract is equivocal, the circumstances existing when the contract was made, as well as the existence of a custom so well known that the parties must have contracted with the intention that it would apply to their contract, may be shown by parol evidence."

2. It was also held:

"Where, on the interlocutory hearing of an equitable petition to enjoin a breach of a contract upon the ground that the damages which the plaintiff may suffer will be incapable of ready computation and ascertainment, the judge, upon conflicting evidence, reaches the conclusion that the plaintiff has established a right to an injunction, and accordingly grants the same, it is erroneous to allow the defendants to dissolve the injunction upon the giving of a bond to answer the final judgment."

3. The evidence on the interlocutory hearing was conflicting as to whether Wells was granted the right to the exclusive presentation of the pictures.

4. On final trial, as shown by the record now before us, the evidence was substantially the same as on the interlocutory hearing and would have authorized a verdict for Wells, finding that he was entitled to the exclusive privilege of exhibiting the films under the conditions named in the contract.

[1] 5. Under the evidence it was error for the court to award a nonsuit on the ground that as matter of law there had been such a change in conditions as to ownership, control, and character of the theaters as to show inability of Wells to comply with his obligations under the contract, and to constitute a

waiver upon his part of performance by First National Exhibitors' Circuit, the other party to the contract.

[2] 6. The judgment disallowing amendments to the petition was not erroneous.

Judgment reversed.

All the Justices concur, except BECK, P. J., and HILL, J., who dissent.

HILL, J. (dissenting). In *Tifton, Thomasville & Gulf Ry. Co. v. Bedgood*, 116 Ga. 945, 43 S. E. 257, it was held:

"Contract rights coupled with liabilities, or involving a relation of personal confidence between the parties, cannot be transferred to a third person by one of the parties to the contract without the assent of the other."

Mr. Justice Little, in delivering the opinion of the court in that case, said:

"All choses in action arising under contract may be transferred. Executory contracts of a certain character may likewise be transferred. The rule universally recognized is that 'rights arising out of contract cannot be transferred, if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pollock on Contracts (4th Ed.) 425, and authorities cited. Mr. Clark in his work on Contracts, (page 524), citing a number of authorities, declares that it is a settled rule that a person can not assign his liabilities under a contract, or, 'to put the matter from the point of view of the other party to the contract, a person cannot be compelled to accept performance of the contract from a person who was not originally a party to it.' The same author, in dealing with this subject, also says that a person 'may so assign with the consent of the other party to the contract; but this is, in effect, a rescission by agreement, and the substitution of a new contract.' All the modern text-writers, so far as we have been able to ascertain, recognize that the doctrine above cited from Mr. Pollock is fully established. See Hammond on Contracts, § 355, and note 48 of page 724; Hollingsworth on Contracts, 295; Harriman on Contracts, p. 228, § 382; Anson on Contracts, 287. Possibly the leading modern case in which the doctrine of the assignability of such contracts as this is most fully discussed and applied is that of *Arkansas Smelting Co. v. Belden*, 127 U. S. 379. In the course of the opinion in that case Mr. Justice Gray, who delivered it, in support of the ruling there made says: 'At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of

Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' "

And see *Taussig v. Corbin*, 142 Fed. 660, 73 C. C. A. 656, where it was said:

"A contract by which complainant was given the exclusive right to sell in a specified territory certain patented articles to be sold to him by the other party as required, and by which he agreed to push the sale of the articles, the contract to continue so long as he did so, was in effect one for continuing the personal service on his part, which he could not specifically enforce in equity, for want of mutuality in the remedy."

See, also, *Pomeroy's Eq. Jur.* § 1405.

The contract in this case between Jake Wells and the First National Exhibitors' Circuit, Incorporated, provided that Wells leased eight Charlie Chaplin releases for six days on each release for the first week after the release date, and by the terms of the contract Wells agreed to keep and perform the terms of the contract and to pay the amounts specified therein, etc. Wells was designated as the owner of the theater in which the pictures were to be exhibited. Other portions of the contract refer to the prices to be paid and when payment shall be made, and the agreement is subject to the conditions on the back of the contract. One of the conditions on the back of the contract, which Wells agreed to, is that he is not to show the films leased in any other theater or theaters, or on any other dates than those specified, except with the consent of the lessor in writing. There are other agreements of minor importance.

In view of the authorities cited above, the provisions of the contract, and the evidence, I think that the contract between Wells and the First National Exhibitors' Circuit, Incorporated, is one which is not assignable without the consent of the First National Exhibitors' Circuit, and that consent is wanting, so far as the pleadings and the evidence disclose. The contract is an exclusive one, which could not be assigned by Wells, and although he offered in evidence an agreement between himself and the Carolina Amusement Company, in which he appears to have bought back the rights that he had sold, he is in the position of a purchaser from the third person to whom he had sold. He is not, therefore, in a position to assert that he had the exclusive right to exhibit the films in Atlanta, for the reason that he himself had violated the terms of the contract between himself and the First National Exhibitors' Circuit, which he claims was exclusive, and, this being a case in equity, before he can ask equity he must do equity. When Wells sold all of his theaters in Atlanta and his interest in the films to the Carolina Amusement Company, he put it beyond his power to perform

his part of the contract with the First National Exhibitors' Circuit, and it could not, under such circumstances, compel specific performance from Wells. Where there is an absence of mutuality of remedy, specific performance cannot be enforced.

Nor could Wells remedy the situation in which he had placed himself by making a new contract, under the terms of which the Carolina Amusement Company was to permit Wells to use either the Forsyth or Rialto Theaters, which had formerly been owned or leased by Wells, and sold by him to the Carolina Amusement Company, for the reason, as stated above, that the First National Exhibitors' Circuit had the right to rely upon Wells performing the original contract as agreed, and the duties and liabilities imposed by the contract could not be carried out by exhibiting the films in a theater owned or leased by the Carolina Amusement Company, and conducted by that company and not by Wells. The First National Exhibitors' Circuit had the right to expect and to demand that the contract between it and Wells be carried out in good faith by Wells, and no one else, in a theater owned and conducted under his management, where whatever of reputation he had made in the moving picture world might be of benefit to the First National Exhibitors' Circuit. The contract between the First National Exhibitors' Circuit and Wells was made to the latter individually, and the very nature of the contract involved personal service and exhibiting the films in certain theaters which were then owned and conducted by Wells in Atlanta, and the contract was not, under the above authorities, assignable.

From what has been said, and the authorities cited, it follows as a matter of law, that the court did not err in disallowing the offered amendments to the petition, nor in awarding a nonsuit.

(151 Ga. 260)

BARMORE et al. v. GILBERT. (No. 2057.)

(Supreme Court of Georgia. March 4, 1921.)

(Syllabus by the Court.)

Life estates — Money, etc., should not be intrusted to life tenant without security, unless will so provides; life tenant held not entitled to possession without security, though remaindermen joined in her petition.

Where the subject-matter of a life estate is money or its equivalent, or is such property as must be converted into money before possession of the same shall be intrusted to the life tenant, security should be required to preserve the fund for the remainderman, unless a contrary intention of the testator appears in the will. Applying this ruling to the petition in this case, to require the executor to deliver to the life tenant, without security, the money and promissory notes belonging to the estate, the judge presiding without a jury did not err,

in view of the provisions of the will, in refusing to grant the petition.

Error from Superior Court, Cobb County; D. W. Blair, Judge.

Proceeding by Mrs. J. F. Barmore and others against E. G. Gilbert, executor. Judgment in favor of the executor, and the petitioners bring error. Affirmed.

J. F. Barmore died testate. The provisions of his will (omitting the first item, relating to the payment of his debts) were as follows:

"Item Two. I will, devise, and bequeath to my beloved wife, Josephine Barmore, all the property, both real and personal, that I may die seized of, for and during her natural-life or widowhood.

"Item Three. I desire and direct that my wife shall use only the income from my property, and under no condition is she to encroach on the corpus as the income of money that I have now loaned out will be ample for her support and maintenance, she also having the use of my house.

"Item Four. At the death or marriage of my said wife, I will and direct that all of my property, or the proceeds thereof, be equally divided among my children.

"Item Five. If any of my children should die before the final division of my estate, leaving child or children, then said child or children shall take the share that the deceased parent would have taken had they been in life.

"Item Six. I hereby nominate and appoint my friend, E. G. Gilbert, as executor of this my last will and testament.

"This May 3, 1917."

After 12 months had elapsed from the qualifications of the executor, the widow and the five children of the testator cited the executor to an accounting in the court of ordinary, and in their petition prayed that he be required to deliver to the widow, the life tenant, the entire estate of the testator in his hands, without requiring bond or security from her. The executor answered, and the proceeding was appealed to the superior court, where by consent the case was tried by the judge without a jury. On the hearing it appeared that the estate of the testator consisted of both realty and personalty, the latter being a comparatively small amount of money, and a much larger proportion of promissory notes, which had been given to the testator by various persons; that most of the notes had been collected by the executor, and the money so received had been loaned by him on real estate securities; that he had turned over to the widow all of the real estate, and after the payment of debts of the testator the executor had paid to her the interest on the money and the notes in his hands. The only issue tried by the judge was whether the executor, upon the petition of the widow and the children of the testator, in view of the provisions of his

will, should be required to deliver to the widow the money and promissory notes belonging to the estate in the hands of the executor in accordance with the prayers of the petition. The judge decided the issue against the petitioners, and they excepted.

Geo. F. Gober, of Atlanta, for plaintiffs in error.

Wm. Attaway and Anderson & Roberts, all of Marietta, for defendant in error.

FISH, C. J. (after stating the facts as above). As to the rights and liabilities of a tenant for life, Civil Code (1910) § 3666, declares:

"The tenant for life is entitled to the full use and enjoyment of the property, so that in such use he exercises the ordinary care of a prudent man for its preservation and protection and commits no acts tending to the permanent injury of the person entitled in remainder or reversion. For the want of such care, and the willful commission of such acts, he forfeits his interest to the remainderman, if he elects to claim immediate possession."

So in *Bowman v. Long*, 26 Ga. 142, it was held:

"The tenant for life in property is entitled to the possession of the 'corpus' of the property for his own use, subject to a right in the remaindermen to have the property in a state of security, to be forthcoming to them, on the termination of the life estate."

Because of this duty to preserve and protect the estate in remainder, the relation of the life tenant to the remainderman has been held to be, to a certain extent, a fiduciary one, and termed an implied or quasi trusteeship. 17 R. C. L. 626, note 10. In order to protect remaindermen, the early practice in England was to require security from the life tenant before allowing him to take possession of personal property of any character, to the use of which he had become entitled by bequest; but a distinction was drawn later between specific bequests of property and those of the residue of an estate, and some courts have held that, where specific articles are left to legatees for life, with remainder over, all that is required, in the absence of a showing of danger of loss or waste, is that an inventory thereof be indorsed by the life tenant, with acknowledgment that these were held for life only, with title in the remaindermen. Where, however, the property, for which the use for life is bequeathed is money or its equivalent, or is the residue of an estate which is money or its equivalent, or is such property as must be converted into money, a different rule obtains. As such property may be easily lost or wasted, the general rule, unless it is to be inferred from the language of the will that the life tenant is to have possession, is that he must give reasonable security to preserve the funds for the remaindermen. Where the testator has

directed that the life tenant have possession of the funds, it has been held that even then the matter of exacting security is regarded as discretionary with the court; and if the testator has not seen fit to require such security, the court will not require it, unless it is shown that there is danger of loss, either because of the irresponsibility of the life tenant, his removal of the estate beyond the jurisdiction of the court, or some similar reason, since the requirement of security might impose on the life tenant a burden which he could not discharge, and thus the intention of the testator would be defeated. 17 R. C. L. 626, 627 (17). The matter of a life estate in money or its equivalent, and the rights of a life tenant in relation thereto, has been under consideration several times by this court. In *Thornton v. Burch*, 20 Ga. 791, it was held:

"Money, notes, and accounts may be limited over, after the determination of a life estate. * * * A gift over of his whole estate, real and personal, after the determination of an estate for life, is a bequest of the money, as well as other property."

In *Chisholm v. Lee*, 53 Ga. 612, it was held:

"Where money is bequeathed to the widow for life, and at her death to the heirs of the testator, it is the duty of the executor to invest the principal, and to pay over the interest to the widow, so as to preserve the former for the benefit of those ultimately entitled."

See same case, 56 Ga. 126.

In *Phillips v. Crews*, 65 Ga. 274, it was held:

"A life estate in money, with remainder over, may be created. Money may be lost, but it should not be destroyed in the use."

In the opinion is this language:

"But it is said that neither an estate in remainder, nor a limitation over, can be created in money, because it is such property as is destroyed in the use. Sometimes it is lost in the use, but it should never be so with trust money. He who undertakes to execute a trust is charged with the duty of seeing to it that it is not destroyed in the use; the income may be destroyed by its use, for it was so intended, but the corpus must be preserved for the remaindermen. A life estate may be created in money, and section 2253 of the Code [Civil Code of 1910, § 3664, declaring that an estate for life cannot be created in such property as is destroyed in the use] does not allude to money, but to such things as perish with the usage. In 20 Ga. 793, it is ruled that there can be as little doubt of the executor's liability to account to the remaindermen for the money and notes left by the testator as the other property."

In *Crawford v. Clark*, 110 Ga. 729, 36 S. EL 404, it was held:

"A remainder may be created in money; and an executory bequest of money, limited upon a definite failure of issue, is valid."

The will there involved directed that the executor should pay the money to the daughter, to whom the life estate was given, when she should arrive at 21 years of age or marry. The daughter married before her majority. It was said in the opinion:

"If the bequest had given her a separate estate, the will, which was the law for the executor in this case, expressly required the possession of the money to be given to her. In such event he could not hold the money and pay her only the income thereof. But as the bequest did not create a separate estate in the daughter, under the law as it then stood [1847] the marital rights of the husband attached."

The prior decisions of this court on the subject of a life estate in money, to which we have referred, were cited. In *De Loney v. Hull*, 128 Ga. 778, 58 S. E. 349, it was held:

"Where an executor holds certificates of stock or certificates of indebtedness issued by a railroad company, which, by the terms of the will, are bequeathed to a person, to go over to another in the event he dies 'without leaving a family,' and where, in a suit in chancery for an accounting and other relief, it is decreed that the executor 'shall at once turn over and deliver' to the legatee the property bequeathed to him to be held by him under the will, the executor has the right, before surrendering the certificates, to indorse thereon memoranda to the effect that the certificates are held by the legatee under the terms of the will."

In *Thomas v. Owens*, 131 Ga. 248, 62 S. E. 218, strongly relied on by counsel for plaintiffs in error, a part of the first item of the will was as follows:

"I devise and bequeath to my said sister [Margaret W. Thomas] for life my interest in Guinas plantation, Habersham county, Georgia, and on her death I devise and bequeath my said interest in said plantation to my niece, Mary B. Thomas, and her heirs."

The will then disposed of other properties of the testatrix. Mary W. Thomas and George W. Owens were appointed executors of the will, which authorized them, or either of them, to sell and dispose of the property of the testatrix at public or private sale as might be deemed best, and to reinvest the proceeds of the sale in such property as may be deemed to the best interest of the estate, without any order of court being applied for or had for such sales or investments. A codicil was in this language:

"I republish and reaffirm said will, save and except that I direct that my estate shall not be divided during the lifetime of my sister, Margaret W. Thomas, but shall be held together until her death. I bequeath to my said sister Margaret W. Thomas, the income from my estate during her life, and on her death direct that said estate be divided as devised and directed in my will last mentioned."

It was held:

"A life estate for Margaret W. Thomas was carved out of the estates devised to the other legatees. * * * There being no debts, Margaret W. Thomas is entitled to have possession of the estate of the testatrix from the executor. * * * Upon the death of Margaret W. Thomas, all the property not devised to her in fee is to be divided among the other legatees in the manner indicated in the will."

In the opinion it was said:

"Having come to the conclusion * * * that by force of the codicil Mrs. Thomas takes a life estate in the property devised to the other legatees, the next question is whether Mrs. Thomas is entitled to the possession of the estate, or should it remain with the executors until the death of Mrs. Thomas, and then be divided by them? There is no pretense that the estate owes any debts. Mrs. Thomas is sui juris and laboring under no disability. She is entitled to the full use and enjoyment of the property devised to her, unless restrained by the will and codicil. She is as much entitled to the possession of the estate devised for life as that devised in fee, if the will does not give possession to the executors until her death. A tenant for life is entitled to the full use and enjoyment of the property. Civil Code, § 3090. In this respect there is no difference between realty and personalty. As was said in *Bowman v. Long*, 26 Ga. 146: 'In a life estate the tenant is entitled to have the possession of the property for his own enjoyment; and all that the remainderman can require is that the "corpus" of the property shall be kept in preservation, to be delivered to him on the termination of the life estate. * * * Of course, this rule must be subordinate to the rule that the corpus is to be so kept that it shall be preserved for delivery to the remainderman, on the termination of the life estate. The law has ways by which it can effect this object, and yet not deprive the tenant for life of the use and profits of the property during his life. It can require him to give security for the forthcoming of the property at the termination of the life estate.' *Crawford v. Clark*, 110 Ga. 732, 36 S. E. 404; *Brantley v. Porter*, 111 Ga. 886, 36 S. E. 970; *Walker v. Watson*, 32 Ga. 264. We take it to be well settled therefore, that, unless otherwise provided in the will and codicil, Mrs. Thomas is entitled to the possession of the property devised to her, to the exclusion of the executor."

It is further said:

"It is emphasized that the testatrix directs that her estate shall not be divided during the lifetime of her sister, Mrs. Thomas, and shall be kept together until her death. This provision of the codicil emphasizes the testamentary intent that Mrs. Thomas should have undisturbed possession of the whole estate until her death, when the several estates in remainder are to become estates in possession. The executor is not a trustee for any of the legatees; he holds for neither Mrs. Thomas nor the remaindermen. The codicil is satisfied if the property is not divided until Mrs. Thomas's

death; and the holding should be by her, in the absence of a contrary declaration by the testatrix."

This decision was in accord with the general rule announced in Civil Code, § 3866, hereinbefore quoted. The rulings in that case are not in conflict with those made in the prior cases to which we have referred, but the prior decisions collated in *Crawford v. Clark*, supra, are approvingly cited. The exact question whether, in the absence of intention of the testator, the life tenant should have the possession of the money or its equivalent, without giving security, for the protection of the remaindermen, was not presented or decided in the case of *Thomas v. Owens*.

In view of the provisions of the will here involved, the case falls squarely within the general rule (21 C. J. 966, cases in note 64), that, where the subject-matter of a life estate is money or its equivalent, or is such property as must be converted into money, before possession of the same shall be intrusted to the life tenant, security should be required, unless the will shows a contrary intention of the testator. There is nothing in the will indicating that the testator intended that the life tenant should have the possession of the money and promissory notes belonging to his estate, either with or without security, but the strong intimation is that she should not have possession at all; for he directs in item 3 that she shall use only the income from his property—

"and under no condition is she to encroach on the corpus, as the income on money that I have now loaned out will be ample for her support and maintenance, she also having the use of my house."

This provision, considered in connection with the entire will, seems to exhibit the purpose of the testator to be that, as the income on the money he had loaned out would be sufficient for her maintenance, she should not receive the corpus of the fund, even for its investment and management so as to make on it an income to which she would be entitled. The petition is that the executor be required to deliver to the widow, the life tenant, the possession of the entire estate in his hands, and that this be done without requiring any security to be given. The five children of the widow joined with her in the petition. If they are all the children, still they may not be all of the remaindermen who may be interested in the property of the testator under the provisions of the will. The living children of the testator who joined in the petition may now have children of their own. There is nothing in the record as to this. Or they may hereafter have children; and should the petitioning children, or some of them, die before the death or marriage of

the life tenant, leaving children, then such last-named children would take the interest of their deceased parents. What may happen cannot be now known; and the only protection for the executor, in view of the contingencies that may arise, is to require security before so much of the estate of the testator as consists of money, or its equivalent, shall be delivered to the life tenant.

The only question presented for decision to the trial judge sitting without a jury was whether, under the petition, the executor should be required, in view of the provisions of the will, to deliver all the money and promissory notes belonging to the estate to the life tenant without requiring of her security. He refused to require the executor so to do, and we hold that he did not err.

Judgment affirmed.

All the Justices concur.

(151 Ga. 308)

CATO v. SOUTHERN RY. CO. (No. 1862.)

(Supreme Court of Georgia. March 5, 1921.)

(Syllabus by Editorial Staff.)

1. Carriers ⇐241—Master and servant ⇐88
(6)—Pullman conductor not a "passenger" or "employee."

One in the employ of the Pullman Company as conductor, under a contract whereby he ratified a contract between his employer and the railroad company and agreed that he should not have the rights of a passenger, and that it should not be liable for any injuries sustained by him, was not an "employee" or a "passenger" of the railroad company, but sustained a special contractual relation; the liability for injuries to the Pullman company's employees, not pertaining to the public duty resting on the railroad company as a common carrier, but arising solely from the contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Passenger.]

2. Courts ⇐217—Questions whether contract is void and whether demurrer was properly sustained cannot be certified to Supreme Court.

Questions whether a contract between the Pullman Company and an employee was null and void, or barred the employee's right to recover for injuries, and whether the court erred in sustaining the demurrer and dismissing the petition, are not such questions as the Supreme Court is required or authorized to answer, when certified by the Court of Appeals.

Atkinson, J., dissenting in part.

Certified Questions from Court of Appeals.

Action by T. F. Cato against the Southern Railway Company. Judgment dismissing the petition, and plaintiff brought error to the Court of Appeals, which certified certain questions to the Supreme Court. Certain of

the questions answered, as stated in the opinion, and others not answered.

Reuben R. Arnold, of Atlanta, for plaintiff in error.

Harris, Harris & Witman, of Macon, for defendant in error.

PER CURIAM. The Court of Appeals certified the following questions:

"T. F. Cato sued the Southern Railway Company, alleging, in part, that he was in the employment of the Pullman Company as conductor; that 'he, as said Pullman conductor, had no responsibility for the running of defendant's train, but only looked after the passengers in the Pullman car, and the plaintiff alleges that the defendant, under these circumstances, owed him the duty of extraordinary care'; that he was injured by a collision between two trains at Reids, on the line of said railway company between Jacksonville, Fla., and Atlanta, Ga.; that he was permanently injured, and the railway company was negligent in several particulars specified; and he prayed for damages. Plaintiff amended his petition, and attached thereto, as Exhibit A, a copy of an agreement signed by him and the Pullman Company, and prayed that 'the said instrument, in so far as the same may purport to relieve any corporation of its liability to plaintiff for its negligence, shall be declared by this court to be null and void.'

"The material portions of the contract, Exhibit A., signed by T. F. Cato, are as follows:

"'Atlanta, Ga., July 6, 1907. Be it known, that I, the undersigned, hereby accept employment by, and enter into or continue from this date in the service of, the Pullman Company, upon the following express terms, conditions, and agreements, which, in consideration of such employment and the wages thereof, I do hereby make with the Pullman Company, to wit:

"'First. So long as I shall remain in said employment and service, I will fully comply with all regulations, rules, and orders of said company or its agents, issued for the government of its employees, go wherever I may be required in said service, and well, faithfully, and honestly perform all duties assigned to me.

"'Second. My wages shall at all times be calculated and paid at the monthly rate per day for the number of days I shall have been actually employed, and I may quit or resign, or may be suspended or discharged from such employment, at any time, or at any place, without previous notice. * * *

"'Fourth. I assume all risks of accidents or casualties by railway travel, or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit, and discharge the Pullman Company, and its officers or employees, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death in such employment or service.

"'Fifth. I am aware that the said Pullman Company secures the operation of its cars

upon lines of railroad; hence my opportunity of employment, by means of contracts wherein said the Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employees of said the Pullman Company in cases provided for in such contracts; and I do hereby ratify all such contracts made or to be made by said the Pullman Company, and do agree to protect, indemnify, and hold harmless said the Pullman Company with respect to any and all sums of money it may be compelled, or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me; and this agreement may be assigned to any such corporation or person and used in its defense.

"'Sixth. I will obey all rules and regulations made or to be made for the government of their employees by the corporation or persons over whose lines of railroad the cars of said the Pullman Company may be operating while I am traveling over said lines in the employment or services of said the Pullman Company; and I expressly declare that while so traveling I shall not have the right of a passenger with reference to such corporations, or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release and acquit or discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me while in said employment or service.'

"To the petition as amended a demurrer was filed; and upon a hearing thereof the following order was passed: 'Demurrer sustained, and the plaintiff's petition dismissed.' To this order the plaintiff excepted. Copies of all the pleadings are in the record. The Court of Appeals wishes to know:

"(1) Under the contract, a copy of which is attached to the amended petition and marked Exhibit A: (a) What relation did the Pullman conductor sustain to the railway company? (b) What diligence did the railway company owe the Pullman conductor?

"(2) Is the said contract 'in its essence a contract between master and servant'?

"(3) Is the contract 'in effect a contract by which the carrier undertakes to relieve itself from the consequences of the negligence of itself and servants'?

"(4) Is said contract null and void, or is it a bar to the plaintiff's right to recover, under all of the allegations in the petition?

"(5) Did the court err in sustaining the demurrer and dismissing the plaintiff's petition?"

[1] 1. The Pullman conductor was not an employee or a passenger of the railway company. The relation he sustained to that company was entirely contractual, under the special terms of the contract. The special service which the railway company was, under the contract, to render to the Pullman Company, incident to which its conductor was to be carried in its cars while performing the services for which it employed him, did not pertain to the public duty resting

upon the railway company as a common carrier, but arose solely from its contract with the Pullman Company, ratified by the conductor in his contract with the latter company. *Baltimore & Ohio, etc., Ry. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, and cases cited; *Denver, etc., R. Co. v. Whan*, 39 Colo. 230, 89 Pac. 89, 11 L. R. A. (N. S.) 432, 12 Ann. Cas. 732, and numerous cases collated in the notes to the principal case in the last two reports); *Hughson v. Richmond, R. Co.*, 2 App. D. C. 98.

[2] 2. The foregoing ruling covers in substance the questions certified by the Court of Appeals, except those numbered 4 and 5, which are not such as this court is required or authorized to answer under the law authorizing the Court of Appeals to certify questions to the Supreme Court, as was ruled in the case of *English v. Rosenkrantz*, 150 Ga. 817, 105 S. E. 613.

All the Justices concur, except ATKINSON, J., dissenting as to the first headnote (division of decision).

(151 Ga. 270)

MOORE et al. v. McAFEE. (No. 2096.)

(Supreme Court of Georgia. March 4, 1921.)

(Syllabus by the Court.)

1. New trial §15—Exceptions to order making parties not proper ground.

Exceptions assigning error upon an order of court making parties cannot properly be made a ground of a motion for new trial.

2. Parties §53—Where motion was treated as amendment making a new defendant and he filed a disclaimer, he was a party.

Although no rule nisi issued against B. H. Ray, calling upon him to show cause why he should not be made a party defendant, where plaintiff's counsel filed a written motion that said Ray be made a defendant, and this application was treated as an amendment to the pleadings, and the amendment was allowed by order of the court, and the party named filed his pleadings disclaiming title, and in such disclaimer referred to himself as a party defendant, objections to evidence based upon the ground that the person named was not a party to the suit were properly overruled.

3. Deeds §38(1)—Not void for uncertainty because not giving district in which land is located.

A deed containing the description, "a parcel of land lying in Crawford county, on Deep creek, in the ——— district of said county, and known as the south half of lot 30 in a survey of said district and containing 101½ acres," is not void for uncertainty merely because it does not set forth the district in which the lot specified is located. It would be competent to show by parol testimony, if such was the case, that there was only one lot 30 in that county on the creek named.

4. Evidence §332(1)—Order for sale of land and administrator's deed held admissible though order did not describe land and bill was lost.

The decree and order from the superior court, directing the administrator to sell the assets of the estate remaining in the hands of the administrator, and reciting that it was granted in a specified case which arose upon a bill to marshal assets, and that it appeared to the court from the bill that the only asset of the estate was the land described in the bill, was properly admitted in evidence over the objection that it did not describe the land in controversy, and did not furnish authority to the administrator to sell any land unless accompanied by the bill in which the land was described, as there was a presumption that the bill referred to was in existence at the time of the granting of the order, and its loss or destruction could not prevent the introduction in evidence of the order itself and the deed executed in pursuance thereof at the sale by the administrator.

5. Deeds §38(1) — Not void for uncertainty when describing land as lots and parts of lots but also giving name.

A deed containing the description, "lots 32 and 33 containing 202½ acres each, also lots and parts of lots 29 and 30 and 35 in the Sixth district of said county, containing 450 acres, more or less, with mill site and water privileges thereon, said tract being known as Old Grant Mill Place," was not void for uncertainty in the description of the land intended to be conveyed; for the identity of the tract of land known as Old Grant Mill Place could be shown by parol evidence.

6. Boundaries §35(2)—Evidence §274(7) —Boundaries of land may be established by reputation derived from ancient sources or declarations of deceased parties; evidence based on maps and statements of persons since deceased held admissible.

In locating land described in a deed as being composed of lots and parts of lots of land Nos. 29, 30, and 35 in the Sixth district of a named county, known as "Old Grant Mill Place," it is competent to establish its boundaries of traditional reputation in the neighborhood, derived from ancient sources or from the declarations of persons since deceased who had peculiar means of knowing what the reputation of the boundary was in an ancient day; but present-day reputation is not admissible. Under this ruling, evidence of the tradition as to there being a tract of land known as the Grant Mill Place, and what it consisted of, was admissible.

7. Trial §255(4), 259(1)—Acts and declarations of defendant is admissible, and other defendant should request limitation; written request that evidence be limited necessary.

Evidence of sayings and doings of B. H. Ray, some of them tending to show recognition upon his part of the plaintiff's claim of title and possession of the land, Ray being one of the parties defendant, was admissible, certainly to establish the plaintiff's case against Ray himself; and the evidence having been properly admitted, if the other defendant wish-

ed the effect of such evidence limited to one of the parties, a proper written request therefor should have been preferred. The court was not bound, in the absence of such written request, to deal with the special parts of the testimony in his charge, although counsel for such other defendant may have called the court's attention to the fact that the evidence could not be binding upon any one except Ray, and coupled with this suggestion a request that the court instruct the jury that the evidence was not binding upon the administrator of Mrs. Ray.

8. Ejectment §90(1) — Lease under which lessees had occupied part of land held admissible.

The lease from Colbert and McAfee, executors of J. G. Colbert, to one Powell, was admissible in evidence, there being some evidence to show that the lessee named had, through agents or employees, occupied a part of the land in controversy.

9. Trial §228(3)—Instruction stating law "if" plaintiff was making a certain claim held not erroneous.

While it is the duty of the court to determine the contentions of the parties to a case and not leave that to the determination of the jury, nevertheless it was not such an inaccuracy as to require the grant of a new trial that the court, in charging the jury in this case, said that, "if the plaintiff claims a right to recover upon his prior possession, the plaintiff must show actual possession before the defendant took possession, and that he had actual possession of the entire south half of lot 30," the lot in dispute. Here "if," beginning the part of the instructions quoted, may be regarded as equivalent to the word "where," for the court had already instructed the jury that the plaintiff was undertaking to show his title, that is, the title of the Colbert estate, by showing possession of the land in connection with certain deeds offered in evidence. Parts of the evidence in the case, with the deductions which the jury were authorized to draw therefrom, were sufficient foundation for this charge.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, If.]

10. Adverse possession §116(1) — Instructions held not contradictory.

The court instructed the jury that the plaintiff could not recover unless he showed by a preponderance of the evidence that there was a tract of land known as the Grant Mill Place containing approximately 450 acres, and that the boundaries of such tract should also be fixed by evidence; and, in the part of the charge immediately following such instructions, added: "I charge you that the deed is not such a deed upon which the plaintiff can recover in this case, unless it is shown by a preponderance of the evidence that the plaintiff, as executor of Colbert, or Colbert in his lifetime, was in the open, continuous, notorious, and exclusive possession for seven years, under the deed, of some part of the land embraced in the deed." It is insisted that these parts of the charge are contradictory, misleading, and not authorized by the evidence. There was some evidence to authorize the charge; nor

were these parts of the charge contradictory. The first part placed upon the plaintiff the burden of showing by evidence that there was a tract or land known as the Grant Mill Place, containing a specified number of acres, and also of fixing the boundaries of the tract; and the other part, given in connection, meant merely that the deed alone, even if the plaintiff had carried the burden placed upon him by the first part of the charge, would not authorize a recovery, but that possession, such as prescribed by the statute, must also be shown.

11. New trial §26 — Remarks to counsel by court not sufficient ground when mistrial not moved for.

Remarks addressed to counsel in a colloquy between the court and counsel are not grounds for reversal of the judgment refusing a new trial, it appearing that the remarks were made upon the conclusion of the evidence and before the charge of the court to the jury was begun, and counsel had full opportunity of moving for a mistrial on the ground now taken in the motion for a new trial. Having failed to do this, the plaintiffs in error cannot, after the return of an adverse verdict, have that verdict set aside and a new trial granted.

12. Sufficiency of evidence.

Upon a review of the entire record we cannot say that there is no evidence to support the verdict.

Error from Superior Court, Crawford County; H. A. Mathews, Judge.

Ejectment by A. J. McAfee, executor, against L. D. Moore, administrator, and others. Judgment for plaintiff, and defendants bring error. Affirmed.

McAfee, executor of Colbert, brought ejectment to recover the south half of lot 30 in the Sixth district of Crawford county. The parties defendant were J. B. Spiller, Mrs. Nancy Newberry, executrix of M. J. Newberry, and L. D. Moore, administrator of the estate of Mrs. Emma M. Ray, deceased. When the case was called for trial and both parties announced ready, counsel for the plaintiff offered an amendment reciting that B. H. Ray was sole heir at law of Emma M. Ray; that he was claiming the land in dispute as sole heir, was actually defending the suit, and was a proper party defendant; that he claimed possession and right of possession of the land; and it was prayed that he be made a party and be required to set up a defense in this suit. This was signed by the plaintiff's counsel, and the court indorsed upon the amendment, "Amendment allowed, October 21, 1919," and then signed the same officially. After the evidence was closed by both parties, by agreement of counsel, upon suggestion of the judge, Mrs. Nancy Newberry, as executrix, etc., filed a disclaimer; and she as such executrix was then considered as eliminated from the case. J. B. Spiller filed a disclaimer at the same time. B. H. Ray also, through his attorney,

filed a disclaimer, but was treated as a party defendant by the court and by the plaintiff. The jury returned a verdict finding for the plaintiff the premises in dispute, a verdict quando against the estate of Mrs. Emma M. Ray for mesne profits, and a verdict for mesne profits against B. H. Ray individually. Moore, administrator of Mrs. Ray, and B. H. Ray, individually, made a motion for new trial, which was overruled, and the movants excepted.

L. D. Moore, of Macon, for plaintiffs in error.

R. D. Feagin, of Macon, for defendant in error.

BECK, P. J. (after stating the facts as above). [1] 1. One ground of the motion for a new trial assigns error upon the granting by the court of an order making B. H. Ray a party defendant upon the trial of the case, without his consent and over the objection of the administrator of Mrs. Ray, and without notice or rule nisi to B. H. Ray. Objection to such an order should have been made the subject of direct exception; error upon the same cannot be properly assigned in a motion for new trial.

[4] 4. Error is assigned upon the ruling of the court in admitting in evidence an order appearing upon the minutes of Crawford superior court at September term, 1876, and which contains the recital that it was made in the case of Smith, Administrator of Culverhouse, v. Moore, being a bill to marshal assets; and the further recital that it appeared to the court from the bill that the only asset of the estate remaining was the land described in the bill, which recital was followed by an order of the court that the administrator sell the land at public outcry, after due advertisement, and bring the money into court for distribution. This order was objected to upon the ground that it did not describe the land in controversy nor describe any land, and did not furnish authority to the administrator to sell any land, unless it was accompanied by the bill of the administrator in which the land was described. The court did not err in admitting this evidence over the objection made. There is a presumption that the administrator acted upon the order in connection with the bill, and that the bill sufficiently described the land.

[6] 6. Exception is taken to the ruling of the court in permitting the plaintiff as a witness in the case to testify as follows:

"There was a general tradition in the neighborhood as to there being a Grant Mill Place and as to what the Grant Mill Place consisted of. It was in the southeastern part of this county in the Sixth district. Deep creek runs through part of it. Toteover runs between 30 and 35. I got this information to start with from maps, but mainly from Wiley Patterson. He gave me general information of the land,

and Frank Mathews and Billie Mathews gave me the location and told me where the line was, and Mr. Becham and Mr. Nichols. Mr. Becham is dead; so is Nichols. Billie Mathews is dead. These were old settlers in that community. Billie Mathews lived on the west of lot 35, adjoining, I think, on the lot adjoining 35."

This testimony was objected to upon the grounds that a tradition cannot be proved in that way; that the evidence did not show a tradition as to the boundaries of the Grant Mill Place, did not specify any particular boundary or evidence of any boundary of any particular tract of land. The court refused to rule out any evidence, upon motion of movants, when the plaintiff closed his evidence. In deciding this case when it was formerly here it was said by this court:

"In locating land described in a deed as being composed of lots and parts of lots of land Nos. 29, 30, and 35 in the Sixth district of a named county, known as the 'old Grant Mill Place,' it is competent to establish its boundaries by proof of traditional reputation in the neighborhood, derived from ancient sources or from the declarations of persons since deceased who had peculiar means of knowing what the reputation of the boundary was in an ancient day; but present-day reputation is not admissible." *McAfee v. Newberry*, 144 Ga. 473, 87 S. E. 392.

Under that ruling the testimony quoted was admissible. Though the evidence may not have contained a complete description of the lands contained in the Grant Mill place, it did tend to show certain facts tending to establish the identity of the Grant Mill Place. Whether other evidence in the case completed the description, or not, is another question.

[11] 11. Another ground of the motion for new trial is based upon the contention that the court expressed an opinion in the presence of the jury upon certain evidence in the case. These remarks (the court addressing plaintiff's counsel) were:

"You have made Mr. Ray a party, and, so far as the evidence developed, he is in adverse possession against the administrator, and it is not disputed Newberry is not in possession or any claim to the property."

And addressing the administrator of Mrs. Emma M. Ray, the court stated:

"How about filing a disclaimer for Mrs. Ray's estate? You are not in possession and never have been."

The administrator replied: "The plaintiff never has been."

The Court: "But he is seeking to recover from the person who is in possession, and that seems to be B. H. Ray. He is trying to get possession, and you are not asking for possession." Reply by the administrator, Mr. Moore: "I am trying to make him let me alone. The plaintiff has not shown he was ever in possession of an inch of it in his life."

The Court: "I think I will have to submit

that to the jury; the Supreme Court held that."

These remarks were made by the court to the counsel in a colloquy between the court and counsel for plaintiffs in error. It is unnecessary to go into the record and determine whether or not the opinion expressed by the court was upon any contested issue of fact. Plaintiffs in error cannot, in a motion for new trial, avail themselves of the remarks made by the court under the circumstances attending the use of the expressions complained of. Section 4863 of the Civil Code provides that a new trial shall be granted where the court expresses or intimates his opinion as to what has or has not been proved. But where the court makes such an expression of opinion in ascertaining the position or opinion of counsel as to what has or has not been proved, or the effect of certain evidence, and does so before beginning his charge to the jury, and where the remarks made are entirely disconnected from the charge, as they were here, a party will not be permitted to allow the remarks to pass unchallenged until after the case has been submitted to the jury and a verdict adverse to him returned, and then seek to avail himself of them in a reviewing court. While remarks addressed to counsel in this way may be cause for a new trial, as provided in the statute just referred to, nevertheless counsel himself should take some steps to avoid the hurtful effect, by making a motion for a mistrial or asking the court to instruct the jury to disregard the remarks; but a party cannot remain quiescent until after verdict and then avail himself of the remarks made by the court in a motion for new trial, where the verdict is adverse. Of course, if the expression or intimation of the court's opinion occurs during his charge to the jury, while they may have no more hurtful effect than if they had been made in a colloquy between the court and counsel, nevertheless, as counsel could not well, in the midst of the charge, except to the remarks and move for a mistrial, he may avail himself of the remarks made in the course of the charge in his motion by making it one of the grounds thereof although no motion for a mistrial was made. There are cases in our reports where it has been held that certain remarks complained of as containing an expression of opinion by the court were not ground for a motion for new trial because not used in a charge to the jury but were made in the course of a colloquy between the court and counsel; and while it is not expressly said in any of these cases that if the remarks were hurtful a motion for a mistrial should have been made, the conclusion reached by the court must have been based upon the principle above announced.

[2, 3, 5, 7-10, 12] The rulings made in headnotes 2, 3, 5, 7, 8, 9, 10, and 12 require no elaboration.

Judgment affirmed.

All the Justices concur.

(151 Ga. 316)

EASTMAN COTTON MILLS et al. v. CITIZENS' & SOUTHERN BANK.
(No. 1860.)

(Supreme Court of Georgia. March 5, 1921.)

(Syllabus by Editorial Staff.)

1. Mortgages \S 298(3)—Receipt of less than is due under insurance policy does not prevent sale under power from passing title.

The receipt by a mortgagee of a less amount than was due on the mortgage under an insurance policy payable to it as its interest might appear did not destroy the vitality of a power of sale in the mortgage, or prevent a sale under the power from passing legal title to the mortgagee, which purchased at the sale.

2. Mortgages \S 544(1) — Right of creditor to have amount of insurance policy compromised by mortgagee applied on mortgage must be set up in pleadings.

Where a mortgagee, holding as collateral security an insurance policy payable to it as its interest might appear, compromised a claim against the insurer and sold the premises under a power of sale, becoming the purchaser, and a creditor sold the same premises under execution, if the creditor, in a suit against it for possession of the premises, was entitled to have the full amount of the policy applied on the mortgage, pleadings setting up the facts entitling it to such equitable remedy should have been filed, and a mere oral statement of counsel could not take the place of proper pleadings.

Error from Superior Court, Laurens County; E. D. Graham, Judge.

Action by the Citizens' & Southern Bank, trustee, against the Eastman Cotton Mills and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. M. Clements, of Eastman, Burch & Daley, of Dublin, and Jno. R. L. Smith and Grady C. Harris, both of Macon, for plaintiffs in error.

Adams & Adams, of Savannah, and J. S. Adams, of Dublin, for defendant in error.

HILL, J. The Citizens' & Southern Bank was the holder, as trustee, of certain bonds amounting in the aggregate to \$85,000, which had been issued by the Oconee River Mills, a manufacturing corporation. A policy of fire insurance was issued to the Oconee River Mills, which was deposited with the trustee as collateral and made payable as its interest might appear. The Oconee River Mills

subsequently became insolvent, ceased to operate, and vacated the premises for a space of time that was in violation of a clause that was in the insurance policy, which provided that the policy should be void "if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days." The buildings constituting the manufacturing plant, the property insured, were destroyed by fire. The trustee brought suit against the insurance company on the policy referred to, the insured being a joint plaintiff with the trustee. Pending the suit the trustee made a settlement with the insurance company in the nature of a compromise of the claim for an amount less than the amount of the policy and less than the debt represented by the bonds; and the case was dismissed by the plaintiffs' attorneys. Then, in the exercise of the power of sale contained in the mortgage executed by the Oconee River Mills to secure the payment of the bonds, the trustee brought to sale the land upon which the manufacturing establishment had stood, conformably to the provisions of the power of sale, and became the purchaser at the sale, as it was expressly authorized in the mortgage to do, a deed being duly executed conveying the property to it as purchaser. Subsequently to the sale the Eastman Cotton Mills, a creditor of the Oconee River Mills, brought suit upon a claim against the latter, reduced the same to judgment, and had an execution issued on this judgment, which was levied upon the lot of land upon which the mill had formerly stood, and that lot was sold under the execution, the plaintiff in *fi. fa.* being the purchaser at the same, and receiving a sheriff's deed duly executed. The purchaser at the execution sale went into possession of the property. The present suit, complaint for land, was instituted by the Citizens' & Southern Bank as trustee, the grantee in the first conveyance referred to, against the Eastman Cotton Mills. The defendant filed a plea and an answer, general in its nature, asserting that it had title to the land, and that the plaintiff did not have such title. During the trial counsel for the defendant made a statement to the court, setting up in substance the facts in regard to the pledge of the policy, the compromise, the fact that the policy was greater in amount than the aggregate amount due on the bonds, and their contention that this amounted to a payment of the mortgage given to secure the bonds, that the mortgage therefore was paid off and discharged, that the power of sale was no longer of force, and that the sale to the plaintiff was inoperative and no title was passed thereunder, although the deed referred to was executed. After hearing this statement and the evidence that

was introduced, the court directed a verdict for the plaintiff.

[1, 2] A verdict for the plaintiff was demanded under the facts submitted to the court, and therefore the court properly so directed. The receipt by the bank of a less amount than the amount of the mortgage was not in law a payment and discharge of the mortgage; it left a balance still due, and therefore the vitality of the power of sale was not destroyed, and a sale held under the power conformably to its provisions passed legal title to the bank; and the only question involved under the pleadings in this case was whether the plaintiff had legal title, its deed being older than the defendant's deed; and, that being true, a verdict in its favor necessarily followed under the pleadings and the evidence submitted to support them. If, upon the application of equitable principles to the facts of the case, the defendant desired and was entitled to have the full amount of the policy applied to the mortgage held by the trustee, pleadings setting up the facts entitling it to this equitable remedy should have been filed, and the power of the court to make the application thereby invoked. The mere oral statement of counsel of their insistence could not take the place of proper pleadings.

Judgment affirmed.

All the Justices concur, ATKINSON, J., specially.

(151 Ga. 328)

THOMPSON v. STATE. (No. 2189.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 1206(4)—Statute providing for punishment of felonies as misdemeanors not repealed by Indeterminate Sentence Law.

The Indeterminate Sentence Act did not repeal Pen. Code 1910, \S 1062, providing that on recommendation of the jury approved by the presiding judge the punishment for a felony other than those enumerated therein shall be as provided for misdemeanors.

2. Criminal law \S 797—Failure to charge that jury could recommend punishment as for misdemeanor held error.

On a trial for assault with intent to murder, the failure to charge that in case of conviction, the jury could recommend, if they saw fit, that defendant be punished as for a misdemeanor, was error.

Certiorari from Court of Appeals.

Lewis Thompson was convicted of assault with intent to murder, and the conviction was affirmed by the Court of Appeals (103 S. E. 731), and he brings certiorari. Reversed.

Richard B. Russell and H. H. Chandler, both of Atlanta, and J. P. Brooke, of Alpharetta, for plaintiff in error.

Jno. T. Dorsey, Sol. Gen., of Marietta, for the State.

FISH, C. J. [1] 1. The Indeterminate Sentence Act (Acts 1919, p. 387) did not repeal section 1062 of the Penal Code of 1910, which provides that on the recommendation of the jury trying the case, when such recommendation is approved by the presiding judge, the punishment of a felony other than one of those enumerated in such section shall be as provided for misdemeanors.

[2] 2. It was error requiring the grant of a new trial for the court to fail to charge the jury, on the trial of one charged with the offense of assault with intent to murder, that in the event of conviction they could recommend, if they saw fit, that the defendant be punished as for a misdemeanor. *Moore v. State*, 150 Ga. 679, 104 S. E. 907.

3. Applying these rulings to one of the grounds of the motion for new trial, the Court of Appeals erred in sustaining the judgment of the trial court refusing a new trial.

Judgment reversed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 330)

MIMS v. MIMS. (No. 2223.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error ⇐303—Authentication of grounds of motion for new trial should be unconditional.

Special grounds of a motion for a new trial, complaining of recited charges, should be approved or disapproved by the judge, and not approved in a conditional manner, requiring the Supreme Court to examine the entire charge, to ascertain whether the charges set out in the motion are correctly stated.

2. Appeal and error ⇐303—Approval of grounds of motion for new trial with explanatory note held disapproval, preventing consideration.

The trial judge's approval of the grounds of a motion for a new trial, with an explanatory note, referring to the brief of the evidence and the charge for the evidence and charges, was not an approval without qualification, but amounted to a disapproval, preventing the Supreme Court from passing on grounds of the motion dependent on the evidence and charges.

3. Appeal and error ⇐303—Act regarding sufficiency of approval of grounds of motion for new trial held inapplicable to conditional approval, amounting to disapproval.

Act Aug. 21, 1911 (Acts 1911, p. 150) § 8, providing that, when the judge has passed on the merits of a motion for a new trial and no question has been raised as to the sufficiency

of the approval of the grounds of such motion, no such question shall be entertained by the reviewing court, did not apply, where the court approved the grounds with a qualification which amounted to a disapproval.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between Abble L. Mims and S. G. Mims. Judgment for the latter, and the former brings error. Affirmed.

Jno. H. Hudson and James & Bedgood, all of Atlanta, for plaintiff in error.

Branch & Howard, of Atlanta, for defendant in error.

HILL, J. [1] Where the special grounds of a motion for new trial complain of certain recited charges of the court to the jury, it is the duty of the judges either to approve or to disapprove these grounds, and not to approve them in a conditional manner, so as to require the Supreme Court to examine the entire charge to ascertain whether the charges set out in the grounds of the motion are correctly stated or not. *Landrum v. Landrum*, 145 Ga. 307, 89 S. E. 201; *Louisville & Nashville R. Co. v. Ogles*, 146 Ga. 20, 90 S. E. 476; *McLean v. Mann*, 148 Ga. 114, 95 S. E. 985.

[2] (a) Where the trial judge approved the grounds of the motion for new trial in the following language:

"The recitals of the facts, contained in the above and foregoing motion for new trial and the amendments thereto, as modified by the court, are hereby approved as true and correct"

—and where, on the motion, the judge entered explanatory notes as follows: "As to what the evidence was, see brief of evidence," and as to what the charge was "reference is made to charge of the court," such approval was not unconditional, and under the rule laid down above the court did not approve the amended grounds of the motion for new trial as correct without qualification, but such action on the part of the judge amounted to a disapproval of the grounds as stated, leaving it to the Supreme Court, by comparing the evidence stated in the motion with the brief of the evidence, and the charges set out in the motion with the general charge, to ascertain whether such grounds contained correct excerpts from the brief of evidence and the charge of the court, and under such an entry this court cannot undertake to pass upon the grounds of the motion dependent upon such alleged evidence and charges.

[3] (b) This character of entry does not fall within section 3 of the act of August 21, 1911 (Acts 1911, p. 149). Here there was not a mere failure to approve the grounds of the motion, as provided for in the act of 1911, but an entry which amounted to a disapproval.

al of them as set out in the motion for new trial. *Landrum v. Landrum*, supra.

2. While the evidence was conflicting and somewhat uncertain, it cannot be held that the verdict was without evidence to support it.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 313)

FLOYD COUNTY v. SALMON. (No. 1985.)
(Supreme Court of Georgia. March 5, 1921.)

(Syllabus by the Court.)

1. Statutes \S 250—Taxation \S 549(4)—Effective from date of passage when so provided; tax receivers entitled to compensation at increased rate from passage of act of 1918.

The act of the General Assembly, approved August 17, 1918 (Acts 1918, p. 110), amending section 1202 of the Civil Code of 1910, relating to the compensation of tax receivers in this state, went into effect from and after the date of its passage, and "from and after that date" (for so much of the year as remained) receivers were entitled to compensation at the rate fixed by the act.

(Additional Syllabus by Editorial Staff.)

2. Statutes \S 255—Becomes effective from approval, etc., unless otherwise provided by Constitution or statute.

As a general rule, in the absence of constitutional or general statutory provision governing the matter, or a provision to the contrary in the statute itself, a statute becomes effective on the day of its approval by the Governor, or of its passage over his veto, or by his nonaction within the time specified for the return of the bill.

3. Statutes \S 250—May prescribe time of taking effect.

A statute may fix the day or time when it shall take effect.

4. Constitutional law \S 48—Plain language cannot be changed to avoid invalidity.

When an act is capable of two constructions, one making it violative of the Constitution and the other making it consonant therewith, the court must adopt the latter construction; but the mere fact that the plain, positive, and unambiguous language of the act brings it in conflict with the Constitution will not enable the court to declare the legislative meaning to be other than that clearly, concisely, and positively expressed.

5. Statutes \S 190—Unambiguous statute cannot be construed according to supposed intention.

When an act is plain, unambiguous, and positive, and not capable of two constructions, the court is not authorized to construe it according to the supposed intention of the Legislature.

George, J., dissenting in part.

Certiorari from Court of Appeals.

Action by J. Z. Salmon against Floyd County. A judgment for defendant was reversed by the Court of Appeals (24 Ga. App. 796, 102 S. E. 364), and defendant brings certiorari. Affirmed, with directions.

Denny & Wright, of Rome, and Moore & Pomeroy and Joseph H. Ross, all of Atlanta, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

GEORGE, J. [1] Civil Code (1910). \S 1202, provides that—

"The county shall pay the receiver one-half of what the collector gets for collecting the county tax."

By an act of the General Assembly, approved August 17, 1918 (Acts 1918, p. 110), section 1202 of the Civil Code of 1910 was so amended as to be read as follows:

"The county shall pay the receiver the same compensation the collector gets for collecting the county tax."

J. Z. Salmon, tax receiver of Floyd county, claimed as such receiver, for the year 1918, the same compensation allowed the tax collector for collecting the county tax. The county paid him one-half of the compensation allowed the collector for collecting the county taxes, without prejudice to the rights of the receiver to proceed to collect the balance alleged to be due him. Accordingly the receiver filed suit against the county, and alleged that under the act approved August 17, 1918, he was entitled to recover the same compensation allowed the tax collector. To the petition the county filed a general demurrer. The demurrer was sustained, and the receiver sued out a writ of error to the Court of Appeals. That court reversed the judgment of the trial court, and the county brought by certiorari the decision of the Court of Appeals to the Supreme Court for review. The county does not by its demurrer question the constitutionality of the act of 1918, but insists that inasmuch as the duties of the receiver for the year 1918 were performed, or practically performed, prior to the passage and approval of the act, the compensation of the receiver for the year in question is to be governed entirely by the old law as contained in Civil Code, \S 1202, and not by the act approved August 17, 1918.

With respect to the time when statutes are to take effect, the old English rule was that if the act was not directed to operate from any particular time, it took effect from the first day of the session at which it was passed. This legal fiction and this extraordinary application of the doctrine of relation was acted upon by the English courts until the statute of 33 Geo. III, c. 13, which statute declared that laws shall operate from the

time of receiving the royal assent. Sedgwick on Construction of Statutes (2d Ed.) 65.

"Under Constitutions which, by providing in effect that no bill shall become a law until it shall have received the approval of the chief executive or shall have been passed over his refusal to approve, make the executive a necessary constituent of the law-making power, an act becomes a law, not when it is passed by the two houses of the Legislature, but when it is approved by the executive, unless it becomes a law by the lapse of time specified for the return of a bill to the Legislature or by being passed by the Legislature notwithstanding the disapproval of the executive." 25 R. C. L. 797.

Cf. article 5, § 1, par. 16, of the Constitution of this state (Civil Code, § 6485); *Green v. Hall*, 36 Ga. 538; *Epstin v. Levenson*, 79 Ga. 718 (2), 4 S. E. 328.

[2, 3] The general rule followed in the United States is that, in the absence of constitutional or general statutory provision governing the matter, the statute becomes effective on the day of its passage; that is to say, on the day of its approval by the chief executive, or its passage over his veto, or by his nonaction within the time specified in the Constitution for the return of the bill to the Legislature, unless the time for the going into effect of the statute is fixed by the statute itself. It is elementary that the statute itself may fix the day or time when it shall take effect; and it has been held that a statute providing that it shall take effect "from and after" a day named takes effect on the day following the one named. *State v. Roney*, 82 Ohio St. 376, 92 N. E. 486, 19 Ann. Cas. 918. The act approved August 17, 1918, provides "that from and after the passage of this act" section 1202 of the Civil Code (1910) shall read as in the act provided. By its plain terms the act repealed all laws in conflict therewith, and went into effect from and after its passage.

[4, 5] It is contended that this ruling will necessarily invalidate the act, in view of certain constitutional provisions and inhibitions pointed out in the brief of counsel for the county. While we do not concede the soundness of the conclusion, the act is plain, susceptible to but one construction. When an act is capable of two constructions, one making it violative of the Constitution and the other making it consonant therewith, it is the duty of the court to adopt the latter construction. *Park v. Candler*, 113 Ga. 647 (3), 39 S. E. 89. Where the act is plain, unambiguous, and positive, and is not capable of two constructions, the court is not authorized to construe the act according to the supposed intention of the Legislature. Unless adequate grounds are found in the act itself, in its context, or in the absurd consequences and results which would necessarily follow from its literal interpretation, the mere fact that

the plain, positive, and unambiguous language of the act would bring it in conflict with some constitutional provision is not of itself sufficient to enable the court, in the exercise of its proper function, to declare the legislative meaning to be other than that clearly, concisely, and positively expressed in the act. We are of the opinion that the act went into effect from and after its passage. The Court of Appeals, therefore, correctly held that the petition was not subject to general demurrer.

Whether the receiver's compensation is to be apportioned, that is, whether he is to be paid for his services at the rate fixed in the old law up to August 17, 1918, and at the rate provided in the act approved August 17, 1918, thereafter to the end of the year (and for subsequent years), is not expressly dealt with by the act. The time when compensation is to be paid to tax receivers or collectors is not fixed by statute. As matter of common knowledge, receivers and collectors are paid in the fall of the year after the taxes are due and collected. The tax collector receives for his services commissions, as provided in Civil Code, § 1234. The majority of the court are of the opinion that while the compensation of the collector is not in a strict sense salary, it is analogous to salary. The view of the majority of the court is that the standard by which the compensation is to be measured is, since the passage of the act of 1918, the full amount paid the collector; prior to the passage of that act, one-half of the amount paid the collector; and that the plaintiff in this case is entitled to be paid for his services at the rate fixed in the old law until August 17, 1918, and at the rate provided in the act thereafter to the end of the year. In support of this view, it is suggested that both under the old law and under the act of 1918 the receiver is compensated for his entire services; that his services for 1918 had not been fully performed by August 17, 1918, the date of the approval of the act; and that, since the receiver is entitled to no specific part of his compensation for any particular service, there is no legal difficulty in apportioning the compensation of the receiver for the year 1918, treating the compensation to be paid him in the nature of salary for his entire services for the year. In this view the writer does not concur, but is of the opinion that the act, the validity of which has not been challenged, should be given literal application, for the reasons stated in the opinion.

Judgment affirmed, with direction.

All the Justices concur except

GEORGE, J., who dissents from the ruling that the compensation of the tax receiver for the year 1918 should be apportioned, as ruled by the majority.

(151 Ga. 256)

RAILROAD COMMISSION OF GEORGIA v. MACON RY. & LIGHT CO. (No. 2033.)

(Supreme Court of Georgia. March 4, 1921.)

(Syllabus by the Court.)

1. Street railroads — 66 — Railroad Commission cannot determine right to abandon part of line.

The Railroad Commission of Georgia has no express or implied statutory power to determine whether a chartered street railroad company may entirely discontinue or abandon service upon a line, or part thereof, voluntarily constructed by it and devoted to the public use.

(Additional Syllabus by Editorial Staff.)

2. Evidence — 22(1) — Judicial notice taken that street railroad was chartered by secretary of state and subsequently changed name.

Under Civ. Code 1910, § 5734, relative to judicial notice, the court takes cognizance that the Macon Consolidated Street Railroad Company was originally chartered by the secretary of state, and that its name was subsequently changed to the Macon Railway & Light Company.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Mandamus by the Macon Railway & Light Company against the Railroad Commission of Georgia. Judgment granting the writ, and defendant brings error. Reversed.

James K. Hines, of Atlanta (Hall, Grice & Bloch, of Macon, representing parties at interest, not parties to the record), for plaintiff in error.

John R. L. Smith, Grady C. Harris, and Wallace Miller, all of Macon, for defendant in error.

GEORGE, J. [1] The Macon Railway & Light Company filed its petition with the Railroad Commission of Georgia, "asking permission to abandon service on the Rivoll extension, between Lundy Road and the end of the line." From its petition it appears that the extension "was placed in service in September, 1912, and consists of 1.87 miles of single track, extending from Lundy Road, which is a point 4.04 miles from the center of the city of Macon and 1.9 miles from the nearest point of the city of Macon to the end of the line." The reasons upon which the company based its application were fully set forth in the petition. The company prayed that the Commission take jurisdiction of the matter, and, after final hearing, that the company be granted "the privilege of suspending service on this line." The Commission held that it was without jurisdiction in the premises, and the company applied for a mandamus to compel the Commission to exercise its jurisdiction, to hear evidence on the merits of the application, and to determine

whether or not the applicant should be allowed to discontinue service on said extension as prayed. The mandamus was granted, and the Commission excepted.

[2] The court will take cognizance that the Macon Consolidated Street Railroad Company was originally chartered by the secretary of state. Its name was subsequently changed to the Macon Railway & Light Company. Civil Code (1910) § 5734; Atlanta, etc., R. Co. v. A., B. & A. R. Co., 124 Ga. 125, 52 S. E. 320. The question is whether the Railroad Commission of Georgia has jurisdiction to permit a street railroad company chartered by the secretary of state to discontinue service upon a line voluntarily constructed by it and devoted to the public use. The powers of the Commission are defined by our statutes. It is conceded that the power to permit a chartered street railroad company to abandon altogether its duties to the public is not expressly conferred upon the Railroad Commission. Coming directly to the question presented by this record, it is also conceded that the power to permit a chartered street railroad company to abandon or discontinue service to the public on a particular portion or part of its line is not expressly conferred upon the Commission. Our statute provides that—

"The Railroad Commission shall have and exercise all the power and authority heretofore conferred upon it by law, and shall have the general supervision of all common carriers, * * * street railroads * * * within this state, * * * and * * * is authorized * * * to require all common carriers and other public service companies under their supervision to establish and maintain such public service and facilities as may be reasonable and just, either by general rules or by special orders in particular cases." Civil Code (1910) § 2663; Ga. Laws 1907, p. 75, § 6.

The street railway company contends that the Commission has power to determine whether it is reasonable and just that it should be required to continue service upon the extension named, under given facts and circumstances, and taking into consideration the extent to which the particular extension is used by the public, the purpose for which it is used, the loss it entails upon the company, the extent to which that loss impairs the efficiency of more useful portions of the system, and all matters relevant to the general question; that the power of "general supervision" of the company, and the power "to require" the company under supervision "to maintain such public service and facilities as may be reasonable and just," not merely imply, but include, the power to determine what is reasonable and just and the power to not require such as is not reasonable and just; and that the Commission has power to grant the privilege of suspending

service on the particular extension permanently or for the present, if it concludes that reason and justice to the company and the public do not require the operation of it. It is argued that the Commission has authority to determine what service is just and reasonable, and therefore to determine that a particular service is not just and not reasonable. It is to be noted, however, that the company does not seek merely to have it determined whether the service on the particular extension is just and reasonable, but it seeks the sanction of the Commission to the discontinuance or abandonment of the particular extension.

In the view we take of the matter, the question involves the power and jurisdiction of the Commission to determine the extent of the legal obligation resting upon the company under its charter. Since the Commission has no express power under our statutes to permit the abandonment of service upon a particular line voluntarily constructed by it and devoted to the use of the public, the power to permit such abandonment cannot be implied. The implied powers of the Commission are such as are reasonably necessary to execute the powers expressly conferred upon it. It may be true that the power of the Commission (if such power be conceded) to permit the company to abandon service upon a particular line, or portion thereof, cannot be held to confer the power upon the Commission to permit the company to abandon all service and the discharge of all duties to the public, if the rendering of such service becomes unreasonable and unjust. But where can the line be drawn? The power to permit a street railroad company to discontinue or abandon service upon a particular line, or upon a particular part of its system, is so extraordinary as to preclude the idea that the General Assembly would have left such power to implication merely. It is more reasonable to assume that the General Assembly would have given such power in express terms.

The power of the Commission to reduce service and facilities, short of actual suspension of all service, cannot be questioned; but, as we have indicated, the power to reduce service and facilities is quite different from the power to determine the extent of the legal obligation resting upon the company under its charter. The distinction must be borne in mind, although the Commission is asked to permit the discontinuance or abandonment of service upon ever so short a portion of its system. While the Commission has power, under our statute (Civil Code 1910, § 2664), to permit a carrier to remove spur tracks and side tracks, it must not be left out of view that the maintenance of a particular spur track or side track is merely one of the incidents of service, and that the

power to dispense with one incident of service merely does not imply or include the power to discontinue the whole, even on a portion of the carrier's line.

The conclusion here reached is in harmony with the ruling of the New York Public Service Commission (1st Dist.) in *Re Long Island R. Co.*, P. U. R. 1919E, 275. See, also, *In re Lake Erie, etc., Ry. Co.* (Ohio Pub. Util. Com.) P. U. R. 1916F, 553, and *In re Eastern Wisconsin Elec. Co.* (Wis. Com.) P. U. R. 1918E, 748. It is conceded that the foregoing rulings were based upon facts different from the facts here involved. It is also true that a majority of the Commissions of other states have held that the power of general supervision and the power to regulate service necessarily include and imply the power to permit public utilities to abandon service. The same has been held by the courts of last resort in some of the states. See *Railroad Commission v. Kansas City So. R. Co.*, 111 La. 139, 35 South. 487; *State ex rel. Tate v. Brooks-Scanlon Co.*, 143 La. 539, 78 South. 847; *Brooks-Scanlon Co. v. Railroad Commission*, 144 La. 1086, 81 South. 727; *People ex rel. Hubbard v. Colorado Title & Trust Co.*, 65 Colo. 472, 178 Pac. 6, P. U. R. 1919A, 542; *In re Tremont & Gulf Ry. Co.* (La. Com.) P. U. R. 1915A, 457; *Culver v. St. Joseph, etc., Ry. Co.* (Mo. Com.) P. U. R. 1917B, 542; *In re Parkville Oil & Gas Co.* (Mo. Com.) P. U. R. 1919A, 502; *Oswayo Chemical Co. v. N. Y., etc., Ry. Co.* (Pa. Com.) P. U. R. 1919C, 690; *Caster v. Kansas Postal-Telegraph Co.*, 96 Kan. 298, 150 Pac. 544, P. U. R. 1915E, 222; *In re Tidewater, etc., R. Co.* (Va. Com.) P. U. R. 1917E, 793; *In re Belt Line Ry. Corporation* (N. Y. Com.) P. U. R. 1919D, 56 (express power as to street railroads conferred by statute); *In re Grand River Gas Co.* (Okl. Com.) P. U. R. 1917C, 1032, 1044; *In re Emigration Canyon R. Co.* (Utah Com.) P. U. R. 1917F, 464.

Other Commissions have acted upon the assumption of power in this particular, the question not being expressly raised. See *In re Fairview Transportation Co.* (Ill. Com.) P. U. R. 1917E, 44; *In re Chicago, etc., Ry. Co.* (Minn. Com.) P. U. R. 1919B, 704; *In re Exeter, etc., Ry.* (N. H. Com.) P. U. R. 1919B, 251; *In re Sandpoint, etc., R. Co.* (Idaho Com.) P. U. R. 1916F, 1077; *Smith v. Atlantic So. R. Co.* (Iowa Com.) P. U. R. 1915F, 125; *In re Charleston, etc., Co.* (W. Va. Com.) P. U. R. 1916F, 338; *Day v. Tacoma Ry., etc., Co.* (Wash. Com.) P. U. R. 1915C, 593; *In re Coburn Steamboat Co.* (Me. Com.) P. U. R. 1915C, 71.

In view of what we have said, however, it follows that the court erred in making the mandamus absolute.

Judgment reversed.

All the Justices concur.

(151 Ga. 227)

WILLIAMS et al. v. MITCHEM.**MITCHEM v. WILLIAMS.**

(No. 2053.)

(Supreme Court of Georgia. March 3, 1921.)

(Syllabus by the Court.)

1. Pleading \S 204(2)—Petition held to state cause of action as to crop already harvested.

The petition in an action of trover, instituted to recover possession of "one bale of cotton in seed, gathered," and other "crops not gathered," set forth a cause of action for recovery of the bale of cotton, and was not subject to the general demurrer, which was directed against the petition in its entirety.

2. Landlord and tenant \S 323, 326(5, 6)—Cropper converts crop by selling and applying proceeds to his own use; contract held to create relation of "landlord and cropper."

It is a conversion for a "cropper," as defined in the Civ. Code 1910, \S 3707, without consent of the landlord, to gather and sell a part of the crop and apply the proceeds to his own use. The contract between the plaintiff and defendant created the relation of "landlord and cropper," as defined in section 3707.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Landlord and Cropper.]

3. Landlord and tenant \S 331(3) — Nonsuit improper when evidence authorizes recovery of one bale of cotton though other crops ungathered.

The evidence was sufficient to authorize a verdict for the plaintiff for recovery of one bale of cotton, and it was erroneous to grant a nonsuit.

4. Replevin \S 4—Will not lie by landlord to recover possession of unharvested crops from cropper; "personalty."

Agricultural crops raised by a "cropper" do not become personalty until they are detached from the soil; and the owner of the land cannot employ the remedy provided in the Civ. Code 1910, \S 4483, generally applicable for the recovery of the possession of personalty, for the purpose of recovering from the "cropper" possession of the crops raised by him, while they remain attached to the soil.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

5. Assignments not passed on.

It is unnecessary to rule upon certain assignments of error on the admission of evidence, as the same questions will not likely arise on a further trial of the case.

6. Bonds \S 35 — Replevin \S 126 — Summary judgment on bond not authorized when part of property was realty; bond held good as common law bond; "statutory bond."

A suit was brought by a landlord against his "cropper," to recover possession of crops raised by the latter, some part of which had been converted into personalty and the balance

remained attached to the soil; in connection with such suit the plaintiff made and filed an affidavit as to the value of all the property, etc., for the purpose of requiring bail under the provisions of the Civ. Code 1910, \S 5150; the defendant refused to execute bond; the plaintiff, in order to obtain possession of the property, executed a bond payable to the defendant in double the value of all the property, for the forthcoming of such personalty and realty to answer the judgment or decree that may be rendered in the case, and upon execution of such bond received possession of all of the property sued for. *Held*, that such bond so executed by the plaintiff was not a statutory bond, within the meaning of the Civil Code 1910, \S 5150-5152, upon which the judge could summarily enter a judgment for the defendant against the principal and sureties named in the bond, on nonsuit or dismissal of the case.

(a) The bond is a sufficient common-law bond, upon which a separate action could be instituted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Statutory Bond.]

George, J., dissenting in part.

Certiorari from Court of Appeals.

Action by T. J. Williams and another against C. E. Mitchem. A judgment for defendant was affirmed by the Court of Appeals (102 S. E. 870), and plaintiffs bring certiorari. Reversed.

On August 30, 1918, T. J. Williams and Y. D. McCollum instituted an action against C. E. Mitchem in the city court of Morgan, Calhoun county. The petition alleged:

That the defendant was in possession of "all of the crops of cotton, cotton seed, corn and fodder, peanuts, grown during the year 1918" on a described plantation, "there being (30) thirty bales of cotton, mature, in the field ungathered, and one bale of cotton in seed, gathered, (4,000) four thousand bushels of peanuts, in the field ungathered, but mature and ripe for gathering, and (1,500) fifteen hundred bushels of corn, and all fodder in stacks, mature, standing in field ungathered, * * * and said property being of the aggregate value of (\$10,000) ten thousand dollars." That the said defendant refuses to deliver the above-described property to petitioner or to pay them the profits thereof, though petitioners have made such demand for same upon him. That the yearly value of said property is \$2,000. Wherefore petitioners pray that process may issue," etc.

The petition was subsequently amended by alleging that "petitioners claim title to said property," and by inserting in paragraph 2 of the petition the words "more or less" following the words "30 bales of cotton" and "4,000 bushels of peanuts" and "1,500 bushels of corn," as employed in that paragraph.

On the day the petition was filed, one of the plaintiffs made an affidavit before the

clerk of the court, in which, among other things, it was said that plaintiffs had instituted the suit above mentioned to recover the property. The property was described in the same language as above set forth in the petition. After describing the property it was said:

"That deponent has reason to apprehend that said property will be eloiigned and moved away and will not be forthcoming to answer the judgment that may be made in said case, and said property is in the possession, custody of defendant, O. M. Mitchem, and that said firm does verily and bona fide claim said described property."

On September 2, 1918, the plaintiffs as principals and named persons as sureties executed a bond payable to the defendant in the sum of \$20,000. The property was described in the bond by the same language as employed in the petition. It was stated in the bond that the plaintiffs had instituted the suit above mentioned; that plaintiffs had "required bail" of the defendant; that the sheriff had seized the property; that defendant had failed to give the bond "required by law in such cases provided"; and that plaintiffs desired to take the property in their possession. The condition of the bond was that should the plaintiffs "produce or cause to be produced and forthcoming the said property to answer the judgment that may be entered in said case, and shall well and truly pay the condemnation money, whatever it may be, then this bond to be void."

The defendant filed a general demurrer to the petition at the first term, which being overruled he filed exceptions pendente lite, which were allowed. The defendant also filed an answer admitting possession of the property, but alleging that it was of the value of \$20,000, and that the title and right of possession of the property was in himself. The answer was amended at the trial term by alleging, among other things, the following in substance: "that on or about" February 23, 1918, the defendant undertook to purchase from the plaintiffs the plantation on which the crops were produced, which was then in possession of "one C. A. Sauls" under a contract of employment with the plaintiffs, the terms of which were unknown to defendant, but, being unable to agree on terms of "an immediate purchase and sale," plaintiffs as parties of the first part and defendant as party of the second part entered into a written contract, which omitting formal parts was as follows:

"Witnesseth that the parties of the first part hereby agree to rent, for the year 1918, that certain farm of 1,325 acres, more or less, in the Third land district of Calhoun county, Georgia, known as the Daniel home place, to the party of the second part, on a share-crop basis, that is, the said second party is to farm and operate said place, raising the usual crops suitable to the land, one-half of which is to be

paid to the parties of the first part as rental of land, which the second party agrees to do. Parties of the first part agree to furnish the second party the farm implements necessary to make the crop, now on said place, also the live stock with which to work the farm, as now on said place, or such substitution of the same as may be agreed upon, and further agree to furnish feed for the stock. It is further agreed that the second party is to care for the stock and land to the very best advantage, watching the interest of the first parties at all times; and the parties of the first part further agree that they will sell and convey the said farm to the second party for a consideration of \$36,000.00, provided said option of purchase is exercised on or before November 1, 1918; and in the event the second party should make purchase and pay said sum, then in that event only the first parties waive the payment to them of any rent or share of crop for the year 1918. It is also understood and agreed that second party is to make satisfactory agreement and trade with the party now on said farm, without cost or expense to first parties, before this contract is of any value and effect, as first parties are not to be responsible to second party hereto unless he first trades with the party now in possession for the occupancy of said farm for the year 1918."

After execution of the contract defendant made an arrangement with C. A. Sauls, whereby Sauls relinquished possession of the place to the defendant, and he immediately entered possession under the written contract with the plaintiffs. Defendant employed labor to put the lands in cultivation and to put in operation a "13-horse farm" on the place, in the course of which he rented "a 2-horse crop" to one Sam Favors, and employed "5 share-croppers to work 6 plows," and operated "5 plows with wages-hands." Under the terms of the contract the plaintiffs did not retain title to the crops, and the "relation of landlord and cropper" did not exist between plaintiffs and defendant, and plaintiffs had no title or right of possession of the crops, but the same was in defendant and his only obligation as to rental was to pay the plaintiffs one-half of the crops grown on the place for the year 1918, in the event that he did not exercise his option to purchase the place.

At the trial the plaintiffs offered an amendment to the so-called replevy bond, so as to add the words "more or less" immediately following the words "30 bales of cotton" and "4,000 bushels of peanuts" and the words "1,500 bushels of corn," as contained in the original bond. The amendment was disallowed, and the plaintiffs excepted.

The plaintiffs introduced testimony in substance as follows: Having recently purchased the land, they entered into the written contract with the defendant as copied above, furnished him all the things enumerated, and in addition furnished him "guano" with which to make the crop and money to meet the monthly pay rolls to his hands for labor,

amounting in all to about \$1,944.50. Defendant was to pay for half the guano. He employed all the labor that he used in operating the place. He had supervision of the entire place. Plaintiffs had nothing to do with the hiring or managing the labor "nor with the planting of crops, what kind, when or how much." Defendant did not pay for any of the supplies furnished him, and did not exercise the option to buy the place. Shortly before institution of the suit the labor on the place became demoralized, and the crops were about to go to waste. Plaintiffs demanded possession, which demand was refused. The defendant sold one bale of cotton for \$191, and also carried some corn off the place and sold it. Such sale occurred prior to institution of the suit. Practically all other crops were in the field ungathered. The suit was instituted and bail required; and after the defendant's refusal to give bail, plaintiffs made bond and took possession of the crops in order to market them. An agent employed by the plaintiffs harvested and marketed all the crops, keeping an accurate account of all the farm products and their market value. The values amounted to \$5,573.06. In addition to the parol evidence, the plaintiffs introduced the written contract and closed.

At the conclusion of the evidence the judge granted a nonsuit and dismissed the case. Afterward and on the same day the judge summarily entered judgment on the bond as follows:

"The plaintiffs having been nonsuited in the above-stated case, and said case dismissed by order of the court, and it appearing to the court that the property sued for in said case was replevied by the plaintiffs (the defendant having failed to replevy the same) by said plaintiffs giving the within bond and taking possession of said property, and the defendant having elected to take a money judgment for the value of said property instead of a writ of restitution, and it appearing to the court that the plaintiffs have placed a value of \$10,000 on said property by their affidavit to obtain bail, and counsel for defendant having moved the court to be allowed to enter up judgment on said bond against the principals thereon and their sureties for said sum of \$10,000 and interest thereon: It is thereupon considered, ordered, and adjudged by the court that the defendant, O. E. Mitchem, do have and recover of and from Williams & McCollum and T. J. Williams, as principals, and D. A. Smith, K. S. Worthy, G. A. Dozier, and J. M. Clements, as sureties, the sum of \$10,000 principal, with interest thereon from September 2, 1918, at 7 per cent. per annum, and \$—— costs."

The plaintiffs excepted to the judgment of nonsuit, and to the judgment on the bond.

In the bill of exceptions error was assigned on the exceptions pendente lite, relating to rejection of the amendment to the replevy bond, and on certain rulings as to the admissibility of evidence, which have not been

set forth. The defendant filed a cross-bill of exceptions assigning error upon the judgment overruling the demurrer to the petition; also upon the judgment allowing the amendment to the petition; also upon the ruling of the court in permitting witnesses to testify as to the amount and value of the crops produced on the place, over the objection that it was irrelevant. On review in the Court of Appeals the judgment of the trial court was affirmed on the main bill, and the cross-bill of exceptions was dismissed. 102 S. E. 870. The case is here for decision upon writ of certiorari to the judgment of the Court of Appeals, on the main bill of exceptions.

R. R. Jones, of Dawson, Pottle & Hofmayer, of Albany, and C. J. Taylor, of Valdosta, for plaintiffs in error.

B. W. Fortson, or Arlington, for defendant in error.

ATKINSON, J. [1] 1. The petition as amended alleged that the defendant was in possession of described property of stated value, to which the plaintiffs in good faith claimed title; and that he refused to surrender such possession on demand by plaintiffs. Included among the several properties so described in the petition was "one bale of cotton in seed, gathered." This part of the property was personality; and relatively to that, the petition set forth a cause of action under the Civil Code, § 4483, which declares:

"In actions to recover the possession of chattels, an alternative verdict in damages to be discharged on delivery of the property may be taken; but it shall not be necessary to prove any conversion of the property where the defendant is in possession when the action is brought."

It was not erroneous to overrule the general demurrer, which was addressed to the petition in its entirety, and merely complained that the petition "sets forth no cause of action," that "the allegations of the petition are not sufficient to support a recovery of the property sued for by the plaintiff," and that "no title or right of title or right of possession of the property sued for is shown in the plaintiff."

[2] 2. The burden was upon the plaintiffs to show title to the property. It is declared in the Civil Code, § 3707:

"Where one is employed to work for part of the crop, the relation of landlord and tenant does not arise. The title to the crop, subject to the interest of the cropper therein, and the possession of the land remain in the owner."

In section 3705 it is declared:

"Whenever the relation of landlord and cropper exists, the title to and right to control and possess the crops grown and raised upon the lands of the landlord by the cropper shall be vested in the landlord until he has received his part of the crops so raised, and is fully paid for all advances made to the cropper in the year said crops were raised to aid in making said crops."

In *Hancock v. Boggus*, 111 Ga. 884, 36 S. E. 970, it is said:

"When it is shown that a landowner entered into a contract with another person, by the terms of which the owner was to furnish the land, stock, tools, and supplies to make a crop, and the other person was to do the work and receive a part of the crop so made, the legal relation which existed between them was that of landlord and cropper."

See, also, *Hackney v. State*, 101 Ga. 512, 516, 517, 28 S. E. 1007.

The contract between the plaintiffs and the defendant is set out in the statement of facts, and need not be repeated. It established the relation between the parties, and, properly construed, created the relation of landlord and cropper, as defined in the Civil Code, § 3707. Such being the relation between the parties, legal title and the right to control and possess all the crops raised on the place by the defendant was vested in the plaintiffs until they received their part of the crops and were fully paid for all advances made to the cropper during the year to aid in making the crops. The defendant, without consent of the owners, could not gather, carry away, and sell a portion of the crop and convert the proceeds to his own use, without being guilty of a wrongful conversion.

[3] 3. The plaintiffs introduced evidence to the effect that of the property described in the petition the defendant carried away and sold one bale of cotton for \$191, before the suit was instituted. This was sufficient basis for a verdict for the plaintiffs, relatively to that part of the property; and it was erroneous to grant a nonsuit and dismiss the entire action.

[4] 4. The greater part of the property sought to be recovered consisted of crops attached to the soil, most of which was mature. The Court of Appeals ruled that such crops were a part of the realty, and therefore that the plaintiffs could not invoke the remedy provided in the Civil Code, § 4483, which applies only to actions for recovery of personality. That ruling is consonant with the decision of this court in the case of *Newton County v. Boyd*, 148 Ga. 761, 98 S. E. 347, where it was held:

"A crop of corn not detached from the soil, whether mature or immature, is a part of the realty, and passes by sale of the land without contractual reservation of the crop. Civil Code, § 3617; *Pitts v. Hendrix*, 6 Ga. 452; *Frost v. Render*, 65 Ga. 15; *Bagley v. Columbus Southern Ry. Co.*, 98 Ga. 626 (25 S. E. 638, 34 L. R. A. 286, 58 Am. St. R. 835). See, also, 8 R. C. L. 360, 871, §§ 6, 16; *Cobb's Law of the Farm*, 13."

As to this part of the property, trover would not lie, but that would not afford ground for nonsuiting the entire action; the plaintiffs having alleged and proved a case

for recovery as to some part of the property, as heretofore indicated.

[5] 5. In the light of the several rulings in the preceding divisions, it is unnecessary to rule on the assignments of error on the admission of evidence. The same questions will not likely arise when the case is returned to the trial court.

[6] 6. Another assignment of error challenges the correctness of the judgment on the bond. The Civil Code, § 5150, declares:

"Where any person who is about to commence an action for the recovery of personal property shall require bail, such person, his agent, or attorney shall make affidavit that the property is in the possession, custody, or control of the defendant, and that he has reason to apprehend that the said personal property has been or will be eloiigned or moved away, or will not be forthcoming to answer the judgment, execution, or decree that shall be made in the case; and shall also state in his affidavit the value of the same, and the amount of hire claimed, if any, and add that he does verily and bona fide claim said personal property, or some valuable interest therein."

Section 5151 declares:

"When such affidavit is made as prescribed in the preceding section, it shall be filed in the clerk's office of the court to which said petition, bill, or other process may be returnable, and a copy thereof affixed to the original petition, or process, and to the copy or copies thereof, and it shall be the duty of the sheriff, or other lawful officer serving such petition or other process, to take a recognizance payable to the plaintiff or complainant, with good security, in double the amount sworn to, for the forthcoming of such personal property to answer such judgment, execution, or decree as may be rendered or issued in the case, and such security shall be bound for the payment of the eventual condemnation money, for which judgment may be signed up against the defendant and said security, and execution had thereon without further proceeding."

In section 5152 it is provided:

"And upon defendant failing to give such security, whether the affidavit be made at the commencement of the suit or pending the same, the property shall be seized and taken by the sheriff or other lawful officer, and delivered over to the plaintiff or complainant, his agent or attorney, upon his entering into like recognizance with security."

These sections are to be construed in connection with section 4483, quoted in the first division, and apply only in actions for the recovery of personality. If the action had been called trover but was for recovery of a tract of land, palpably it would not have been the kind of action contemplated by the statute, and a so-called "forthcoming bond" for the production of the property to answer the judgment of the court would not be a statutory bond, within the meaning of the law. So also, where the action is for recovery both of personality and realty, a forthcoming bond

given for all the property at twice its value is not the bond contemplated by the statute. In the latter case there is no authority of law for bail relatively to the realty. Bond is required by the statute relatively to personality, but in such case the amount of the bond is twice the value of the personality. Where a "forthcoming bond" is given for both realty and personality, the court can no more render a summary judgment under the Civil Code, § 5151, against the principal and sureties on the bond, than it could, in an action of trover under the Civil Code, § 4483, render judgment for recovery of the realty. *Roney v. McCall*, 128 Ga. 249, 57 S. E. 503; *Fitzgerald Band v. Colony Bank*, 115 Ga. 790, 42 S. E. 70. In the case of *Glover v. Gore*, 74 Ga. 680, it appears that an action was instituted to recover certain crops grown on specified land, some of which had been gathered and some was still attached to the soil. The plaintiff sued out bail in trover under the statute which is now in Civil Code, §§ 5151, 5152. The defendants refused to give bail, and thereupon the plaintiff gave bond and took possession of and gathered the crops. The plaintiff having been nonsuited, the court did not, as in the present case, enter summary judgment against the plaintiff and his sureties on the forthcoming bond; but the defendants proceeded with this common-law remedy by separate action on the bond, and were allowed to recover. See *Stephens v. Crawford*, 3 Ga. 499 (3); *Justices v. Ennis*, 5 Ga. 569; *Wall v. Mount*, 121 Ga. 831, 834, 49 S. E. 778, and citations; *Mount v. Wall*, 127 Ga. 211, 56 S. E. 298; *Spooner v. Smith*, 134 Ga. 323, 67 S. E. 813.

It was erroneous for the trial judge, after nonsuiting the plaintiffs, to enter summary judgment against the principals and sureties on the bond, for an amount alleged in the affidavit for bail to be the value of the realty and personality. Should the defendant bring a separate action on the bond on the basis that the principal obtained possession of all the property under the bond, and that it was valid as a common-law bond, the rights and equities of all parties involved in the crops which were taken possession of by the principals named in the bond could be adjusted.

The case differs on its facts from *Marshall v. Livingston*, 77 Ga. 21; *Smith v. Adams*, 79 Ga. 802, 5 S. E. 242; *Lauchheimer v. Jacobs*,

128 Ga. 261 (5), 55 S. E. 55; *Pope v. Scott*, 143 Ga. 275 (2), 84 S. E. 582; *Petty v. Piedmont Fertilizer Co.*, 146 Ga. 149 (2), 90 S. E. 966—in each of which the action was properly brought in trover for the recovery of personality, and the bond given was in compliance with the statute.

The judgment of the Court of Appeals, affirming the judgment of nonsuit and the summary judgment of the trial court on the bond, must be reversed.

Judgment reversed.

All the Justices concur.

GEORGE, J. (concurring specially). Matured crops, ready to be harvested, though standing in the field, when produced by annual cultivation, are no part of the realty. Such crops must, for most civil purposes, be deemed personality. This is a workable rule, and the only workable rule. A distinction is to be observed between the natural growth of the soil, such as trees, grasses and the like, which at common law are parts of the soil, and products the result of annual labor of man in sowing and reaping, planting and gathering. In my opinion, therefore, the plaintiffs' petition set forth a cause of action for recovery of the property described therein, and should not have been dismissed on demurrer.

The plaintiffs' petition was for the recovery of the crop as personality. One of them made the affidavit prescribed by statute, to require the defendant to give bail. The defendant having failed to make bond, the plaintiffs executed a bond and took possession of the crops. This court has uniformly held that a party will not be permitted to assert inconsistent positions, and is bound by solemn admissions in *judicio*. In the opinion of the writer, the court is not authorized to afford to the plaintiffs relief against the judgment on the bond on the theory indicated in the sixth division of the decision. But, for the reasons already stated, the plaintiffs were entitled to recover the property sued for, under the allegations of the petition. I therefore concur in the judgment of reversal, but not in the ruling stated in the fourth and sixth headnotes, nor in the reasoning set out in the corresponding divisions of the opinion of the court.

(151 Ga. 106)

CLARKE et al. v. ARMSTRONG et al.
(No. 1890.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by the Court.)

1. Militia \S 3—Members of dissolved military company held not entitled to sue for receivership and distribution of property.

Certain persons, claiming that they were members of an incorporated military company, which had no capital stock and which was not a commercial, trading, or ordinary business corporation, brought an equitable petition, alleging that the corporation had been virtually dissolved as the result of national and state legislation, and that petitioners were members of the corporation at the time of its dissolution. They charged that certain persons, acting as trustees of the corporation, were mismanaging the property, and there was danger of loss of the same, and prayed for injunctive relief and the appointment of a receiver to take charge of the property, and that the property be sold and the proceeds distributed among petitioners and those who were members at the time of the dissolution of the corporation. *Held:*

The petitioners showed no such interest in the property involved in the controversy as authorized them to maintain the action.

2. Militia \S 3—Statute providing for receivership and distribution of assets of dissolved corporation inapplicable to military company.

The provisions of section 2245 of the Civil Code of 1910, relating to the disposition of the assets of a corporation which has been dissolved, do not apply to the disposition of the property of a corporation like the one involved in this controversy, it being a corporation for the accomplishment of certain public purposes, and not a trading or commercial corporation, where subscriptions for stock are required of its members and certificates of stock are issued.

(Additional Syllabus by Editorial Staff.)

3. Corporations \S 629—"Equal" distribution of assets to stockholders on dissolution means equality of right proportionate to stock held by members.

The word "equal" as used in Civ. Code 1910, \S 2245, providing that upon dissolution of a corporation all of the property and assets shall, after payment of debts, constitute a fund for equal distribution among its members, implies not absolute equality of amount, but equality of right entitling each member to an amount payable from the proceeds of the assets of the corporation proportionate to his interest in the corporation's property or to the amount of the shares of stock held by each member.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Equal.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Suit by F. P. Armstrong and others against P. F. Clarke and others. Demurrers to the

petition were overruled, and defendants bring error. Reversed.

Armstrong and others brought a petition against Clarke and others, in which, with the amendments, the following facts were alleged: In the year 1859 the Georgia Legislature incorporated the Gate City Guard, the title of the act (Acts 1859, p. 382) being, "An act to incorporate the Gate City Guards of Atlanta, and to grant certain immunities and privileges to the members of same," and the named incorporators and their successors were given all the corporate powers deemed necessary for the purposes of a volunteer infantry corps. The number of men composing the corps should never exceed 80 privates, exclusive of commissioned and noncommissioned officers. The officers were to be a president and a secretary; the commanding officer being by virtue of his office the president. The immunities and privileges granted to the members and officers were to continue no longer than during membership in the corps. This charter was accepted, and the persons named in it organized under it and continued their organization until they entered the service of the Confederate government in the war between the states. In 1881, when this military corps, the Gate City Guard, began to acquire property, certain of its members applied to the superior court for a charter, which was in that year granted, incorporating the applicants as "the board of trustees of the Gate City Guard." The object of this corporation was to hold and manage the property and funds belonging to the Gate City Guard. This last-named corporation was to have no shares or paid-in capital. The trustees were to serve for the term and in the manner provided for by the constitution and by-laws of the Gate City Guard. The petitioners prayed that they be incorporated for 20 years, with the privilege of renewal. The order to incorporate recited that it appeared that a petition had been filed by certain named individuals for themselves and successors, asking to be incorporated for the purposes above stated, and that the same was in accordance with the requirements of law; and it was ordered that they be incorporated as prayed. Certain valuable real estate belonging to the Gate City Guard was accordingly conveyed to this trustee corporation. Debts having accumulated, a sale of certain property in the City of Atlanta was necessitated. The proceeds of this sale, after paying debts, was invested in other property on Peachtree Street, Atlanta. The charter of the trustee corporation expired by its time limitation in June, 1901. In March, 1902, J. F. O'Neill and certain other persons filed a petition to Fulton superior court, setting forth that in June, 1881, the old charter of the trustee corporation had been granted; that the petitioners were the legal successors of the persons named in the original petition

and order of incorporation; that the original charter had expired in June, 1901; that the board of trustees of the Gate City Guard held the title to valuable property; that petitioners desired to have said charter of the board of trustees, etc., renewed and extended for a period of 20 years from the expiration of said former charter, to wit, June 18, 1901, with certain additions and amendments added. In one paragraph of their petition it was prayed that the trustees should consist of nine members, to wit, the captain, the first and second lieutenants ex officio, and the six other members to be elected at a meeting of the active enlisted members of the Gate City Guard; and it proceeded to set forth the details connected with the election of such trustees by the members of the Gate City Guard. It was further prayed, in another paragraph of the petition, that if the Gate City Guard should at any time disband, the trustees then in office should continue to serve, and preserve and take care of the property in their hands "until the reorganization is effected and recognized by said board of trustees." It was also prayed that the board be granted the power to elect such officers and make such rules for their government as they might see fit, but should not be permitted to sell any of the real property held for the benefit of the Gate City Guard, or invest in other property, without authority so to do by resolution adopted by a majority of the members of the Gate City Guard present at a meeting regularly held. It was further provided that a vote of two-thirds of the members of the Gate City Guard, in which a majority of the trustees concurred, should be had before the trustees could use the corpus of the estate, or incur the same for any purpose; that the board of trustees be given the power to collect the income from the property and hold the same subject to the disposition of the Gate City Guard, "and, upon being demanded by a majority vote of any regular or call meeting of said active company, shall be immediately turned over to said company by said board."

On May 27, 1902, an order was passed by Fulton superior court providing that—

"The charter of the board of trustees of the Gate City Guard, granted by this court on June 18, 1881, is hereby renewed and extended for a period of 20 years from June 18, 1901, the date of the expiration of said former charter, with all the rights, powers, and privileges contained in said former order of incorporation, except as the same may be enlarged, modified, limited, or amended by the provisions of the following application, and such others as are by law incident to corporations of like character, and the persons above named and their successors are incorporated for an additional term of 20 years from June 18, 1901, under the name and style of 'the board of trustees of the Gate City Guard,' with all the rights, powers, and privileges hereinbefore referred to."

After this last order was passed the Gate City Guard held a meeting and passed a resolution authorizing one Harwell, as their commissioner, to execute to the named board of trustees a deed conveying all the property of the company to the trustees; and Harwell executed such deed on June 13, 1902. After this conveyance the board of trustees decided to sell the real estate so conveyed to them by Harwell, and did sell it, and invested the proceeds in two lots on Houston street, Atlanta, which it is alleged is now worth \$100,000. Although the members of the Gate City Guard were not enlisted in the military service of the state for the two years from March, 1893, to some time in 1895, they kept up their organization under their charter, and with the exception of these two years they have been continuously a part of the military forces of the state up to 1916. After the formation of the Fifth Regiment National Guard of Georgia, the company from the Gate City Guard belonged to that regiment and constituted Company L. On June 3, 1916, Congress passed what is known as the National Defense Act (39 Stat. 166). This legislation was adopted by Georgia under the act of August 21, 1916 (Acts 1916, p. 158). Section 61 of the National Defense Act of Congress (U. S. Comp. St. § 3044b) provided:

"No state shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this act: Provided, that nothing contained in this act shall be construed as limiting the rights of the states and territories in the use of the National Guard within their respective borders in time of peace: Provided further, that nothing contained in this act shall prevent the organization and maintenance of state police or constabulary."

The petition alleges that the Gate City Guard was dissolved by this act of Congress.

On August 5, 1917, the Fifth Regiment, which included the members of the Gate City Guard as Company L, was drafted into the service of the United States under the Selective Draft Act of Congress, passed May 18, 1917 (40 Stat. 76). On July 13, 1916, Company L had been mustered into the service of the United States, and saw service on the Mexican border. In the year 1916 the board of trustees authorized Clarke, Harwell, and Silverman to incur the Houston street property, which they did by executing a loan deed for \$21,000. This loan was made largely for the purpose of taking up a pre-existing mortgage of \$10,000, and to enable the trustees to repair and improve the building. Clarke received a commission, it is alleged, of \$2,000 for negotiating this loan. On April 24, 1917, the board of trustees, at the instance of Clarke, passed a resolution authorizing Clarke, Harwell, and Silverman to sell the Houston street property for a sum not less than \$65,000, which power has not yet

been executed. It is alleged that this property is now worth \$100,000, and that Clarke and others will sell it unless restrained.

The petition sets forth that the charter of the first board of trustees was void, because the superior court had no jurisdiction or power to grant such a charter; also that the second charter of the board of trustees was void for the same reason, and also because it purported to be an extension or renewal of the first charter, but was not applied for before the expiration of the first charter. The deed from Harwell, as commissioner, to the board of trustees, was alleged to be unauthorized, because the legislative charter of the Gate City Guard required that all contracts in writing should be signed by the president and countersigned by the secretary. It was alleged that certain of the petitioners were members of Company L of the Fifth Regiment, which Company constituted the members of Gate City Guard, at the date of the act of Congress of June 3, 1916; that certain others of petitioners joined the company later in that month and before it was sent to the Mexican border; and that the rest of petitioners enlisted in the company after its return from Mexico, but before it was drafted into the service of the United States by the act of Congress known as the Selective Draft Act of 1917.

Petitioners prayed that the corporation known as Gate City Guard be decreed to have been dissolved; that an injunction be granted against the defendants to prevent any disposition of the property of the Gate City Guard; that a receiver be appointed; that the assets be converted into money and distributed equally among petitioners; that, in the event the court should decide that the Gate City Guard has not been dissolved, the title to the property be declared and adjudged not to be in the board of trustees, but in the corporation; and that the judgment and decree of the court may declare in whom the title to the property rests. General and special demurrers were filed by defendants on various grounds, among which were that there is no equity in the petition; that plaintiffs have no right to maintain same; that the facts alleged do not show that petitioners have or ever had any such interest in the property as would authorize them to have the same sold and the proceeds divided among them. All demurrers were overruled by the court, and the defendants excepted.

Brewster, Howell & Heyman, W. C. Hendrix and Mark Bolding, all of Atlanta, for plaintiffs in error.

R. B. Arnold, Lowry Arnold, and A. H. Davis, all of Atlanta, for defendants in error.

BECK, P. J. (after stating the facts as above). A reading of the foregoing statement of the substance of the pleadings in this case will disclose the fact that many important questions affecting military com-

panies, both those which have been incorporated and those not incorporated, are involved—questions affecting not only the property rights that may have been acquired by such companies or corporations, but affecting their very existence. But there is one controlling question; and the proper determination of that, under our view of the case as presented, will render the decision of the other questions in the case unnecessary.

[1, 2] The demurrer in the case, upon one ground, raises the point that the petitioners below do not show that they have such an interest in the property involved in the controversy as authorizes them to maintain this suit. The petitioners' general contention is that the act of Congress of June 3, 1916, (39 Stat. 166), called the National Defense Act, had the effect of superseding and destroying the state legislation granting the charter to the Gate City Guard, and that, when the troops composing the guard were drafted into the service of the government, they were thereby discharged from the militia, and the effect was to destroy the state military organization theretofore existing, as the members of that organization who went into the federal service stood thereby discharged from the militia, according to the terms of the act, and that all those who failed to enter the service and take the oath were likewise discharged from the militia by the state government through the Adjutant General, and the effect of this was to leave the organization wholly without members. And they further insist that by no enactment prior to June, 1916, did Congress assume exclusive jurisdiction of organizing, arming, and disciplining the militia and of prescribing the discipline by which the state should train the militia, and never until the act of 1916 did Congress forbid the states from maintaining any other military organizations, and that therefore the Gate City Guard continued to exist up to June 3, 1916, at which time, by the enactment of the law referred to, the Gate City Guard as a military organization was effectively destroyed, and that the property then belonging to it was subject to be distributed according to the law controlling the assets belonging to corporations at the time of their dissolution, and that those members of the Gate City Guard who were members at the time of the dissolution were entitled to have the assets of the corporation divided among themselves equally after the debts of the company were paid. They claim the right to this property under the provisions of the Civil Code, § 2245, as follows:

"Upon the dissolution of a corporation, for any cause, all of the property and assets of every description belonging to the corporation shall constitute a fund, first, for the payment of its debts, and then for equal distribution among its members. To this end the superior court of the county where such corporation was located shall have power to appoint

a receiver, under proper restrictions, properly to administer such assets under its direction."

If the section just quoted did not have the effect of giving to petitioners the right to have the property divided and to participate in a division of the same, then they had no right to maintain this suit. For, if the effect of the act of Congress relatively to the continued existence of the company was as petitioners contend, nevertheless, if upon its dissolution they were not entitled to have the property distributed among those who were members at the time of the termination of the existence of the company, they have no standing in court for any of the purposes sought by their petition. And we do think that section 2245 of the Code, above quoted, is applicable in case of a dissolution of a corporation like the one under consideration here.

[3] The expression "equal distribution among its members" has not the controlling force attributed to it in the argument of counsel for defendants in error, where it is insisted that the provision for "equal" distribution shows conclusively that the statute is applicable to corporations like that involved here; but, as the statute was intended to make provision for the distribution of the assets of corporations generally, where certificates of shares of stock are issued and held by the members of the corporation, the word "equal" must imply, not absolute equality of amount, but equality of right entitling each member to an amount payable from the proceeds of the assets of the corporation proportionate to his interest in the corporation's property or to the amount of the shares of stock held by each member.

From the statement of the facts in the case of *Mason v. Atlanta Fire Co.*, 70 Ga. 604, 48 Am. Rep. 535, it appears that Mrs. Mason filed her bill on behalf of herself and her minor children against the Atlanta Fire Company, alleging, in substance, as follows: in 1850 (Laws 1849-50, p. 183) the company was incorporated by the Legislature under the name of the Fire Company of the City of Atlanta. They were to elect their own officers, who were to be commissioned by the Governor. The members, not exceeding 30 in number, were to be exempt from jury duty, and, except in case of war, from militia duty. The length of time for the continuance of the corporate privilege was not prescribed. By the act of 1854 (Laws 1853-54, p. 371) the membership was increased to 60, and the name changed to the Atlanta Fire Company No. 1. Perpetual succession was given, with the right to have a seal, to sue and be sued, to form a constitution and adopt by-laws. They subsequently adopted a constitution and by-laws, which provided for the election of members, their duties, their expulsion, the dropping of them from

the roll for delinquencies, the election of officers, etc. No provision was made either in the charter or in the constitution and by-laws for the acquisition of property; but from the collection of dues from the members and by voluntary donations, fairs, festivals, excursions and other public and private entertainments, a considerable amount of money was raised and invested in real and personal property for the use of the company. Mason, the husband of complainant, had been a member of this company, and by his zeal, skill, and energy he contributed more to the creation of this fund than any other member. He died in October, 1867, being at that time an active member in good standing, with all his dues paid and a clear record on the company's books. In 1882 the system of fire service in Atlanta was changed; the volunteer service being discontinued and a paid department being organized. This company, therefore, was dissolved, or at least the object of its incorporation ceased. They had sold their personal property for an amount not known to complainant, and their real estate for \$10,000, and the living members of the company were about to distribute the money without regard to the rights of the widows and orphans of deceased members. But it was charged that, if the fund was so distributed, it would, in a large measure, go into the hands of persons who were insolvent and could not respond to any judgment complainant might recover. She prayed for an accounting between living members and the representatives of deceased members, for the appointment of a receiver to take charge of the fund, and for injunction to prevent its being paid out until the rights of complainant could be ascertained. Defendant demurred to the bill: (1) Because complainant disclosed no right in herself to assert the supposed cause of action; and (2) because there was no equity in the bill. In the course of the decision in the case this court, after pointing out that the Atlanta Fire Company was not a trading, commercial, or ordinary business corporation, or anything like it, that its property was acquired, not by subscriptions paid by its members who took certificates of stock, but by donations made by public-spirited and patriotic citizens (for, whether the contributions came through fairs, concerts, or otherwise, still they were donations for a public object), said:

"The view we take of this case renders it unnecessary to determine whether this is a public or a private corporation, whether it is dissolved by the change and transfer of the service it was created to render to others authorized by the public authority to perform them, or whether it still exists as a body corporate, although it has ceased to render the services for which it was created or to exercise any of its franchises, * * * or what will become ultimately of the property belonging to the corporation upon its dissolution or the forfeiture of its charter. The only

question we need to determine is as to the right of these complainants to participate in its property during its existence or after its dissolution."

And then, after discussing certain authorities and decisions from other courts, this court ruled that the complainant had no right to participate in the fund either during the existence of the corporation or after its dissolution. And in the case of *Cummings v. Hollis*, 108 Ga. 402, 33 S. E. 919, a case involving in part the property of the Gate City Guard of Atlanta, the company whose property is here involved, it was ruled:

"When persons claiming to be members of an incorporated military company which has no capital stock, but has acquired property by donation, file an equitable petition seeking to obtain control and management of the affairs of the company so incorporated, and allege that the company was, for noncompliance with law, disbanded by an order passed by the Governor of the state pursuant to a statute, and that the members of the company, including the plaintiffs, acquiesced in such order and ceased to exercise military functions, *held*, that the case so made does not entitle petitioners to the relief sought, and the petition was properly dismissed on demurrer."

And in the opinion in that case it was said:

"The corps [the Gate City Guard] was organized and incorporated for military duty, and for nothing else; and when it ceased to perform military duty under the laws of this state, the purposes of its incorporation were at an end, and its charter was subject to forfeiture for nonuser, under the general law providing for forfeiture of charters. Civil Code, § 1883. The petitioners seek to have the property of the corporation placed in the hands of a receiver until the court should hear and determine to whom the possession of the property belongs, and by the offered amendment they pray to have the property sold and the proceeds divided pro rata among the parties entitled thereto, as set out in the petition. There are two reasons why none of the prayers of the petitioners could have been granted. The first is that the petition shows on its face that the persons seeking relief are not members of the Gate City Guard and are not entitled to any of the rights or privileges conferred by the original charter. The only design in the creation of this corporate body was that its members, as a volunteer military organization, should become a part and parcel of the military forces of the state of Georgia, and the charter conferred upon the members no rights unless such military organization was kept up and maintained. The petition shows on its face that several years ago the company, finding military duty onerous, declined to enlist in the military forces of the state, as the law required, and were disbanded as a military organization by the commander in chief, and not allowed to drill and parade as a military organization. Having been incorporated only to perform duties which they allege became so onerous that they abandoned them, it seems to follow, as a matter of law, that the body ceased to exist as a cor-

poration by practically surrendering its franchise. Certainly, if the members failed to perform military duty, they could do nothing. So that, under the allegations made, the petitioners show that they have no right as members of the Gate City Guard to any of the powers, privileges, or exemptions conferred upon the members of that corps under the act of incorporation. It is not a matter of concern whether the act incorporating the Gate City Guard constituted that organization either a public or a private corporation; nor is it necessary now for us to decide whether the organization still exists as a legal corporate body, nor whether as a corporation, in consequence of the nonuser of the franchises for a period of years, coupled with the fact that under the laws of this state it was disbanded by the Governor, it has incurred a forfeiture of the original charter rights and privileges. The only question involved by the demurrer is as to the right of petitioners to control the property alleged to be owned by the corporation; and if it be found that the petitioners have no right to the control of such property, nor any interest in it, then the ultimate disposition of such property does not concern either this court or the petitioners. The company was organized for a purely public purpose, that of performing military duty for the state. The powers conferred were only such as were necessary for a military organization. The corporation had no capital stock, no shares of stock of any character; no subscription was required of its members; the only property which it was authorized under the law to hold was such as was deemed necessary or convenient for the purposes of said corps, whether obtained by gift or purchase. Concerning the rights of the members of such a corporation, this court in the case of *Mason v. Atlanta Fire Company*, 70 Ga. 604, ruled that the representatives of a deceased member had no right to participate in a fund arising from the sale of the property of the company, either during the existence of the corporation or after it had been dissolved. The ruling made in that case was based on the reasons that members in such a corporation held no stock; that they were members while they lived and belonged to the organization; that while a member of it was in life he had nothing which he could sell or assign; that it was not a trading, commercial, or ordinary business corporation, or anything like it; that its property was acquired, not by subscription paid in by its members who thereby became entitled to certificates of stock, but by donations made by public-spirited and patriotic citizens, and, whether such contributions came from fairs, concerts, or otherwise, still they were donations for a great public object; that membership in such a corporation was not obtained as the result of contract, nor held by virtue of any vested right springing from a contract, but was only obtained by the will of those composing the company who acted under charter from the Legislature of the state. These reasons apply in full force to the organization of the Gate City Guard, as set out in the petition, and, because of them, it must be held that, even if petitioners are members of the Gate City Guard, they can have no such interest in the property belonging to that organization as entitles them either to control

it, or to have it sold and the proceeds divided. On the dissolution of a corporation of this character, its assets are appropriated in other ways than by a division among its members."

It may be that a part of what was said was obiter dictum, but the reasoning upon which the ruling in that case is based is applicable to the controlling question in the present case, and we adopt it as sound principle.

It follows from what we have said that, if the corporation was destroyed by the act of 1916, then these petitioners have no right to maintain this suit. If, on the other hand, it was not dissolved, if it is still in existence, petitioners or other members of the corporation may call upon the officials of the company to take corporate action to preserve the property from waste; and if they refuse to do so, then under proper allegations as members of a corporation, where directors or those occupying a position analogous to directors refuse to act, the members may act. But these petitioners show no right to maintain this suit respecting the property in question here.

Judgment reversed.

All the Justices concur.

(151 Ga. 117)

CLARKE et al. v. ARMSTRONG et al.
(No. 1962.)

(Supreme Court of Georgia. March 4, 1921.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by F. P. Armstrong and others against P. F. Clarke and others. Judgment appointing a temporary receiver and granting an interlocutory injunction, and defendants bring error. Reversed.

Brewster, Howell & Heyman, W. C. Hendrix, and Mark Bolding, all of Atlanta, for plaintiffs in error.

Reuben R. Arnold, Lowry Arnold, and A. H. Davis, all of Atlanta, for defendants in error.

ATKINSON, J. In this case a general demurrer to the petition was overruled, and the judgment of the trial court was reversed. *Clarke v. Armstrong*, 150 Ga. —, 106 S. E. 289. After the judgment overruling the demurrer, but before the decision by this court reversing that judgment, the trial judge appointed a temporary receiver and granted an interlocutory injunction in accordance with prayers of the petition. A separate bill of exceptions assigns error on that judgment. *Held*, that the ruling by this court relating to the decision of the trial court on demurrer is controlling on the assignments of error in the last bill of exceptions; and it follows that the judgment appointing the temporary receiver and granting an interlocutory injunction must be reversed.

Judgment reversed.

All the Justices concur.

(26 Ga. App. 418)

BROOM v. STATE. (No. 11983.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(*Syllabus by Editorial Staff.*)

Criminal law §935(1)—New trial properly denied when verdict authorized by evidence.

Where the verdict was amply authorized by the evidence, the refusal of a new trial on a motion containing only the usual general grounds was not error.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Jesse Broom was convicted of an offense, and he brings error. Affirmed.

Dan R. Bruce, of Valdosta, for plaintiff in error.

J. B. Copeland, Sol., of Valdosta, for the State.

BLOODWORTH, J. The motion for a new trial contained only the usual general grounds; the verdict was amply authorized by the evidence; and the court did not err in declining to grant a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 408)

BEACH v. SAVANNAH RIVER LUMBER CO. (No. 11920.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by Editorial Staff.)*

1. Master and servant §107(5)—Duty to furnish safe place inapplicable to place transformed by work.

The general rule requiring a master to furnish his servant a safe place to work applies to a permanent place, and not to places constantly shifting and being transformed as a direct result of the servant's labor.

2. Master and servant §129(7)—Defective roadbed not proximate cause of injury in attempting to pull car out of hole.

Where a railroad roadbed over which an employee was moving a flat car and pile driver gave way, permitting the car to sink and the employee, in attempting to pull the car back, with full knowledge of the danger and risk assumed, was killed when the car turned over, the faulty construction of the roadbed was not the proximate cause of the death.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by C. L. Beach, administratrix, against Savannah River Lumber Company. Judgment dismissing the petition, and plaintiff brings error. Affirmed.

Stephens, Barrow & Heyward, of Savannah, for plaintiff in error.

Hitch & Denmark, of Savannah, for defendant in error.

LUKE, J. In this case an administratrix sought to recover damages on account of the death of her husband, alleged to have been caused by negligence of the defendant. The action was brought under the statutes of South Carolina, the injury and death of the deceased having occurred in South Carolina, and the defendant being resident of Chatham county, Ga. The plaintiff's petition alleges, substantially, that on December 1, 1919, her husband was in the employ of the defendant as a foreman of a gang of men operating a pile driver near the defendant's mill in Jasper county, S. C.; that it was the duty of her husband, with his gang of men, to lay rails and cross-ties, operate a pile driver and do such other work as the superintendent of logging and construction directed him to perform; that her husband was ordered to lay cross-ties and rails on a roadbed that had recently been constructed by other employees of the defendant, and, after laying the cross-ties and rails on said roadbed, he was directed to move a pile driver over said newly constructed railroad to a point near a gully, over which gully piles were to be driven for constructing a trestle or bridge; that the defendant had recently constructed, as an ex-

periment, a combination pile driver and skidder, which was constructed on a flat car and weighed about 5,700 pounds and by reason of the construction and weight made the car top-heavy; that the roadbed was recently constructed; that her husband was directed to move the flat car and the pile driver over the said roadbed toward the gully for the purpose of driving the piles; that after moving the pile driver and car a short distance, the roadbed gave way and the car sank 8 or 10 inches; that the car was stopped; that after the car was stopped, her husband attempted to pull it back, and while standing on the car, operating the engine to pull the car out of the hole, the car turned over and fell on him and crushed him to death; that her husband was in the performance of his duty, free from fault, and exercising due care and diligence for his safety, did not know of the weak spot in the roadbed, and was not warned of the same by the defendant, and, in the exercise of ordinary care and diligence could not have discovered it; that the defendant knew of the dangerous condition of the roadbed, or in the exercise of ordinary care and diligence should have known it, and should have warned her husband; and that it was the duty of the defendant to have and maintain a safe place for her husband to work. The plaintiff pleads that her husband was killed by reason of negligence of the defendant as follows:

(a) "Said defendant company negligently failed to provide the said M. H. Beach with a safe and properly constructed roadbed for him to operate the said skidder car and pile driver on and over; (b) that said defendant company negligently required the said M. H. Beach to operate said skidder car and pile driver over an unsafe, weak, and defectively constructed roadbed without warning the said M. H. Beach of the unsafe, weak, and defective condition of said roadbed; (c) that said defendant company negligently provided the said M. H. Beach with an experimental, unsafe, defectively constructed and top-heavy skidder and pile driver; (d) said defendant company negligently required the said M. H. Beach to use and operate the same without warning him of the defective construction and top-heaviness thereof, and the danger that might exist in the use thereof or result therefrom."

[1] The defendant demurred to the petition, upon the grounds that there was no cause of action. The court sustained the demurrer and dismissed the petition, and the plaintiff excepted. Held: It was not error to sustain the general demurrer. Under repeated rulings of the Supreme Court and of this court the general rule requiring a master to furnish his servant with a safe place to work is applied to a permanent place, and does not apply to places constantly shifting and being transformed as a direct result of the servant's labor. See *Cowart v. Southern*

Marble Co., 144 Ga. 253, 87 S. E. 282, and cases cited; Atlantic Paper & Pulp Corp. v. Bowen, 23 Ga. App. 249, 97 S. E. 867; Armour v. Hahn, 111 U. S. 813, 4 Sup. Ct. 433, 28 L. Ed. 440.

[2] In the instant case the allegations of the plaintiff clearly show that the proximate cause of the death of the plaintiff's husband was not faulty construction of the roadbed, for it is pleaded that after the roadbed had given way the deceased was not injured, and would not have been injured, had it not been for the fact that, with full knowledge of the danger and risk assumed, he undertook to pull the pile driver and car out of the hole into which they had sunk. Whatever may have been the negligence of the defendant in the construction of the roadbed, and however little the deceased may have known of the dangerous and weak construction of the roadbed, when the car sank and the roadbed gave way he was fully apprised of its defects and weaknesses, was at a place of safety, free from dangers of the roadbed upon which he himself had placed cross-ties and laid rails, and would have escaped injury had he not undertaken to pull the car from the hole into which it had sunk. The reasons here given, pointing out the defects in the plaintiff's petition, are in accord with the laws of the state wherein the plaintiff's husband lost his life. The court did not err in sustaining the general demurrer.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 407)

HUNNICUTT v. GEORGIA RY. & POWER CO. et al. (No. 11917.)

(Court of Appeals of Georgia, Division No. 1. March 8, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 883 — Assignment of error on ruling as to right to argue case waived.

When objection to a ruling is made in such a way as not to put the court and opposing counsel upon notice that the objection is insisted upon, an assignment of error upon the ruling is without merit.

(Additional Syllabus by Editorial Staff.)

2. Trial \S 108—Defendant's refusal to argue held not to prevent plaintiff's counsel from arguing the issues.

Where plaintiff's counsel merely stated the names of cases relied on by him and waived his opening argument, stating that he would argue the issues in his concluding argument, and defendant's counsel thereupon declined to argue the case, plaintiff's counsel was not deprived of his right to argue the issues; he having been given no warning, before concluding his opening statement, that he would be deprived of such right.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by R. Y. S. Hunnicutt against the Georgia Railway & Power Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Arminius Wright, of Atlanta, for plaintiff in error.

Colquitt & Conyers, of Atlanta, for defendants in error.

LUKE, J. Hunnicutt sued the Georgia Railway & Power Company and Welsinger for damages for alleged personal injuries. The case was in default as to Welsinger, and the jury rendered a verdict against him alone. The evidence was conflicting, and would have supported a verdict either way. The only question for decision can be best understood from the following statement in the motion for a new trial:

"Upon conclusion of the evidence in the above-stated case, plaintiff's counsel stated to the court the names of certain cases which he contended were controlling in the case at bar. He then stated that he would waive his opening argument, and in his concluding argument would argue only the issues made by the evidence and as set out in the declaration. Plaintiff's counsel occupied about five minutes in this statement. Thereupon defendant's counsel inquired of the court, if he declined to argue the case, would that be an end of the argument under the statement of plaintiff's counsel that he waived his opening argument after stating his contention as to the law of the case. The court stated that would be the effect if defendant's counsel declined to argue the case. Defendant's counsel then declined to make an argument. Plaintiff's counsel then stated to the court that he had not intended to waive his concluding argument by waiving the opening argument, that he had stated what he believed to be the controlling law of the case, and that he would argue in conclusion the contentions of the plaintiff as set out by the pleadings, and as shown by the evidence. The court suggested to plaintiff's counsel that, if he had made a full opening argument and defendant's counsel had declined to make an argument, the effect would be to cut off further argument, and it seemed to the court that what had occurred on the part of plaintiff's counsel would be equivalent to having made an argument, so far as the effect was concerned, under this rule. The plaintiff's counsel then said, 'Well, let it go,' and thereupon the court proceeded to charge the jury."

[2] We think the court's ruling as above indicated was, in effect, that under the facts stated the plaintiff's counsel was precluded from further argument. There having been nothing said as to the manner of argument until after counsel had concluded his opening statement to the jury, we are of the opinion that so to rule would be to deprive him, without warning, of the invaluable right of arguing the facts of his client's case to the

jury; and, upon proper objection, this court would be constrained to hold such ruling error. See *Cartright v. Clopton*, 25 Ga. 85, *Grant v. State*, 97 Ga. 789, 25 S. E. 399, and *Porter v. State*, 6 Ga. App. 770 (1), 65 S. E. 814.

[1] We are quite certain, however, that the objection as interposed, when coupled with the subsequent and final statement of the plaintiff's counsel, "Well, let it go," does not constitute a good assignment of error.

"The motion should have been made in such a manner as that the judge should clearly understand that a ruling was being invoked, and that opposing counsel should also have notice of it." *Grant v. State*, 97 Ga. 789, 25 S. E. 399.

After the court had argued and reiterated his ruling, and counsel, by way of reply, said, "Well, let it go," it would appear to the ordinary mind that counsel yielded to the court's ruling; and, at best, we do not think it can be held that either the court or opposing counsel was put upon sufficient notice that plaintiff's counsel intended to insist upon his objection to the court's ruling.

This being the only question argued in the brief of counsel for the plaintiff in error, the judgment is affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 397)

WELLS v. McMAHON. (No. 11740.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error \S 999(1)—Jury finding on question of fact is final.

The jury are the final arbiters on questions of fact, and, where they have passed on the evidence and no error of law is shown, their finding is final.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Action by Mrs. A. A. McMahon against W. E. Wells. Judgment for plaintiff and certiorari refused, and defendant brings error. Affirmed.

Roy Lewis, of Atlanta, for plaintiff in error.

Anderson & Slate, of Atlanta, for defendant in error.

BLOODWORTH, J. In the municipal court of Atlanta, Mrs. McMahon sued Wells on a promissory note. Admitting that the amount sued for was correct, the defendant pleaded a set-off. On conflicting evidence the jury found for the plaintiff the full amount sued for. The defendant applied for a writ of certiorari, alleging that—

"Said verdict and said judgment thereon was contrary to the evidence, without evidence to support it, and contrary to the principles of justice and equity."

The judge of the superior court refused to sanction the certiorari, and in his order said:

"The evidence warranted the verdict; the jury were the judges of the credibility of the witnesses; they had the right, if they saw fit, to believe the testimony of the plaintiff's witnesses, which was in conflict with the testimony of the witnesses for the defendant."

It is well settled that the jury are the final arbiters on questions of fact, and where they have passed on the evidence and no error of law is shown, their finding is final. The judge of the superior court properly refused to sanction the certiorari.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 399)

EPPS v. PARRISH. (No. 11759.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Negligence \S 22½ — Guest cannot recover for automobile driver's negligence unless gross.

One who was an invited guest and gratuitous passenger in another's automobile could not recover for the other's negligence in driving the automobile, unless it amounted to gross negligence.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Mrs. E. A. Parrish against Mrs. J. D. Epps. Judgment for plaintiff, and defendant brings error. Reversed.

Hitch & Denmark, of Savannah, for plaintiff in error.

Oliver & Oliver, of Savannah, for defendant in error.

LUKE, J. This case arises by reason of a suit to recover damages, wherein it is alleged that the plaintiff was riding as an invited guest, in an automobile owned and driven by the defendant; that while so riding as such invited guest, along with other members of her family, who were also invited guests, the defendant carelessly and negligently, and because of inexperience and lack of skill in the handling of an automobile, lost control of the automobile and drove it, head on, into a large oak tree, wrecking the automobile, and that by reason of the wreck, the plaintiff was injured. The defendant demurred to the petition, upon the ground that

it set forth no cause of action. The court overruled the demurrer.

Held: Inasmuch as the plaintiff was an invited guest and a gratuitous passenger, and it not being alleged that the defendant was guilty of gross negligence, it was error for the court to overrule the general demurrer. It is our opinion that in order for an invited guest in an automobile to recover of the owner and driver of the car for an injury occasioned by the negligence of the driver, it must be pleaded that such negligence was gross negligence. See, in this connection, the reasoning set out in *Self v. Dunn & Brown*, 42 Ga. 528, 5 Am. Rep. 544. See, also, in this connection, Civil Code 1910, § 3473; *Huddy on Automobiles* (5th Ed.) 890; *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C, 264, Ann. Cas. 1918B, 1088. We understand that it has been an open question in Georgia as to what degree of care is owed by the owner and driver of an automobile to an invited guest. We have reached the conclusion that in order for the invited guest to recover from the owner and operator of an automobile for an injury received by reason of the negligent driving or handling of the machine, there must be facts pleaded that show gross neglect upon the part of the owner and driver of the machine. We have examined cases from other states, and in all cases where there seems to be a holding to the contrary the cases were dependent upon the particular facts there pleaded, such as the driving of the automobile at a reckless rate of speed over the protest of the invited guest, or the racing of the car with other vehicles over his protest. We find no case where there was a ruling contrary to the view we take upon the particular facts as pleaded in the instant case. It was error to overrule the general demurrer to the plaintiff's petition.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(26 Ga. App. 379)

HINES, Director General, v. STEVENS.
(No. 11693.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Railroads — 335(5)—Driver of automobile towing another car, held guilty of negligence proximately causing collision.

Where plaintiff knew that it was about train time, and could have observed an approaching train if he had looked or listened, and knew that the automobile he was towing was heavily loaded, and would have gotten across the track before the arrival of the train if his car had not stalled because of such load, he was negligent in going into a place of dan-

ger with the automobile overburdened, and such negligence, and not the negligence of railroad, if any, was the proximate cause of the damage to his automobile.

Error from City Court of Hinesville; W. C. Hodges, Judge.

Action by O. L. Stevens against W. D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant appeals. Reversed.

Bolling Whitfield, of Brunswick, and N. J. Norman, of Savannah, for plaintiff in error. Darsey & Mills, of Hinesville, for defendant in error.

LUKE, J. This case arises by reason of a suit to recover damages from the Federal Director General, operating the Seaboard Air Line Railway, for alleged damage to an automobile, the property of the plaintiff. The evidence was conclusive that at Dorchester, a station on the line of railroad, there was a crossing over its track; that the track was perfectly straight for several miles, and there were no obstructions to the view; that at a time when a regular passenger train was due to arrive and stop at Dorchester, the plaintiff, who owned a garage within a very few yards of the railroad, coupled behind his Ford car, with a chain about 15 feet long, another Ford car, and started his car in motion, towing the other car in the direction of the railroad, and just as the car in which he was riding got upon the railroad track, his car, because of the heavy load which he was towing, was stalled and stopped immediately upon the railroad track; that upon discovering the approaching train he jumped from his car to a place of safety, and two persons who were in the car that was being towed also jumped to a place of safety; that the engine struck the automobile on the track, and completely wrecked it. There is no conflict in the evidence that the plaintiff did not look to see if there was a train approaching before he went upon the track. The evidence is in conflict as to how far away the train was when he first discovered it. The plaintiff said that it was about the distance of two telegraph poles, or 150 or 200 yards away; witnesses in his behalf place it even closer. There is conflict as to whether the whistle of the engine was blown and the bell rung. The engineer operating the engine testified that he was within 25 yards of the automobile when it suddenly ran upon and stopped on the railroad track; that he had proper brakes for stopping the train, and they were in perfect working condition; that he immediately observed the car upon the track, and applied his brakes with full force, and reversed his engine, and did everything in his power to stop the train before

striking the automobile, but that the automobile ran upon the track so closely that it was impossible to stop the train; that he had his train under control preparatory to making his regular stop at the station; that he sounded his whistle and gave the proper blow-post signal at the proper place. Another member of the train crew testified to the blowing of the whistle and the application of brakes, and corroborated the engineer's evidence as to the distance the train was away from the automobile at the time the automobile ran upon the track.

Held: The verdict in favor of the plaintiff was without evidence to support it. There being no conflict in the evidence that if it had not been for the heavy load, which the plaintiff was undertaking to tow with the destroyed automobile, he would have gotten across the track before the arrival of the train, and there being no conflict in the evidence that the plaintiff knew that it was about train time, and the track was perfectly straight, so that he may have observed the train a mile or more away, if he had cared to look or listen, in our opinion he was grossly negligent in going upon the railroad track, a place of danger, with the automobile overburdened as he says he knew it was. We cannot agree that the proximate cause of the plaintiff's damage was the result of negligence of the defendant's employees. They could not anticipate the presence suddenly of an automobile so overloaded that it would likely stall upon the track. The plaintiff's own negligence was the proximate cause of his damage. It was error to overrule the motion for a new trial.

Judgment reversed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(26 Ga. App. 391)

WILLIAMS v. ROWE. (No. 11716.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error \S 877(4)—First grant of new trial on any ground not disturbed, unless verdict was demanded.

Under Civ. Code 1910, \S 6204, the first grant of a new trial, whether general, or on a ground involving questions of evidence, or a ground involving purely questions of law, will not be disturbed, unless no other verdict than the one rendered could possibly have been returned.

Error from Superior Court, Jefferson County; R. N. Hardeman, Judge.

Action between G. H. Williams and W. G. S. Rowe. A new trial was granted, and Williams brings error. Affirmed.

M. C. Barwick, of Louisville, for plaintiff in error.

W. L. Phillips, of Louisville, for defendant in error.

BLOODWORTH, J. This case comes to this court upon exceptions to the first grant of a new trial. Paragraph 6204 of the Civil Code of 1910 is as follows:

"The first grant of a new trial will not be disturbed by the Supreme Court, unless the plaintiff in error shows that the judge abused his discretion in granting it, and that the law and facts require the verdict, notwithstanding the judgment of the presiding judge."

In *Weinkle v. Brunswick & W. Railroad Co.*, 107 Ga. 368, 38 S. E. 471, the Supreme Court said:

"It may be now considered as settled that this court will not, under any circumstances, reverse a judgment granting a first new trial, whether the grant be general upon all the grounds of the motion or special upon one or more grounds only, or whether it be upon a ground which involves questions of evidence of upon a ground which involves purely questions of law, unless it is made to appear that no other verdict than the one rendered could possibly have been returned under the law and facts of the case. Unless the case can be brought within the exception just stated, it is useless for parties to bring before this court the judgment of a trial judge granting a first new trial."

See, also, *Southern Fertilizer & Chemical Co. v. Peacock*, 19 Ga. App. 592, 91 S. E. 928, and cases cited; *Ellis v. Spell*, 20 Ga. App. 347, 93 S. E. 49; *Taylor v. Central Railroad & Banking Co. of Ga.*, 79 Ga. 335, 5 S. E. 114, and citations.

The evidence in this case is conflicting, and this court will not interfere with the first grant of a new trial.

Judgment affirmed.

BROYLES, O. J., and LUKE, J., concur.

(26 Ga. App. 397)

MADDOX v. BLALOCK. (No. 11733.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error \S 750(2)—Exceptions pendente lite not considered, when error not assigned thereon.

Exceptions pendente lite to rulings on demurrer cannot be considered, where the bill of exceptions did not assign error on such exceptions pendente lite, but only on the ruling on demurrer.

Error from City Court of Albany; Clayton Jones, Judge.

Action between Alonzo Maddox and R. B. Blalock. Judgment for Blalock, and Maddox brings error. Affirmed.

Lippitt & Burt, of Albany, for plaintiff in error.

Milner & Farkas, of Albany, for defendant in error.

BLOODWORTH, J. Counsel for the plaintiff in error, in their brief in this court, argue only as to the ruling on the demurrer, which they sought to bring to this court by a bill of exceptions which assigned error on that ruling and recited the filing of exceptions pendente lite thereto which were brought up as a part of the record.

"Before exceptions pendente lite can be considered by this court, error must have been originally assigned in the main bill of exceptions upon the exceptions pendente lite, and not merely upon the judgment complained of in the exceptions pendente lite, or such an assignment must be made, by the permission of this court, before the argument of the case here." *Ponder v. State*, 25 Ga. App. 763, 105 S. E. 313 (1), and cases cited.

Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 473)

NICKAJACK MILLING & GRAIN CO. v. INTERNATIONAL VEGETABLE OIL CO.
(No. 11955.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(*Syllabus by Editorial Staff.*)

Certiorari \S 68—Sustaining and grant of first new trial not error when verdict not demanded.

When the sustaining of certiorari by the judge of the superior court had the effect of a first grant of a new trial, and the verdict was not demanded by the evidence, the judgment will not be set aside by the Court of Appeals.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between the Nickajack Milling & Grain Company and the International Vegetable Oil Company. After a judgment for the Grain Company, certiorari was sustained by the judge of the superior court, and it brings error. Affirmed.

Hewlett & Dennis, of Atlanta, for plaintiff in error.

Little, Powell, Smith & Goldstein, of Atlanta, for defendant in error.

LUKE, J. The judgment of the judge of the superior court sustaining the certiorari in this case has the effect of granting a new trial; and, this being the first grant of a

new trial, and the evidence not having demanded the verdict, under repeated rulings of the Supreme Court and of this court, the judgment of the judge of the superior court will not be set aside. See *Shirley v. Swafford*, 119 Ga. 43, 44, 45 S. E. 722, and cases cited.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 491)

STRINGER v. STATE. (No. 12031.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(*Syllabus by the Court.*)

1. Motion for new trial improperly overruled. The court erred in overruling the motion for a new trial.

(*Additional Syllabus by Editorial Staff.*)

2. Larceny \S 52—Evidence held admissible to corroborate defendant's claim as to purchasing stolen car.

On a trial for stealing a Ford car which defendant claimed to have purchased from two men dressed as soldiers, testimony that two men so dressed tried to sell a witness a car within a day or two prior to the theft held admissible, though the description of the car was exceedingly vague.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Guy Stringer was convicted of stealing an automobile, and he brings error. Reversed.

John S. Wood, of Canton, and J. M. Neel, Jr., and J. R. Whitaker, both of Cartersville, for plaintiff in error.

Joe M. Lang, Sol. Gen., of Calhoun, for the State.

BROYLES, C. J. The indictment in this case charges the accused, Guy Stringer, with stealing—

"one Ford five-passenger touring car, 1918 model, with bright bumper in front, with the two outside isinglass windows in the rear of same torn, of the value of \$600, the property of J. I. Lowe."

[1] Ground 5 of the amendment to the motion for a new trial is as follows:

"Upon the trial of said case, and during the introduction of evidence by the defendant, the defendant regularly introduced and swore as a witness one J. V. Reece. The witness J. V. Reece testified: 'I know Guy Stringer. I recall the incident, but not the date, that Mr. Stringer had a car taken from him over there last spring a year ago. Just the day before, or within a day or so prior to, the time this car was taken from him, I had a conversation with two men dressed in soldier's uniform, over there, with reference to selling me a car.

This conversation occurred on the road about one mile from where Guy Stringer lives.' The state then objected to this evidence of the witness Reece, and the court excluded it unless it was shown to be a similar [car] to the car that was taken from Stringer. The witness Reece testified that he was not familiar with automobiles and could not definitely describe the automobile which they tried to sell him, as he made no inspection of it; that they were out on the side of the road and wanted to sell him the car; that he did not know the make on it, but it was a two-seated car and had a top on it; that he never saw the car which was taken from Guy Stringer unless this car which the soldiers tried to sell him was the car which was taken from Stringer. The court thereupon excluded the evidence of the witness Reece, and refused to permit him to testify further. Counsel for the defendant then stated to the court that the witness Reece would testify that on the day prior to the day the car in question was taken from Guy Stringer, or a day or so prior to that time, the witness Reece was on the public road about one mile from Guy Stringer's house, and two men dressed in soldier's uniform tried to sell him a two-seated automobile; that these two persons dressed in soldier's uniform were unknown to the witness, and he had never seen them before or since, but that they went off in the direction of Guy Stringer's house. The court thereupon excluded this evidence and refused to permit it to go to the jury for consideration by the jury. Counsel for the defendant thereupon asked the court to let the jury retire, so that the witness could testify in the absence of the jury and thus get it into the record. The court refused to permit the jury to retire, and stated that the court would permit the statement in the record just as if the witness had testified it into the record.

"Movant insists that the court erred in refusing to permit the witness to so testify and in refusing to permit said evidence to go to the jury for its consideration, and says that this ruling by the court was hurtful error, because, as movant insists, this was most material and vital evidence for the defendant, as it was strongly corroborative of the defendant's statement that he had bought the automobile in question from two men dressed in soldier's uniform, and tended strongly to show that the defendant had really bought the car and had not stolen the same as the State contended."

This court is of the opinion that under all the facts of the case the trial court erred in excluding the testimony as above complained of, and that this error requires another trial of the case.

[2] While the exceedingly vague description of the automobile in the rejected evidence did not show that the car there testified about by the witness Reece was the same car afterwards found in the defendant's possession and which he claimed to have bought from two men dressed as soldiers, there was nothing in that description to indicate that it was not the same automobile. At any rate,

the excluded testimony tended indirectly to corroborate the defendant's explanation as to how he came into possession of the car, and was admissible for what it was worth.

The other alleged errors are not passed upon, as they are not likely to recur on another trial of the case.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 400)

COLEMAN v. SAVANNAH BANK & TRUST CO.

SAVANNAH BANK & TRUST CO. v. COLEMAN.

(Nos. 11878, 11879.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Warehousemen \S 15(3)—One to whom factor pledged receipts for turpentine held not liable to principal.

Where a factor to whom plaintiff shipped turpentine with instructions to place it in tanks did so and received negotiable receipts which it pledged to a bank, who did not know that they were the property of any one other than the factor, the bank was not liable to plaintiff.

2. Factors \S 65—When factor deposited proceeds of sales in its name and rendered accounts of sales, one receiving payment of debt not liable to principal.

Where a factor to whom plaintiff shipped turpentine, sold it by his direction; deposited the proceeds to its own credit, rendered accounts of sales to plaintiff, and subsequently from the funds on deposit paid a debt due a bank, the bank was not liable to plaintiff.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by J. A. Coleman against the Savannah Bank & Trust Company. Judgment for defendant, and plaintiff brings error, and defendant files a cross-bill of exceptions. Judgment affirmed, and cross-bill of exceptions dismissed.

Hitch & Denmark, of Savannah, for plaintiff in error.

W. L. Clay, of Savannah, for defendant in error.

LUKE, J. This case arises by reason of a suit by Coleman against the Savannah Bank & Trust Company for \$8,023.33. The plaintiff pleads his right to recover by alleging substantially that he shipped to the Producers' Naval Stores Company, who were naval stores factors, 432 casks of spirits of turpentine, with instructions to the Producers' Naval Stores Company to place the turpentine in tanks; that the turpentine was placed in

tanks of the National Tank & Export Company, and receipts were given by the latter company to the Producers' Naval Stores Company; that subsequently the Producers' Naval Stores Company pledged the tank receipts to the Savannah Bank & Trust Company to secure certain of its notes, aggregating the sum sued for; that the president of the Producers' Naval Stores Company was a director of the Savannah Bank & Trust Company, and that the office of the Producers' Naval Stores Company was in the Savannah Bank & Trust Company building; that the Producers' Naval Stores Company sold the turpentine and paid the proceeds to the Savannah Bank & Trust Company; and that subsequently the Producers' Naval Stores Company was adjudicated to be bankrupt. At the conclusion of the plaintiff's evidence a nonsuit was granted, and to this judgment he excepted.

[1, 2] Held: The judgment of the court awarding a nonsuit was not erroneous. The evidence did not prove the plaintiff's case as laid, nor did the evidence authorize the plaintiff to recover upon his petition. The evidence clearly established the fact that the Savannah Bank & Trust Company had no notice that the turpentine was the property of the plaintiff, or had ever been the property of the plaintiff. The receipts from the Tank Company for the turpentine were in the name of Producers' Naval Stores Company and were negotiable, and there was nothing to indicate title to the property in any one else other than Producers' Naval Stores Company. The evidence further developed the fact that Coleman knew this. The plaintiff further failed to show a right to recover, because the evidence showed that the Producers' Naval Stores Company, at his direction, sold the turpentine and deposited the proceeds of the sale to its credit, and rendered to him accounts of sales, and subsequently, from its funds on deposit, paid to the Savannah Bank & Trust Company the notes referred to in the plaintiff's petition. This case differs from the two cases relied upon by the plaintiff. *Bank v. Nelson*, 38 Ga. 391, 95 Am. Dec. 400, and *Savannah Bank & Trust Co. v. McQueen*, 149 Ga. 302, 100 S. E. 33. In the *Nelson* Case, it will be noted, certain agents were given special and limited authority to sell the goods stored with them, and there was no delivery of the goods to the bank, and the bank had constructive notice of the limited authority. In the case that we have here for review there is no claim by the bank to the turpentine, nor is there any notice to the bank that the tank receipts, which are symbolic and negotiable, were the property of any one other than the Producers' Naval Stores Company. There is no evidence that the Producers' Naval Stores Company was the agent of Coleman. Of course, there

is the further distinction that the turpentine was actually sold and proper accounts of sales were rendered to Coleman, and the notes of the Producers' Naval Stores Company to the Savannah Bank & Trust Company was paid, not with the turpentine, but from the general funds of the Producers' Naval Stores Company. In the *McQueen* Case, *supra*, the bank had notice that the factor, in pledging his principal's property, was acting as an agent, and not as an owner. Under no view of the evidence in this case, upon the issues formed by the pleadings, was the plaintiff entitled to recover of the defendant. It was not error to grant a nonsuit.

Judgment affirmed on main bill of exceptions. Cross-bill of exceptions dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur

(26 Ga. App. 377)

WHITTEN v. MAYOR AND ALDERMEN OF SAVANNAH. (No. 11681.)

(Court of Appeals of Georgia, Division No. 1. March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law §1144(19)—Bill of exceptions presumed tendered in time as recited, though signed more than 20 days after judgment.

Where a bill of exceptions recites that it was tendered within the time allowed by law and there is nothing to show the contrary except the fact that it was signed by the judge more than 20 days after judgment, it will be presumed that it was tendered in time, and the writ of error will not be dismissed.

2. Disorderly conduct §1—Cursing police officers, slamming door and ordering them away held "disorderly conduct."

It was "disorderly conduct" for one, called to the door of her home at night by police officers making inquiry about matters in their line of duty, to curse them, slam the door, and order them away.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disorderly Conduct.]

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Addie Whitten, alias Ada Crosby, was convicted of disorderly conduct in violation of a city ordinance, and certiorari was overruled, and she brings error. Affirmed.

Robt. L. Colding, of Savannah, for plaintiff in error.

Shelby Myrick and Edwin A. Cohen, both of Savannah, for defendant in error.

LUKE, J. [1] 1. Where it is recited in a bill of exceptions in a criminal case that it is tendered "within the time allowed by law," and there is nothing in the bill of exceptions

or the entries thereon, or in the record, tending to show that perhaps, as a matter of fact, the bill of exceptions was not so tendered, except that it was signed by the judge more than 20 days after the date of the judgment excepted to, the writ of error will not be dismissed on the ground that the bill of exceptions was not tendered and signed within 20 days from the date of the judgment excepted to. Under such circumstances, it will be presumed that the bill of exceptions was tendered within 20 days from the date of the judgment and that the judge held the papers, through no fault of the plaintiff in error or his counsel, until the date of the certificate. See, in this connection, *Pennington v. Sparta*, 15 Ga. App. 287, 82 S. E. 826; *Strickland v. Brannen*, 18 Ga. App. 325, 89 S. E. 377; *Cole v. Western Union Telegraph Co.*, 23 Ga. App. 479, 98 S. E. 407; *Hammond v. Hammond*, 135 Ga. 768 (3), 70 S. E. 588; *Jones v. State*, 146 Ga. 8, 90 S. E. 280.

[2] 2. The defendant was charged with disorderly conduct in violation of a city ordinance of the city of Savannah. The evidence authorized the recorder, who tried the defendant, to find that at night, at her home, she cursed police officers who had called her to her door to make inquiry of her about matters in their line of duty. She not only cursed them, but slammed the door of her house and ordered them away. It was not error for the judge of the superior court to overrule the certiorari.

Judgment affirmed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(26 Ga. App. 377)

STANLEY v. COWART. (No. 11680.)

(Court of Appeals of Georgia, Division No. 1. March 8, 1921.)

(Syllabus by Editorial Staff.)

New trial §71—Properly denied when evidence conflicting.

A motion for a new trial on the ground that the verdict was contrary to the evidence was properly overruled where the evidence was conflicting.

Error from Superior Court, Clinch County; J. I. Summerall, Judge.

Action by O. C. Cowart against C. L. Stanley. Judgment for plaintiff, and defendant brings error. Affirmed.

S. Burkhalter, of Homerville, and E. H. Williams, of Alma, for plaintiff in error.

W. T. Dickerson, of Homerville, for defendant in error.

LUKE, J. Cowart instituted an action in trover against Stanley to recover certain property. Upon conflicting evidence, the

jury found in favor of the plaintiff. The verdict has the approval of the trial judge, and, the only assignment of error being that the verdict was contrary to the evidence, it was not error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(26 Ga. App. 340)

RENFROE v. FOUCHE.

FOUCHE v. RENFROE.

(Nos. 11458, 11459.)

(Court of Appeals of Georgia, Division No. 2. Feb. 26, 1921.)

(Syllabus by the Court.)

1. Bailment §11, 12, 13, 14(1), 31(1)—Bailee, exercising proper care, not liable for loss or destruction, but burden is on him to show care; degree of care required stated.

A bailee, who has exercised the proper degree of care and diligence in protecting and keeping safely the thing bailed, is relieved from any liability for its loss or destruction; but, upon proof of loss, the burden is upon the bailee to show that he has exercised the proper degree of care and diligence. Civil Code 1910, §§ 3469, 3470. "If the bailment is for the benefit exclusively of the bailee, he must use extraordinary care; if for the mutual benefit of the parties, ordinary care; and if for the exclusive benefit of the bailor, slight care will suffice." *Merchants' National Bank of Savannah v. Guilmartin*, 88 Ga. 797, 799, 15 S. E. 831, 832 (17 L. R. A. 322).

2. Bailment §14(1)—For repairs calls for ordinary care, though repairs have been completed.

Where a bailment in its inception is for the mutual benefit of both the bailor and the bailee, as where the thing bailed is deposited with the bailee for the purpose of making repairs for a consideration to the bailee, the bailee is under a duty to exercise ordinary care and diligence to protect the property. A compliance by the bailee with his contractual obligation to make the repairs and a holding of the property bailed until the bailor can call for it does not render the bailment any the less one for the mutual benefit of both parties, and is not such a change in its nature as will absolve the bailee from his duty to exercise ordinary care in preserving the property bailed.

3. Master and servant §303—Tort of servant negligently selected actionable, though act is outside scope of authority.

"Every person shall be liable for torts committed by his * * * servant, by his command or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary." Civil Code 1910, § 4413. Where a servant departs from the prosecution of his business and commits a tort while acting without the scope of his authority, the person employing him may still be liable if

he failed to exercise due care in the selection of his servant.

4. Master and servant ¶303—Instruction stating liability of master for servant's torts held properly given.

Where an automobile was deposited by the owner with a garage man for the purpose of making repairs thereon, and where during the continuance of the bailment the automobile was stolen by one of the servants of the garage man, employed to work around the garage, in a suit brought by the owner against the garage man to recover damages for the loss of the automobile a charge of the court submitting to the jury the above legal propositions was correct.

5. Damages ¶127—Insurance against loss not defense to bailor's action against bailee.

In a suit against a bailee for loss of property bailed, it is no defense that the bailor was insured against such loss.

6. Bailment ¶11—Bailee cannot escape common-law liability by posting notice.

A bailee cannot by the posting of a notice to the effect that he will not be responsible for damage to articles bailed by fire or theft relieve himself of his common-law liability to exercise due care in preserving the property against damage from such causes.

7. No errors committed.

The charge of the court fairly submitted all the issues in the case and fairly called attention to all of the contentions of the defendant. No error of law appears as set out in any of the grounds of the motion for a new trial, and the evidence authorized the verdict for the plaintiff.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Action by Mrs. E. C. Fouché against R. H. Renfro. Judgment for plaintiff, and defendant brings error, and plaintiff files a cross-bill of exceptions. Judgment affirmed, and cross-bill of exceptions dismissed.

J. T. Norris, of Cartersville, for plaintiff in error.

Neel & Neel, of Cartersville, and M. B. Eubanks, of Rome, for defendant in error.

STEPHENS, J. Judgment affirmed on main bill of exceptions; cross-bill of exceptions dismissed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 481)

WHITE v. STATE. (No. 12041.)

(Court of Appeals of Georgia, Division No. 1. March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law ¶822(1)—Charge should be read in its entirety.

Excerpts from the charge, which are not objectionable when the charge is read in its entirety, are not grounds for reversal.

2. Criminal law ¶845(1)—Newly discovered evidence which would not probably produce different result not ground for new trial.

Newly discovered evidence, which is not such as would be likely to produce a different verdict upon another trial, does not require a new trial.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

J. W. White was convicted of an offense, and he brings error. Affirmed.

Archibald Blackshear, of Augusta, for plaintiff in error.

A. L. Franklin, Sol. Gen., of Augusta, and John M. Graham, of Atlanta, for the State.

LUKE, J. The evidence in this case fully authorized the verdict, which has the approval of the trial judge.

[1] The special grounds of a motion for a new trial which complained of excerpts from the charge of the court, when the charge of the court is read in its entirety, are without merit.

[2] The newly discovered evidence is not such as would be likely to produce a different verdict upon another trial of the case.

The defendant has had a legal trial, and for no reason appearing in the record was it error for the court to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 475)

McCLENDON v. McCLENDON. (No. 11958.)

(Court of Appeals of Georgia, Division No. 1. March 9, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error ¶588 — Evidence not reviewed, when not briefed as required by law.

Where the evidence is contained in the transcript of the record in full by questions and answers, interspersed with objections and rulings, and with no attempt to brief it as required by law, the court will not review the evidence, or determine questions which cannot be determined without reference to the evidence.

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Action between Jesse McClendon and Clark McClendon. Judgment for the latter, and the former brings error. Affirmed.

Branch & Howard and Bond Almand, all of Atlanta, for plaintiff in error.

C. C. King, of Covington, for defendant in error.

LUKE, J. Under repeated rulings of the Supreme Court, by which this court is bound,

this court will not review the evidence in a case when the evidence has not been briefed as required by law. In the instant case there was no attempt to brief the evidence at all; the evidence sent to this court in the transcript of the record being apparently the evidence in full, with questions and answers, interspersed with objections by counsel and rulings of the court. In other words, there is no brief of evidence therefore, as no question is presented for decision which can be determined without reference to the evidence, the judgment of the court below must be affirmed. See *Baker v. Nix*, 150 Ga. 679, 104 S. E. 625; *McComb v. Hines*, 123 Ga. 246, 51 S. E. 800.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 443)

BOATRIGHT v. STATE. (No. 11860.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by the Court.)

Criminal law §1092(4)—Writ of error dismissed when bill of exceptions tendered more than twenty days after judgment.

It appearing from the recitals in the bill of exceptions that it was tendered to the trial court more than 20 days after the date of the judgment complained of, the writ of error must be dismissed.

Error from Superior Court, Bacon County;
J. I. Summerall, Judge.

Tom Boatright was convicted of an offense, and he brings error. Writ of error dismissed.

I. J. Bussell, of Alma, for plaintiff in error.

A. B. Spence, Sol. Gen., of Waycross, for the State.

LUKE, J. Writ of error dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 378)

NEVE v. GRAVES et al. (No. 11690.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Municipal corporations §705(12)—Automobile owner's guests held not responsible for his fault in driving along street.

In an action for injuries sustained in an automobile collision against invited guests riding in the automobile which collided with plaintiff's car on a street, brought on the theory that they were engaged in a joint enterprise, the petition alleging that they had bought the oil and gasoline used was properly dismissed,

where the owner and driver was not made a defendant, and it did not appear why he was not sued.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Mrs. C. O. Neve against A. Graves, Jr., and others. Judgment dismissing the petition on demurrer, and plaintiff brings error. Affirmed.

Edgar Latham, of Atlanta, for plaintiff in error.

John Y. Smith, of Atlanta, for defendants in error.

LUKE, J. This case arises by reason of a suit for damages wherein the plaintiff alleges that while she was a passenger in an automobile traveling along one of the streets in the city of Atlanta an automobile driven and owned by one Shivery collided with the machine in which she was riding, and as a result thereof she was thrown from her machine and suffered injury. The suit is not against the owner and driver, Shivery, but is against four persons who were riding in the machine with Shivery as his invited guests. It is alleged that the invited guests so sued neither had nor claimed an interest in the automobile in which they were riding, but that the invited guests had bought some oil and gasoline that was put in the car and was being used in the propelling of the car at the time of her injury, and that they were engaged in a joint enterprise. It does not appear why Shivery was not sued. The defendants filed a general demurrer to the petition. The general demurrer was sustained and the petition was dismissed. Held, it was not error to sustain the general demurrer and dismiss the petition. See *Adamson v. McEwen*, 12 Ga. App. 508, 77 S. E. 591.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 427)

DANFORTH v. STATE. (No. 12027.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Criminal law §935(1) — New trial properly denied when verdict authorized by evidence.

Where the verdict was amply authorized by the evidence, the refusal of a new trial on a motion containing only the usual general grounds was not error.

Error from Superior Court, Bibb County,
J. R. Terrell, Judge.

Joe Danforth was convicted of an offense, and he brings error. Affirmed.

H. F. Rawls and Walter J. Grace, both of Macon, for plaintiff in error.

C. H. Garrett, Sol. Gen., of Macon, for the State.

BLOODWORTH, J. The motion for a new trial contained only the usual general grounds, the verdict was amply authorized by the evidence, and the court did not err in declining to grant a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 433)

PHARR v. STATE. (No. 12050.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Criminal law ⚡1160—Verdict supported by evidence and approved by trial judge not disturbed.

Where defendant's conviction was authorized by the evidence and the verdict was approved by the trial judge, it will not be set aside by the Court of Appeals.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Charlie Pharr was convicted of an offense, and he brings error. Affirmed.

Colley & Colley, of Washington, Ga., for plaintiff in error.

R. C. Norman, of Washington, Ga., and M. L. Felts, Sol. Gen., of Warrenton, for the State.

LUKE, J. The evidence in this case was sufficient to authorize the conviction of the defendant, and the verdict, having the approval of the trial judge, cannot be set aside by this court. The single assignment of error upon an excerpt from the charge of the court is without merit, when the charge of the court upon the question complained of is read in its entirety. See in this connection *Hill v. State*, 18 Ga. App. 259, 89 S. E. 351. It was not error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 423)

HILL v. STATE. (No. 12003.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Criminal law ⚡1160—Verdict, supported by evidence and approved by the trial judge, not disturbed.

Where the evidence, though weak, authorized defendant's conviction, and the verdict was

approved by the trial judge, it cannot be set aside by the Court of Appeals.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Lam Hill was convicted of an offense, and he brings error. Affirmed.

W. A. Slaton, of Washington, Ga., for plaintiff in error.

R. C. Norman and Earle Norman, both of Washington, Ga., and M. L. Felts, Sol. Gen., of Warrenton, for the State.

LUKE, J. This case is here for review upon the sole assignment of error that the verdict of guilty was not authorized by the evidence. The evidence was weak, yet the jury had a right to believe, and did believe, the evidence of the prosecutor, which evidence was sufficient to authorize the conviction of the defendant. The verdict, having the approval of the trial judge, and there being evidence to support it, cannot by this court be set aside. It was not error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 473)

VAN HARLENGEN v. BEARSE.
(No. 11957.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by Editorial Staff.)

1. **Parties** ⚡84(2)—Objection that partnership was liable and other partner a necessary party cannot be raised when plea in abatement not filed at first term.

Where, in an action under Civ. Code 1910, § 4417, for injuries caused by a vicious animal, it did not appear on the face of the petition that the suit was for the tort of a partnership, if the animal was owned by a partnership, and the other partner a necessary party, the point should have been raised by sworn plea in abatement filed at the first term under Civ. Code 1895, § 5058, and, not having been so raised, could not be raised at the trial.

2. **Animals** ⚡74(8)—Owner's liability for personal injuries held for jury.

In an action for personal injuries caused by a vicious animal, held, that its viciousness and the negligence of defendant and that of plaintiff were questions for the jury.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. M. Van Harlengen against Asa Bearse. Judgment for defendant, and plaintiff brings error. Reversed.

Robt. C. & Philip H. Alston, of Atlanta, for plaintiff in error.

Wm. F. Buchanan, of Atlanta, for defendant in error.

LUKE, J. 1. By statute it is provided that where a person "owns or keeps a vicious or dangerous animal of any kind, and by the careless management of the same, or by allowing the same to go at liberty, another without fault on his part is injured thereby, such owner or keeper shall be liable in damages for such injury." Civil Code 1910, § 4417.

(a) The plaintiff brought suit under the above section for personal injuries inflicted upon him by a bull alleged to be the property of defendant. Upon the trial the defendant contended that there could be no legal recovery, inasmuch as the suit was brought against him as an individual, and the proof developed that the animal was the property of a partnership composed of defendant and his son. He contended also that the evidence adduced was insufficient to authorize a recovery in any event. At the conclusion of the evidence the court, upon motion of the defendant's counsel, directed a verdict in favor of the defendant.

[1] Held: It does not appear on the face of the petition that the suit was brought against an individual for the tort of a partnership, and, in order for the defendant to claim that the suit against him as an individual is based upon a partnership liability, and that the other partner is a necessary party thereto, he should have raised the point by a plea in abatement properly sworn to and filed at the first term of the court. Civil Code 1895, § 5058; *Merritt v. Bagwell*, 70 Ga. 578, 585; *Hirsch v. Oliver*, 91 Ga. 554 (4), 18 S. E. 354; *Bray v. Peace*, 131 Ga. 638 (2-5), 62 S. E. 1025. No such plea was filed in the instant case, and consequently the defendant could not raise the point at the trial term, and a verdict in his favor could not legally be directed on this question. See, also, 20 R. C. L. § 128.

[2] 2. The injury alleged was proved beyond contradiction, but the other questions of fact involved, as to the viciousness of the bull, the negligence of the defendant, and the negligence of the plaintiff, should have been submitted to a jury for determination. It follows that the court erred in directing a verdict for the defendant.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 413)

H. L. HARRELL REALTY CO. v. ROWELL
(No. 11947.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error \S 1041 (2)—Disallowance of amendment after reversal not error, when amended petition would not have stated cause of action.

The disallowance of an amendment to the petition tendered by plaintiff after return of the remittitur on reversal of a judgment overruling a general demurrer to the petition was not error, where, if the amendment had been allowed, the petition as amended would still have failed to state a cause of action.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by the H. L. Harrell Realty Company against W. M. Rowell. Judgment for defendant, and plaintiff brings error. Affirmed.

Hill & Gibson, of Moultrie, for plaintiff in error.

Dowling & Askew and James Humphreys, all of Moultrie, for defendant in error.

BROYLES, C. J. When this case was here before, the judgment of the trial court, overruling a general demurrer to the petition, was reversed. *Rowell v. Harrell Realty Co.*, 25 Ga. App. 585, 108 S. E. 717. Upon the receipt of the remittitur by the trial court, but before it had been made the judgment of that court, the plaintiff offered an amendment to its original petition. This amendment was disallowed by the court, and the remittitur was then made the judgment of the lower court, and to both of these rulings the plaintiff excepted. An examination of the record shows that the proffered amendment was largely a mere amplification of the original petition, and that, if the amendment had been allowed, the petition as so amended would still have failed to set forth a cause of action. It follows that the court did not err in disallowing the amendment.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 411)

BANK OF LA GRANGE v. GUINN et al.
(No. 11928.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by Editorial Staff.)*

1. Pledges \S 31(4)—Pledgor entitled to damages when pledgee sells contrary to agreement.

Where a bank holding cotton as collateral security for a debt agreed with the owner that if he would sell part of the cotton and apply the proceeds on the debt it would hold the remainder of the cotton until instructed to sell, but, without instructions, sold the remainder of the cotton, the owner was entitled to recover damages.

2. Pledges \S 36—Measure of damages for sale by pledgor contrary to agreement stated.

The measure of damages for a pledgee's sale of cotton, contrary to its agreement with the pledgor not to sell without instructions, was the difference between the selling price and the highest market value at the place where the cotton was sold, at any time between the date of the sale and the date of the trial.

3. New trial \S 70 — Properly refused when verdict authorized by evidence.

A new trial was properly refused on a motion containing only the usual general grounds, where the verdict was authorized by the evidence.

Error from City Court of La Grange; W. T. Tuggle, Judge pro hac.

Action by R. J. Guinn, Jr., and others, against the Bank of La Grange. Judgment for plaintiffs, and defendant brings error. Affirmed.

L. L. Meadors and E. T. Moon, both of La Grange, for plaintiff in error.

M. U. Mooty, of La Grange, and S. Holderness, of Carrollton, for defendants in error.

BROYLES, O. J. [1,2] 1. Where a bank receives cotton as collateral security for a debt evidenced by certain promissory notes, and thereafter makes an express contract with the owner of the cotton that if the latter will sell a portion of the cotton and apply the proceeds of the sale as part payment on the notes it (the bank) will hold the remainder of the cotton until instructed by the owner to sell; and where the owner carries out his part of the contract, and the bank, without instruction from the owner, sells the remainder of the cotton, the owner is entitled to recover damages, and the measure of the damages would be the difference between the price for which the cotton was sold and the highest proved market value thereof at the place where it was sold, at any time between the date of the sale and the date of the trial. *Wood & Bros. v. Jones & Son*, 10 Ga. App.

735, 73 S. E. 1099; *Campbell v. Redwine Bros.*, 22 Ga. App. 455, 96 S. E. 347.

[3] 2. Under the above ruling, the verdict was authorized by the evidence; and, the motion for a new trial containing only the usual general grounds, the court did not err in refusing to grant a new trial.
Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 352)

LOGANVILLE BANKING CO. v. BRODNAX et al. (No. 10954.)(Court of Appeals of Georgia, Division No. 1.
March 2, 1921.)*(Syllabus by the Court.)*

1. Rights of assignee of judgment and execution.

"A plaintiff may, bona fide and for a valuable consideration, transfer in writing a judgment and the execution issued thereon to a third person; and the transferee has the same rights as the original plaintiff had, and the transfer or assignment need not be under seal. Civil Code 1910, §§ 4274, 5969. See *Thompson v. First State Bank*, 102 Ga. 696, 29 S. E. 610.

"(a) Where a statutory claim case is pending in the superior court, and the plaintiff transfers, in writing not under seal, a *fi. fa.* and the judgment on which it is based, 'without any recourse on us whatsoever,' such assignment passes to the assignee the title to the judgment and the execution, with all the resulting incidents of the assignment, which include the right of the assignee, as such, to be made a party plaintiff in the case, to proceed with its prosecution to subject the property levied on, and to recover damages from the claimant if it should appear that the claim was interposed for delay only; and it would not be proper to order that the case proceed in the name of the original plaintiff for the use or the assignee.

"(b) After such assignment the original plaintiff in *fi. fa.* could not proceed on his own account against the claimant for the purpose of recovering such damages." 151 Ga. —, 106 S. E. 4.

(Additional Syllabus by Editorial Staff.)

2. Appeal and error \S 232(1)—Error held not to require new trial when only complaint of ruling was untenable.

A ruling requiring a statutory claim case to proceed in the name of the original plaintiff for the use of a transferee of the judgment and execution, though erroneous, does not require another trial, where the only complaint of such ruling was that the original plaintiff was thereby eliminated from the case, and it was properly eliminated.

Error from Superior Court, Walton County; W. L. Hodges, Judge.

Proceedings on a claim by J. C. Brodnax, trustee, and others to property levied on

under a *fi. fa.* in favor of the Loganville Banking Company. Judgment ordering the case to proceed in the name of the Banking Company for the use of another, and the Banking Company brings error. Affirmed in conformity to answers by Supreme Court to certified questions (151 Ga. —, 106 S. E. 4).

J. H. Felker, of Monroe, for plaintiff in error.

R. L. Cox and O. Roberts, both of Monroe, for defendants in error.

LUKE, J. The motion of counsel for the plaintiff in error to amend the bill of exceptions by making Mrs. Sallie May Woodruff a party thereto is granted, and the motion of counsel for the defendant in error to dismiss the bill of exceptions is denied.

On April 16, 1917, Loganville Banking Company obtained judgment for a large sum of money against S. N. Forrester. On August 31, 1917, a *fi. fa.* was issued thereon, and on September 1, 1917, the sheriff levied the *fi. fa.* on certain land as property of the defendant in *fi. fa.* On September 22, 1917, J. C. Brodnax, as trustee for Forrester, filed a claim to a portion of this land, and the *fi. fa.* and claim were returned to the superior court of Walton county for a trial. Subsequently, on February 16, 1918, Loganville Banking Company, in consideration of the full amount of principal, interest, and attorney's fees and costs, transferred and assigned in writing to Sallie May Woodruff the *fi. fa.* and the judgment on which it was based, "without any recourse on us whatsoever." This transfer was not under seal, while the claim bond was under seal. At the August term, 1919, of the Walton superior court, Loganville Banking Company tendered issue, claiming it was entitled to proceed for damages against the claimant and his security, alleging that the claimant had abandoned his claim, and that his claim was filed for delay only. The claimant and the other defendants joined issue. At this stage of the proceedings Sallie May Woodruff moved the court to make her a party plaintiff in the case, on the ground that she was the sole owner of the *fi. fa.*, and that the *fi. fa.* should proceed for her use as transferee. Over objection of counsel for Loganville Banking Company the court made her a party plaintiff. The court ruled also that Loganville Banking Company had by the above-mentioned transfer assigned any and all rights that it had for damages for delay, and passed an order eliminating the Loganville Banking Company from the case, and ordered that the case proceed in the name of the Loganville Banking Company for the use of Sallie May Woodruff as transferee. To these rulings the Loganville Banking Company excepted.

(1. 2) Under the rulings in the headnote (which were made by the Supreme Court on

February 16, 1921, in answer to certain questions certified by this court), all the rulings of the trial court excepted to were correct, except the one ordering that the case proceed in the name of the original plaintiff for the use of the transferee, and this error does not require another trial of the case, since the only complaint of the plaintiff in error, the Loganville Banking Company, as to this ruling is that the Loganville Banking Company was thereby eliminated from the case, and, under the ruling of the Supreme Court, it was properly so eliminated.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 354)

LOGANVILLE BANKING CO. v. FORRESTER et al. (No. 10955.)

(Court of Appeals of Georgia, Division No. 1. March 2, 1921.)

Error from Superior Court, Walton County; W. L. Hodges, Judge.

Action between the Loganville Banking Company and S. N. Forrester and others. Judgment adverse to the Banking Company, and it brings error. Affirmed.

J. H. Felker, of Monroe, for plaintiff in error.

R. L. Cox and O. Roberts, both of Monroe, for defendants in error.

LUKE, J. This case is controlled by the decision this day rendered in Loganville Banking Co. v. Brodnax, Trustee, et al., 106 S. E. 808.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 435)

DAVIS v. STATE. (No. 12045.)

(Court of Appeals of Georgia, Division No. 1. March 9, 1921.)

(Syllabus by the Court.)

1. Criminal law — 1041—Sufficiency of approval of grounds of motion for new trial not considered when not raised before trial judge.

In this case the state questions the sufficiency of the approval of the grounds of the motion for new trial, and insists that there is no proper approval of such grounds. No motion was made to dismiss the motion for a new trial, and the question for the first time, upon the sufficiency of the approval of the special grounds of the amended motion for a new trial, is raised here by the state. Since the passage of the act of 1911 (Laws 1911, p. 149; Park's Pen. Code, § 1090 [a]), "where the judge has finally passed on the merits of a motion for a new trial and the parties have raised no question as to the sufficiency of the approval of the grounds of such motion,

* * * no question as to these matters shall be entertained by the reviewing courts unless first raised and insisted on before the trial judge."

2. Criminal law \S 1084(4), 1144(12)—Motion for new trial insufficient when not showing objections to evidence excluded; evidence presumed excluded on objection of opposite party.

Under the ruling in *Summerlin v. State*, 25 Ga. App. 568(1b), 103 S. E. 832, neither ground of the amendment to the motion for a new trial presents any question for the consideration of this court. In each ground the movant complains of the rejection of certain testimony, but it is not stated therein what objection to the testimony was offered by the other party and sustained by the court. If it had been stated in the grounds that the court on its own motion excluded the evidence, a different question would be presented. Where no such statement, however, appears in the ground, it will be presumed that the usual modus operandi was followed, viz., that the evidence offered by the movant was objected to by the opposite party for some stated reason, and that this objection was sustained by the court, and the evidence excluded for that reason.

3. Criminal law \S 1160—Overruling of motion for new trial not error when verdict authorized by evidence.

The evidence authorized the verdict, which has the approval of the trial judge, and it was not error to overrule the motion for a new trial.

Luke, J., dissenting.

Error from City Court of Carrollton; James Beall, Judge.

Clarence Davis was convicted of an offense, and he brings error. Affirmed.

Emmett Smith, of Carrollton, for plaintiff in error.

Willis Smith, Sol., and Boykin & Boykin, all of Carrollton, for the State.

PER CURIAM. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

LUKE, J. (dissenting). I do not disagree to the ruling announced in the first headnote, but I do disagree to the ruling announced in the second headnote, and to the affirmance of the judgment overruling the motion for a new trial.

Upon the trial of the case the prosecutor had testified that his feeling towards the

defendant was good. Upon cross-examination the defendant sought to inquire of the prosecutor if he had not had a recent previous difficulty with the defendant, for the purpose of rebutting the statement that no ill feeling existed between them. The court refused to permit the defendant to so interrogate the prosecutor. As laid down in *Smith v. State*, 12 Ga. App. 13 (2), 76 S. E. 647, it was error to deny the defendant this right. The majority opinion holds that since the defendant did not show in his motion for a new trial upon what ground the court ruled out the evidence which he offered on cross-examination, the assignment of error was insufficient. It is to this technical ruling that I do not agree. The party offering evidence which is rejected, in order to have this court pass upon a ground of a motion for a new trial which complains of the judge's refusal to admit the evidence, does not have to show upon what ground the court refused the evidence. The only burden that the movant has to carry is to show that legal testimony has been excluded by the court. To hold otherwise would be to hold that illegal testimony should be admitted for no reason other than that there was lodged no legal objection to its admissibility. The complaint here is not to the court's overruling an objection to testimony where by precedent it is necessary for the movant for the party complaining to show that a legal objection had been lodged to the testimony. In the one instance the complaint is to the exclusion of legal testimony entitled to be admitted in the trial of the cause, and in the other instance the complaint is to the overruling of an objection, which objection must be shown to be legal.

The party offering evidence which is rejected does not have to show in his motion for a new trial upon what ground the evidence was excluded. The court may have ruled the evidence out without objection, and it may be impossible for the party offering the evidence to know what moved the court. The only burden to be carried by the party offering evidence is to show that the evidence was admissible. In this case error is not assigned upon an objection to evidence which was overruled, but error is here assigned upon the refusal of the court to admit legal testimony, and it does not make any difference upon what ground the evidence was excluded.

The dissent which I file in this case is the same in principle as the dissent in the case of *Summerlin v. State*, 25 Ga. App. 572, 103 S. E. 832, in so far as this identical question is involved.

(26 Ga. App. 427)

FELDER v. STATE. (No. 12028.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by Editorial Staff.)***Criminal law** \S 935(1)—New trial properly denied when verdict authorized by evidence.

Where the verdict was amply authorized by the evidence, the refusal of a new trial on a motion containing only the usual general grounds was not error.

Error from City Court of Houston County; A. C. Riley, Judge.

Dave Felder was convicted of an offense, and he brings error. Affirmed.

A. C. Riley, Jr., and Emmett Houser, both of Ft. Valley, for plaintiff in error.

Robt. E. Brown, Sol., of Ft. Valley, for the State.

BROYLES, C. J. The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial, which contained only the usual general grounds.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 418)

APPLING v. STATE. (No. 11889.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by Editorial Staff.)***Homicide** \S 142(5)—Conviction for assault with intent to murder E. not sustained by evidence showing shooting of A.

A verdict finding defendant guilty of assault with intent to murder E. is contrary to the law and the evidence, where the evidence shows only a shooting of A., and does not show that E. was ever known by the name of A.

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Henry Appling was convicted of assault with intent to murder, and he brings error. Reversed.

Earle V. Norman and Colley & Colley, all of Washington, Ga., for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., and M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. Henry Appling was indicted and convicted of assault with intent to murder Henry Esquire by shooting him with a pistol. The evidence shows that accused shot at Willie Askew four times with a pistol, one shot hitting him. There is not a particle of evidence to show that accused

shot, or shot at, Henry Esquire, or that Henry Esquire was ever known as Willie Askew, or called by that name. The verdict of guilty therefore is contrary to law and evidence. Irwin v. State, 117 Ga. 722, 45 S. E. 59, and cases cited.

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 433)

CITY OF ALBANY v. HARDY. (No. 12046.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by the Court.)***Criminal law** \S 1024(8)—Decision on certiorari reversing conviction for violation of ordinance not reviewable.

"The decision of the superior court on certiorari, reversing the judgment of a municipal court convicting one of a violation of a municipal ordinance, is not subject to review by this court." Mayor, etc., of Hawkinsville v. Ethridge, 96 Ga. 326, 22 S. E. 985; Mayor, etc., of Macon v. Wood, 109 Ga. 149, 34 S. E. 322." City of Valdosta v. Goodwin, 21 Ga. App. 664, 94 S. E. 812.

Error from Superior Court, Dougherty County; John R. Wilson, Judge.

F. J. Hardy was convicted of a violation of a municipal ordinance, but the judgment was reversed by the superior court on certiorari, and the City of Albany brings error. Writ of error dismissed.

Jas. Tift Mann, of Albany, for plaintiff in error.

Pope & Bennet, of Albany, for defendant in error.

BLOODWORTH, J. Writ of error dismissed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 392)

SCARBOROUGH v. MALLORY. (No. 11725.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by the Court.)***Libel and slander** \S 80—Petition alleging charge that defendant had moved a boundary corner held to state cause of action.

The petition in this case sufficiently alleges that the defendant imputed to the plaintiff a crime punishable by law, sets out a complete cause of action, and the court did not err in overruling the general demurrer and in refusing to dismiss the petition.

Error from Superior Court, Campbell County; John B. Hutcheson, Judge.

Action by J. M. Mallory against F. M. Scarborough. Judgment overruling a general demurrer to the petition, and defendant brings error. Affirmed.

Mallory brought suit for slander, and his petition contained in part the following allegations:

"Petitioner charges and alleges that said defendant, F. M. Scarborough, has injured and damaged the character and standing of your petitioner as a citizen of said county and state, in the sum aforesaid, for that the said defendant did, on or about the 20th of January, 1919, and at divers other times, in the months of January, February, and March, 1919, willfully, wickedly, falsely, and maliciously charge that your petitioner did pull up and remove a stone corner or stake placed there many years ago by the surveyors of the land lots of now Campbell county where it had been placed and driven in the ground at the southeast corner of lot of land No. 149, and, after taking said stone corner or stake, that your petitioner carried said stone to a point 47 feet south of said corner, and placed it at a point 47 feet on the dividing line of lots Nos. 149 and 150, then and there driving said stone corner into the ground, and claimed that the corner of said lots above stated was at the point where he had removed said stones and driven them into the ground, and that this was done on the part of said J. M. Mallory with the purpose and intention of changing the land line of said lots of land to a point 47 feet from where it originally belonged, for the purpose of stealing and possessing from defendant a fine and valuable part of his bottom land on lot No. 149," and that the alleged slanderous words of the defendant "were made for the purpose of injuring and damaging your petitioner's good name, character, and standing as a worthy citizen of this state, and caused your petitioner to be held up to public contempt, scorn and ridicule, to his injury and damage in the sum aforesaid, and were made by the defendant falsely, maliciously, and known to be false when made by said defendant, for the purpose of injuring and damaging, and which did injure and damage, your petitioner in the sum aforesaid. These statements hereinbefore charged, were made as aforesaid at divers times and places during the period herein alleged; some of them were made in the presence of the surveyor of Campbell county and his assistants, and also of Mr. Smith, the county surveyor of Fayette county."

The court overruled a general demurrer to the petition, and the defendant excepted.

J. F. Gollightly, of Atlanta, for plaintiff in error.

James & Bedgood and John H. Hudson, all of Atlanta, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). Under the record as it comes to us the only question for determination, and the only one argued in the brief of plaintiff in error, is whether or not the court erred in overruling the general demurrer. To impute

to another a crime punishable by law is slander. Civil Code 1910, § 4433. Section 743 of the Penal Code of 1910 is as follows:

"If any person shall knowingly, maliciously, or fraudulently cut, alter, or remove any certain boundary tree, or other allowed landmark, to the injury of another, he shall be guilty of a misdemeanor."

In *Whitley v. Newman*, 9 Ga. App. 90 (6) 70 S. E. 687, this court held:

"In order for one to impute a crime to another, in such a sense as that the imputation is actionable as slander, it is not necessary that the descriptive averments or essential ingredients by which the nature of the crime is defined should be stated with that distinctness requisite in an indictment. But, on the other hand, it is not enough that the party to whom the remark is addressed may unwarrantably reach the conclusion, from the language used, that a crime is being imputed to the person to whom the speaker refers. For a defamatory oral utterance to be slanderous as imputing a crime, the statement must not only be such as may convey to the auditor the impression that the crime in question is being charged, but it must be couched in such language as might reasonably be expected to convey that meaning to any one who happened to hear the utterance."

Under the above ruling the petition in this case sufficiently alleges that the defendant imputed to plaintiff a crime punishable by law, sets out a complete cause of action, and the court did not err in overruling the general demurrer and in refusing to dismiss the petition.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 470)

LINGO v. WHITE. (No. 11954.)

(Court of Appeals of Georgia, Division No. 1, March 9, 1921.)

(Syllabus by the Court.)

Contracts ~~§~~ 54(1)—Check given wife and by her delivered to hospital to pay her father's expenses held not without consideration.

Where a husband, at the solicitation of his wife, executes a bank check, payable to "Cash," and delivers it to her, for the express purpose of paying in advance a week's expenses of her father at a hospital where the father is then lying critically ill, the rules of the hospital requiring such payment to be made in advance, and she delivers it to the owner of the hospital for the purpose stated, and the father is cared for in the institution until his death, which occurs after her delivery of the check, but upon the same day, the check is not without a valid consideration. And where the owner of the hospital presents the check to the drawee for payment, and payment is refused because of an order of the husband to stop payment, the owner of the hospital is entitled to recover from the husband the face value of the check.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. B. Lingo against F. A. White. Judgment for plaintiff, and certiorari sustained by the superior court, and plaintiff brings error. Reversed.

R. R. Jackson, John F. Echols, and J. W. Weaver, all of Atlanta, for plaintiff in error. J. L. Anderson and John T. Pearson, both of Atlanta, for defendant in error.

BROYLES, C. J. Dr. Lingo brought suit against F. A. White in the municipal court of Atlanta, upon a \$40 check, and obtained a judgment for the full amount of the check, and the defendant carried the case to the superior court by certiorari, the certiorari was sustained, and final judgment was entered in favor of the defendant. It is on exceptions to this judgment that the case comes to us for review. The evidence showed that the check, which was made payable to "Cash," was drawn by the defendant, and, at the solicitation of his wife, given to her for the express purpose of delivering it to the plaintiff as payment in advance for one week's hospital expenses of her father, which expenses, in accordance with the rules of the hospital, were payable in advance. The check was delivered to the plaintiff or his agent on the same day it was executed by the defendant, and the patient died a few hours after such delivery. Upon learning of the death of his father-in-law, the defendant went to the hospital and demanded the return of the check, but his demand was refused and he was informed there was still a balance of \$3 due the plaintiff for professional services rendered his father-in-law. He paid the \$3 under protest. He subsequently ordered payment on the check stopped, and, when it was presented to the bank upon which it was drawn, payment was refused. The evidence further showed that the defendant's father-in-law had been at the hospital about 21 days before he died, and that on two previous occasions before the defendant gave his wife the check in question, he had given his mother-in-law money to pay in advance a week's hospital bill of her husband. The evidence further showed that there was no contract or understanding between the plaintiff and the defendant as to the payment of these hospital expenses, but that the contract was between the plaintiff and the defendant's father-in-law, and that the plaintiff looked to the father-in-law for such payment.

It is apparent from the record that the defendant stopped payment on the check because his father-in-law died shortly after the delivery of the check for the week's hospital expenses in advance, and before the expiration

of that week, and he evidently thought he was therefore entitled to a rebate, if not to recover the entire amount of the check. However, no such defense was insisted upon by the defendant in the trial court, but the grounds of the defense were that the contract to pay the hospital expenses was between the plaintiff and the defendant's father-in-law, that the plaintiff looked for payment to the father-in-law, and extended no credit to the defendant, and that the defendant was not a party to the contract, and was not legally or morally bound for the payment of the expenses, that the check was based upon no valid consideration, and that after gratuitously giving the check to his wife for the purpose of paying the expenses, the defendant had a legal right to change his mind before the plaintiff had cashed the check and to stop payment thereon. We cannot agree with these contentions. We think the check was based upon at least two valid considerations: (1) The agreement to keep the defendant's father-in-law in the hospital for another week, and (2) the benefit flowing to the defendant from the granting of his wife's request to pay her father's hospital expenses for another week. The first consideration is obvious, and needs no discussion, except to say it was not rendered invalid by the fact that the father died before the expiration of the week for which his expenses had been paid in advance. As to the second consideration, the slightest reflection will convince any one that where a husband and wife are living together in peace and happiness (and the living together and the peace and happiness will be presumed, nothing to the contrary appearing), and the wife requests her husband to give her \$40 for the purpose of paying in advance for a week the hospital expenses of her father who is lying critically ill in the hospital, a refusal by the husband to give that small amount (he being able to do so) to ease the last hours of her dying father would tend to alienate her affections and to cause a "rift in the lute" of their domestic peace and happiness. Ergo, there was a benefit flowing to the husband from the giving of the check in question. The check being based upon a valid consideration, the defendant had no legal right to stop payment thereon after it had been delivered by his wife to the plaintiff.

It follows from what has been said that the verdict in favor of the plaintiff was demanded by the evidence, and that the judge of the superior court erred in sustaining the certiorari and entering final judgment in favor of the defendant.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 475)

SANDERS v. STATE. (No. 11962.)(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)*(Syllabus by the Court.)*

1. Homicide \S 33, 309(4) — Killing held voluntary manslaughter if result of sudden passion, and instruction thereon authorized.

On the trial of an indictment for murder, where the defendant's statement and the evidence tended to show, as one of the legitimate views thereof, that the families of the accused and the decedent were at enmity; that, in a quarrel between the accused and his father on one side and the decedent and his companions on the other, the decedent shot and wounded both the accused and his father; and that, although the decedent then ceased his assault, the accused ran to his home near by, armed himself with a pistol, returned to the scene of the assault, and, without additional cause or excuse, save the heat of passion engendered by the quarrel, shot and killed the decedent—the court did not err in giving in charge to the jury the law of voluntary manslaughter.

2. Homicide \S 114, 276 — Intent is essential to mutual combat, but may be shown by acts, conduct, and circumstances; intent is question for jury; evidence held to make question for jury as to intent.

Without a mutual intent to fight, there can be no mutual combat; but that intent, like any other intent, may be manifested by the acts and conduct of the parties and the circumstances surrounding them at the time of the combat, as well as the circumstances leading up to and culminating in such combat. The question of intent is peculiarly for the jury where there is any evidence from which it may be inferred. In the instant case the court did not err in referring that question to the jury, by giving them in charge the law applicable to mutual combat.

3. Instructions not reversible error.

When considered in the light of the entire charge of the court and the facts of the case, none of the instructions complained of contain reversible error.

4. Sufficiency of evidence.

The evidence authorized the verdict, and it was not error to overrule the motion for a new trial.

(Additional Syllabus by Editorial Staff.)

5. Homicide \S 121 — Justification cannot be based on assault which is completely ended.

Under Pen. Code 1910, §§ 70, 74, justification for a homicide cannot be based on a deadly assault which has been completely ended unless the assailant manifests some apparent purpose to renew or continue it.

6. Homicide \S 114—Killing held not justifiable under law governing mutual combats.

Where defendant and his father were assaulted by decedent, and defendant ran home, armed himself with a pistol, and left his place of safety to enter or recommence the affray and remained in it until decedent was mortally

wounded, the killing was not justifiable under Pen. Code 1910, § 73, relative to a killing in mutual combat.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Freddie Sanders was convicted of voluntary manslaughter, and he brings error. Affirmed.

Stubbs & Duke, of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, for the State.

LUKE, J. Freddie Sanders was indicted jointly with his father, West Sanders, for the murder of John Adams, and, being separately tried, the son was found guilty of voluntary manslaughter. From the defendant's statement and the conflicting evidence, the jury were authorized to find the following facts: On the day before the homicide West Sanders wrongfully killed a hog belonging to Adams, while Fred Sanders and his sister went to the Adams home, during his absence, assaulted and beat his wife, and forcibly took and carried away a pistol belonging to Adams. But later, either on the same day or at some time during the night, Adams and West Sanders mutually adjusted their differences by an agreement that Sanders should either pay for the hog he had killed or replace it with one of his own. On the occasion of the homicide Adams, with two companions, had started to the Sanders home to demand the return of his pistol, but met both West and Fred Sanders in the road near their home, where, in a discussion of the troubles of the preceding day, a quarrel ensued, which terminated in both West and Fred Sanders, who were then unarmed, being shot and wounded by Adams. As to what then followed, the defendant in his statement to the court and jury, said:

"I didn't have anything in my hand, and I ran to the house and got the pistol out of the washstand drawer, and come back and shot him and killed him."

In a supplemental statement, made after the testimony was closed, the defendant further said:

"I want to finish telling you about what I done. I shot John to protect myself and my father, too. If I hadn't done something, he would likely have killed me and the whole family."

But as to what John Adams, the deceased, was doing at the time the fatal shot was fired, or at any time after Fred Sanders left the scene of the first shooting to arm himself for the final combat, the evidence is conflicting, and the defendant's statement is by no means clear. As to that interval of time the jury were authorized by some of the evidence, as well as by the defendant's state-

ment, to infer that the deceased did nothing whatever to justify or mitigate the killing. From other evidence they were authorized to infer that the deceased merely held his ground, pistol in hand, awaiting the return of Fred Sanders, with the intention then and there to continue the fight; and that, upon the return of Fred Sanders, with his pistol in hand, the two men began simultaneously to shoot at each other, and continued to shoot until Adams fell mortally wounded.

Other theories of the case, deducible from the evidence, are unimportant here; the only attack upon the evidence being that it demanded either a conviction of murder or an absolute acquittal, and that it discloses no theory of voluntary manslaughter, either as where a killing occurs in a sudden heat of passion or as where the killing results from mutual combat.

[1, 5] 1-3. Under the facts above outlined, a charge on the law of voluntary manslaughter was not only authorized, but was demanded. *Barney v. State*, 5 Ga. App. 301, 63 S. E. 28; *Smith v. State*, 147 Ga. 682, 95 S. E. 223. Even the defendant's statement, if true, shows no justification for the killing. The most that it does for him is to show a killing without malice and in a sudden heat of passion, provoked by the decedent's felonious assault upon the defendant and the defendant's father, thereby reducing the offense from murder to voluntary manslaughter. If the killing had occurred while the decedent was actually shooting at the defendant or at the defendant's father, or if it had occurred while the decedent was manifestly intending or endeavoring to shoot at either or both of them, then the killing would be justifiable homicide under the law of self-defense or under the right of a son to defend his father. Penal Code 1910, §§ 70 and 74. But justification cannot be based on a deadly assault which has been completely ended, unless the assailant manifests some apparent purpose to renew or continue it. *Cochran v. State*, 9 Ga. App. 824, 72 S. E. 281. Where, as in this case, the assault had been completely ended, and the person assailed had left the scene of the assault, had gone into his own home, armed himself, and returned to the original scene before the killing occurred, the question is, not whether such killing was justifiable, but whether it was the result of a sudden heat of passion or of a deliberate desire for revenge. If it was the result of that sudden, violent impulse of passion supposed to be irresistible, then the killing was voluntary manslaughter; but if the interval between the assault and the homicide was sufficient for the voice of reason and humanity to be heard, then the killing should be attributed to deliberate revenge, and be punished as murder. Penal Code 1910, § 65. In so far as these principles of the law of homicide are concerned, the jury, in finding the accused

guilty of voluntary manslaughter, simply accepted as true the version of the facts most favorable to him.

[2, 8] From the evidence above set out, a mutual intent to fight, and an actual fight in pursuance thereof, resulting in the homicide in question, were reasonably inferable. For this reason the court did not err in giving in charge to the jury the law applicable to such combats. But under this theory of the case no more justification for the killing appears than under the other. To justify a killing in mutual combat, it must appear, not only that the threatened danger, whether real or apparent, was urgent and pressing "at the time of the killing," but also "that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." Penal Code 1910, § 73. While, from this theory of the facts, the impending danger is sufficiently made to appear, yet in view of the defendant's own statement that he armed himself for that combat, left his place of safety to enter or recommence the affray, and, having entered it, remained in it until his antagonist fell mortally wounded, he negatives the other essential of the justification he claims.

[3, 4] The verdict was authorized by the evidence, and the charge of the court is not subject to the criticisms urged. The defendant has had a fair trial. It was not error for any reason assigned to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 462)

FARRELL v. BEAN. (No. 11940.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by the Court.)

1. Brokers \S 81—Vendor may sue purchaser for commissions for use of broker.

The suit was properly brought in the name of the owner of the property for the use of the real estate broker.

2. Brokers \S 82(3) — Amendment alleging fraud properly disallowed, when facts insufficient to show fraud.

It was not error to disallow the proffered amendment to the defendant's answer.

3. Evidence \S 431, 444(4) — Parol evidence admissible to show contract delivered in escrow.

The court erred in rejecting evidence offered by the defendant to show that, because of nonperformance of a condition precedent as to which the writing was silent, the alleged contract sued upon was no contract at all.

Luke, J., dissenting in part.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by T. F. Bean, for the use of J. H. McNesser, against P. J. Farrell. Judgment for plaintiff, and defendant brings error. Reversed.

This is a suit by T. F. Bean, the owner of certain realty, for the use of J. H. McNesser, a real estate broker, to recover commissions alleged to be due by reason of the breach of the following contract:

"Atlanta, Ga. 4/5/1920.

"The undersigned hereby agrees to purchase through J. H. McNesser, agent, the following described property, to wit: All that tract or parcel of land lying and being in the city of Atlanta, Ga. House and lot known as number 164 Whiteford Ave., for the sum of five thousand five hundred dollars (\$5,500), to be paid as follows:

Cash payment.....	\$2,400 00
Assume loan 7% int., due about 1922.....	1,600 00
Assume bal. in notes at \$27.50 per mo. 7% int.	1,500 00
	<hr/> \$5,500 00

"Special Stipulations.

"Fire insurance and interest on loan are to be prorated at the time of closing deal. I have this day deposited with J. H. McNesser, real estate agent for Mr. Bean, the sum of \$25, twenty-five dollars, as a part of the named purchase money to bind this trade; a reasonable length of time being allowed for the examination of titles by my attorney. If said titles are good, I agree to make settlement at once; but if said titles are not good, and cannot be made good within a reasonable length of time, the said cash payment is to be returned to me, and this trade canceled. If through any fault of mine I fail or refuse to complete the above trade, then I agree to pay J. H. McNesser the amount of commission which he would have received, had I complied with my contract above set out.

"[Signed] P. J. Farrell, Purchaser."

"I hereby accept the above offer of \$5,500 upon the terms and conditions therein named, and guarantee the title to be perfect, and to deliver same free of legal incumbrance to the purchaser, and agree to pay J. H. McNesser, for having negotiated the above sale, a commission on the gross amount as follows, viz.: 5 per cent. on the first \$5,500; 2½ per cent. on the excess over the first \$5,000. In event the buyer fails to pay for the property as stipulated above, then the amount paid in is forfeited, and is to be kept by J. H. McNesser as part compensation for service by him rendered in this trade. This April 5, 1920.

"[Signed] T. J. Bean, Owner."

The defendant answered, denying liability, on the ground that the writing quoted was not a legal and valid contract and was not binding upon him, because it was signed with the express agreement and understanding that it was to be held in escrow by McNesser, and not to be delivered to Bean until the defendant sold his home place, No. 98 Alto ave-

nue, Atlanta, Ga., and that this place was never sold, and the contract was never delivered. Upon the trial the defendant offered to amend his answer, by adding allegations of fraud in the procurement of the contract. The amendment was disallowed, the case proceeded to trial, and at the conclusion of the evidence the court directed a verdict for the plaintiff. The defendant sued out certiorari, and to the judgment overruling the certiorari he excepted.

T. J. Ripley and W. M. Bailey, both of Atlanta, for plaintiff in error.

Etheridge, Sams & Etheridge, of Atlanta, for defendant in error.

BROYLES, O. J. (after stating the facts as above). [1] 1. There is no merit in the contention that it was not proper to bring the suit in the name of Bean, suing for the use of McNesser. *West v. Morris*, 10 Ga. App. 651, 73 S. E. 1075.

[2] 2. The proffered amendment to the defendant's answer, which alleged fraud in the procurement of the contract, was properly disallowed, since the facts therein set forth were insufficient to show fraud.

[3] 3. While the proffered amendment to the answer was properly disallowed, the defendant, under the original answer, was entitled to show by parol evidence, if he could, that the instrument in question was signed by the defendant with the express understanding and agreement that it was to be held in escrow by McNesser, the agent, and not to be delivered to Bean, the owner, until the defendant had sold his home place, and that that place had never been sold, and that the instrument had never been delivered to Bean.

A written instrument may, by parol evidence, be shown not to be a contract at all, because of the nonperformance of a condition precedent as to which the writing is silent. It may be shown by parol evidence:

"That the writing is not a valid or enforceable legal obligation, because it does not possess finality of utterance as a completed, all-comprehensive, and presently operative embodiment of the entire agreement of the contracting parties.' It is manifest * * * that there is a very marked difference between allowing parol evidence for the purpose of varying the terms of a writing whose execution and delivery are not denied, and allowing [parol] proof * * * for the purpose of showing that, on account of the nonperformance of some condition, perhaps not stated in the instrument, the alleged contract was in reality never created at all." *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590; *Hartman Stock Farm v. Henley*, 8 Ga. App. 255, 68 S. E. 957; *Equitable Manufacturing Co. v. Hill-Atkinson Co.*, 17 Ga. App. 494, 87 S. E. 715; *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706; *Purcell v. Armour Packing Co.*, 4 Ga. App. 253, 256, 61 S. E. 138.

It follows from what has been said that the trial court erred in rejecting the evidence offered by the defendant for the purpose of showing that when he signed the instrument sued upon he did it with the express understanding and agreement that the instrument was not to be delivered until he had sold his home place, that he had sold it, and that the instrument had never been delivered. The error in rejecting this evidence necessitated a new trial, and the judge of the superior court erred in overruling the certiorari.

Judgment reversed.

BLOODWORTH, J., concurs.

LUKE, J., dissents as to the ruling stated in the third headnote.

(26 Ga. App. 467)

DAVIS v. STATE. (No. 11946.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by the Court.)

1. Forgery \S 16, 29(1), 32, 34(4) — Indictment and information \S 73(1) — Indictment for uttering and publishing forged deed held sufficient as against general demurrer; indictment held to show signing was without grantor's knowledge or consent; indictment need not allege existence of property; allegation of intent to defraud two persons supported by proof of intent to defraud either; allegation of intent to defraud apparent grantor or his heir not inconsistent; filing for record is "uttering" and "publishing."

The indictment charges that the accused, Charles E. Davis, did "utter and publish as true the false, fraudulent, forged, altered, and counterfeited quitclaim deed purporting to be signed, sealed, and delivered by J. D. Kirkpatrick, in the presence of J. O. Scott and Walter Harris, J. P., to Southern Trading & Trust Company, a corporation, of the county of Fulton and state of Georgia, * * * said quitclaim deed being in words and figures as follows, to wit: [A complete copy deed is here set out], by then and there filing said false and fraudulent, forged, altered, and counterfeited quitclaim deed for record with the clerk of the superior court of said county as a bona fide quitclaim deed, with intent to defraud the said J. D. Kirkpatrick and * * * Mrs. J. D. Kirkpatrick, sole heir at law and legatee of the said J. D. Kirkpatrick, knowing the said deed to have been so falsely and fraudulently made, forged, altered, and counterfeited, and knowing the said names, to wit, J. D. Kirkpatrick's, as grantor, and J. O. Scott's and Walter Harris', as witnesses, to have been so fraudulently and falsely signed to said deed as aforesaid, contrary to the laws of said state," etc. *Held*:

(a) As against a general demurrer, the indictment was sufficient. Penal Code 1910, \S 231, 232, 954.

(b) The averment that the grantor's name was "falsely and fraudulently" signed to the deed sufficiently shows, even as against special

demurrer, that such signing was done without the grantor's knowledge or consent.

(c) It is not necessary, even as against special demurrer, that the indictment show that the property described in the deed is or ever was in existence. Penal Code 1910, \S 954. If such property was not in existence, that fact is matter of affirmative defense; and even then the real question would be not so much whether the property existed as whether its nonexistence rendered vain the alleged intent to defraud. Penal Code 1910, \S 232.

(d) Such an indictment may properly allege an intent to defraud two or more persons, and the allegation is sufficiently established by proof of intent to defraud any one or more of them. The state not being restricted in its proof to the specific date alleged in the indictment, the allegation of an intent to defraud the purported grantor of the forged deed and his "sole heir at law and legatee" did not necessarily render the indictment inconsistent or the allegation impossible of proof.

(e) Filing a forged deed for record "with the clerk," or "in the office of the clerk," as contemplated by law for the recordation of a valid deed, is an uttering and publishing within the scope and purview of section 232 of the Penal Code of 1910.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Publish; Utter.]

2. Criminal law \S 824(9) — Failure to charge on circumstantial evidence held error, though charge not requested.

In a trial under an indictment for uttering a forged deed, where the state relied exclusively upon witnesses' knowledge of handwriting to show that the deed was a forgery, and relied wholly upon circumstantial evidence to show that the accused knew it was a forgery, as well as that his intent in uttering it was to defraud certain designated persons, and where the defendant in his statement denied each of these elements of the alleged offense and introduced evidence tending to disprove them, the failure of the court to instruct the jury as to the weight of circumstantial evidence was error, requiring the grant of a new trial, even though no written request for such an instruction was presented. Penal Code 1910, \S 1010, 1087; Weaver v. State, 135 Ga. 317, 69 S. E. 488; Glaze v. State, 2 Ga. App. 704, 708, 58 S. E. 1126; Amason v. State, 23 Ga. App. 784, 99 S. E. 631.

3. Forgery \S 34(1) — Deed held not inadmissible in evidence because of printed matter not referred to in indictment.

Where an indictment alleges that a forged deed was "in words and figures as follows, to wit," and undertakes to set out a complete copy of the deed, beginning with the words "State of Georgia, Floyd county" and ending with the names of the purported grantor and of the attesting witnesses in the usual form, and where the original deed offered in evidence varies from the copy, in that the upper margin contains matter appropriate for the backing of such a deed, together with other matter usually found on printed legal forms for such deeds, and, in the lower margin, the grantor's name and seal is followed by a blank line and

the word "Seal," the variance affords no valid ground of objection to the admission of the original deed in evidence. *Haupt v. State*, 108 Ga. 53(2), 34 S. E. 313, 75 Am. St. Rep. 19.

4. Other errors not likely to recur.

A new trial must be granted because of the error pointed out in the second note, *supra*. If any other error appears from the record, it is not such as will likely recur on another trial of the case.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Charles E. Davis was convicted of uttering and publishing a forged instrument, and he brings error. Reversed.

Denny & Wright and Willingham, Wright & Covington, all of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., of Rome, for the State.

LUKE, J. [1-4] Only the second headnote needs elaboration. It appears, from the evidence, that the purported grantor and the two attesting witnesses whose names were signed to the deed in question were all three dead; and no eyewitness to the making of the deed, or to its attestation, was offered, either by the state or by the accused. To prove that the deed was a forgery, the state relied upon witnesses who testified to their knowledge of the handwriting of the purported grantor and of the attesting witnesses, and who further testified that, in their opinion, the signatures were all false, though good imitations of the genuine. The defendant, on the other hand, offered like evidence to the effect that the purported signature of the grantor was genuine, and offered other evidence to the same effect by expert comparison of that signature with another signature, which was proved to be the genuine signature of the purported grantor. To prove the defendant's guilty knowledge and fraudulent intent, the state relied upon evidence tending to show that the grantee in the alleged deed was a corporation; that the defendant was president of that corporation; that the deed was first found in his possession and was filed for record by him; that he had made various conflicting statements as to the source from which he had received it; that he had once refused to surrender it on demand by counsel of the purported grantor or his estate; and that later, when arrested and charged with the forgery of the deed, he had offered to surrender it upon condition that he be discharged from custody. The defendant, in his statement to the court and jury, denied any guilty knowledge or fraudulent intent on his part, and introduced in evidence, as correspondence between the grantor and the grantee, letters purporting to have been written sev-

eral years before the origin of this prosecution, during the year following the date of the deed in question, and tending to show an effort on the part of the grantor to repossess the deed in question, because, as he contended, his signature thereto had been obtained by fraud on the part of the grantee. The deed itself is dated May 12, 1910; the purported grantor appears to have died in 1915; the deed was filed for record in February, 1918; and the indictment was returned in July, 1920. The allegation that the defendant filed the deed for record was established by positive and direct evidence, and was admitted by him in his statement.

Under that evidence, it was for the jury to say whether or not the accused was guilty of the charge laid in the bill of indictment. In such a case, however, the trial judge must, whether so requested or not, instruct the jury that, to warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilty, but must exclude every other reasonable hypothesis than that of the guilt of the accused. In this case the learned trial judge failed, perhaps by mere oversight, so to charge the jury; but, that failure being assigned as one of the grounds of the motion for a new trial, both the lower court and this court are bound, as matter of law, to sustain the motion.

For the reason hereinbefore given, it was error to overrule the motion for a new trial. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 306)

NATIONAL SURETY CO. v. CITY OF ATLANTA. (No. 10533.)

(Court of Appeals of Georgia, Division No. 2. March 4, 1921.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the City of Atlanta against the National Surety Company. Judgment for plaintiff, and defendant brings error. Reversed in conformity to judgment of Supreme Court on certiorari (151 Ga. —, 106 S. E. 179).

For former opinion of the Court of Appeals, see 24 Ga. App. 732, 102 S. E. 175.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

Jas. L. Mayson and S. D. Hewlett, both of Atlanta, for defendant in error.

STEPHENS, J. 1. This court having in a judgment rendered in this case (24 Ga. App. 732, 102 S. E. 175) affirmed the judgment of the city court of Atlanta, and the Supreme

Court on certiorari having reversed the judgment of this court (151 Ga. —, 106 S. E. 179), the judgment of affirmance originally rendered by this court must be vacated, and the judgment of the trial court reversed. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(6 Ga. App. 386)

GALLIVITTOCH v. PROVIDENT LIFE & ACCIDENT INS. CO. (No. 11713.)

(Court of Appeals of Georgia, Division No. 1. March 8, 1921.)

(Syllabus by the Court.)

Insurance — 622(2, 4), 623(3)—Policy limitation on time for bringing suit is valid; minority does not excuse delay; insurer not estopped by letter.

A condition in an insurance policy providing that no recovery shall be had thereon unless suit is brought within "two years from the time within which proof of loss is required by the policy" is valid, and no recovery can be had on a policy containing such a condition when the action is not brought within the time specified in the policy, unless the provision is waived or there is valid excuse for delay.

(a) The minority of a beneficiary is no excuse for delay beyond the contractual limitation fixed by the policy.

(b) This contractual limitation is not waived, nor is the insurance company estopped from pleading it, by a letter written by the company to the attorney of the beneficiary, soon after the loss, in which it is stated that "within the very near future" a representative of the company would call upon the said attorney with the view of closing the matter; the letter stating further that the company would appreciate any assistance shown this representative in effecting an amicable and fair settlement of the claim.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Joe Gallivitch, by next friend, against the Provident Life & Accident Insurance Company. Judgment for defendant and plaintiff brings error. Affirmed.

Joe Gallivitch, a minor, by next friend, sued the Provident Life & Accident Insurance Company on an insurance policy, alleging that Frank Gallivitch, his father, was injured in an accident, and as a result thereof died on March 25, 1915, and that "proof of the death of the said Frank Gallivitch has been furnished to said company as required by the terms of the said policy." The petition was filed February 23, 1920, and the defendant filed a demurrer, the first and fourth grounds of which were as follows:

"(1) That the said petition set forth no cause of action in favor of said plaintiff against this defendant."

"(4) The fourth paragraph of said petition fails to alleged what injuries said Frank Gallivitch received and how he was injured."

The petition was amended, and the defendant filed a demurrer on the grounds:

"That the said petition as amended sets forth no cause of action in favor of said plaintiff against this defendant;" "that said petition as amended shows the said cause of action to be barred under the terms of the policy, which provides that no cause be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy."

A second amendment to the petition was offered, which alleged:

That promptly after the death of the insured the policy was placed in the hands of an attorney for collection, and that on June 11, 1915, the company wrote to the said attorney as follows: "We have received proof in connection with the death of Frank Gallivitch, accompanied by your letter of the 5th inst. This claim will be given prompt and careful attention, and we will advise you further concerning the same within a few days. You can rest assured that we will not delay matters any longer than is necessary." That on June 22, 1915, the company wrote to the said attorney as follows: "With further reference to this claim about which the writer called on you in person recently, will say that this matter is now having our attention and has been referred to Dr. W. W. Lee for disposition. Dr. Lee will call upon you within the very near future with the view of closing the matter. We will certainly appreciate any assistance shown the doctor in effecting an amiable [amicable?] and fair settlement of this claim." That "upon receiving these letters he expected a settlement of the said policy by the defendant company, and, relying upon the promises in said letters and shortly thereafter, he enlisted in the service of his country and served with the marines in France during the World War, being absent from Savannah for several years." That "upon petitioner's return in November, 1919, very much to his astonishment he found that no settlement had been made, and promptly took the matter up with the defendant company, whereupon they promised to pay a portion of the policy, but refused to pay the entire amount of the liability when this suit was filed."

To the allowance of this amendment objections were filed, two only of which are necessary for consideration here:

"(1) That the letters set forth in said proposed amendment were not such letters as would mislead the plaintiff into believing that this claim would be paid, thereby lulling him into security.

"(2) That these letters were written within three months after the death of the insured, and that suit was not filed until nearly five years after the death of the assured and after the writing of said letters."

The court sustained these objections; the proposed amendment was disallowed; the

grounds 1 and 4 of the original demurrer and grounds 1 and 2 of the demurrer to the petition as amended were sustained, and the petition was dismissed.

H. P. Cobb, of Savannah, for plaintiff in error.

Anderson, Cann & Cann and McIntire, Walsh & Bernstein, all of Savannah, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). The policy sued on contained the following clauses:

"Affirmative proof of loss must be furnished to the company at its said office in case of claim for loss of time from disability, within ninety days after the termination of the period for which the company is liable, and in case of claim for any other loss, within ninety days after the date of such loss. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy."

This court and the Supreme Court are absolutely committed to the proposition that a condition such as the above in an insurance policy is reasonable and valid, and that a compliance therewith is necessary to sustain an action on a policy in which is contained such a condition. *Maxwell Bros. v. Liverpool & London & Globe Ins. Co.*, 12 Ga. App. 127(1), 128(1), 76 S. E. 1036, and cases cited; *Stanley v. Sterling Mutual Life Ins. Co.*, 12 Ga. App. 477, 77 S. E. 664, and cases cited. See, also, *Brooks v. Georgia Home Ins. Co.*, 99 Ga. 116, 24 S. E. 869; *Met. Life Ins. Co. v. Caudle*, 122 Ga. 608, 50 S. E. 337(1); *Gross v. Globe & Rutgers Fire Ins. Co.*, 140 Ga. 531, 79 S. E. 138; *Third Natl. Bank of Columbus v. American Bonding Co.*, 145 Ga. 126, 88 S. E. 585. In *Melson v. Phenix Ins. Co. of Brooklyn*, 97 Ga. 723, 25 S. E. 189, Mr. Justice Lumpkin said:

"Where the parties, by agreement, make a fixed and unqualified limitation for themselves, they abandon all the legal regulations on the subject, and consequently must stand upon their contract as written."

It will be noted that the policy sued on required that proofs of loss be furnished "within ninety days from the date of such loss," and that suit must be brought, if at all, "within two years from the expiration of the time in which proof of loss is required by the policy." The petition in this case shows that the death, and consequently the loss, occurred in March, 1915, and alleges that "proof of the death of the said Frank Galivitch has been furnished the said company as required by the terms of said policy," and yet suit was not filed until February,

1920, nearly five years after the loss. However, the plaintiff seeks to avoid the plain and legal provision of the policy as to the two-year limitation by two contentions.

First. It is contended the contractual limitation in the policy was suspended because the beneficiary was a minor. Is this contention good? Is the minor beneficiary bound by the stipulation in the policy as to the two-year limitation? It will be noted that the contract of insurance was made between the father of the beneficiary and the company, and as between them counsel for the plaintiff in error concedes that the contractual limitation is valid. Let us remember that this is not a suit that could not be brought because of minority of the beneficiary. The suit could have been instituted by "next friend" as well within the two-year period of contractual limitation as when it was brought, more than four years after the loss. As far as we have been able to ascertain, the exact question under consideration has never been passed upon directly by the appellate courts of this state. The nearest approach thereto is found in *Maxwell v. Liverpool Ins. Co.*, 12 Ga. App. 127, 76 S. E. 1036. In the opinion in that case, Chief Judge Hill said:

"It is next contended by counsel for plaintiff in error that a member of the partnership whose property was insured was insane during a period of time immediately following the fire, and that during that period this contractual limitation was suspended as to the partnership. Under the law a partnership is a distinct and separate entity from the members who compose it, and the fact that one partner was temporarily insane or otherwise incapacitated to look after the affairs of the partnership, or to comply with its contracts, would not excuse a failure of the partnership, or of either of the members thereof, to perform the duty of looking after the interests of the partnership. It may be that the running of the statute of limitations would be suspended during the period of insanity of a member of the firm, but we are clear that any disability on the part of a member of the firm would not suspend the running of a contractual limitation, or fix a period of limitation other than that prescribed by the contract. The limitation in the present case is a condition precedent to the right of action on the policy, and the partnership, having made the contract, is bound thereby, regardless of any intervening infirmity of one of its members. It has been held that the minority of a beneficiary in an insurance policy did not exempt him from complying with a stipulation requiring an action on the policy to be brought within one year after the right accrued. *Suggs v. Travelers' Ins. Co.*, 71 Tex. 579 (9 S. W. 676, 1 L. R. A. 847); *Mead v. Phenix Ins. Co.*, 68 Kan. 437 (75 Pac. 475, 104 Am. St. R. 412, 64 L. R. A. 79)."

While this is not a direct adjudication of the question under consideration, it is quite persuasive. In addition to the Texas and Kansas decisions referred to in the foregoing

quotation, there are decisions of other courts that such a stipulation in an insurance policy is binding on an infant plaintiff. In *O'Laughlin v. Union Central Life Ins. Co.* (C. C.) 11 Fed. 280, the headnotes are as follows:

"(1) A condition in a life policy that no suit shall be brought upon it unless brought within one year after the assured's death is valid.

"(2) A suit cannot be maintained upon a policy containing such a condition unless instituted within the time specified.

"(3) Where suit is not instituted within the time specified, the condition need not be specially pleaded as a defense. It is sufficient to deny that the conditions of the policy have been complied with.

"(4) The fact that the beneficiaries named in the policy are minors will not prevent the enforcement of such a condition."

See, also, *Fey v. I. O. O. F. Mutual Life Ins. Society*, 120 Wis. 358, 98 N. W. 206; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 19 L. Ed. 257.

So we must conclude that the contractual limitation was not suspended because of the minority of the beneficiary.

Second. Was the defendant estopped by the letters sent by the company to the attorney of the plaintiff from pleading the limitation fixed by the policy? Plaintiff in error insists that it was, and to support this contention several cases are cited each of which is easily differentiated from the case sub judice. To illustrate: In the case of *Hartford Ins. Co. v. Amos*, 98 Ga. 533, 25 S. E. 575, one of the cases relied upon by the plaintiff in error, the record shows that after the fire the insurance company was garnished by creditors of the insured, and the company "promised to adjust and pay the loss . . . when the garnishment could and should be disposed of." The Supreme Court based its ruling on this positive promise. The other Georgia case cited for the plaintiff in error was that of *Stanley v. Sterling Mutual Life Ins. Co.*, 12 Ga. App. 475, 77 S. E. 664. In the opinion in that case this court said (12 Ga. App. 478, 77 S. E. 666):

"According to the testimony of the plaintiff, this officer [the secretary and treasurer of the company] made a direct promise to pay the loss. The plaintiff went to see him several times, but each time the officer said that everything was all right, and that the plaintiff would get his insurance. The plaintiff was thus lulled into the belief, by the repeated promises of the company's officer, that he would be paid without suit."

In the case under discussion, if there had been a direct and positive promise to pay the loss, a different case would probably have been presented. There is nothing in the letters in the amendment to the petition which could be construed into an absolute promise to pay. A statement in a letter from

the company to the attorney for the plaintiff that a representative of the company would call upon him "within the very near future with a view of closing the matter," and that the company "will appreciate any assistance shown the doctor in effecting an amiable [amicable?] and fair settlement," was not a promise to pay, or such a negotiation for settlement as to lull the plaintiff into the belief that he would be paid without suit, especially as it is not shown that the doctor did call "within the very near future," or that he ever called at all, or that the negotiation for a settlement ever went further than is shown by this letter. This letter might have been a reason for waiting a reasonable time for the doctor to call in an effort to adjust the matter but was not sufficient to "lull him [the plaintiff] into a false security" and cause him to wait beyond the two-year period of limitation embraced in the contract for bringing the suit. It is therefore clear that the ruling of the court upon the pleadings and in dismissing the suit was not error.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 412)

EVANS v. WILLIAMS. (No. 11937.)

(Court of Appeals of Georgia, Division No. 1. March 8, 1921.)

(Syllabus by Editorial Staff.)

Certiorari \Leftrightarrow 56(1) — Untraversed answer of magistrate is conclusive.

An untraversed answer of the magistrate to a petition for certiorari is controlling on the superior court and Court of Appeals, and where such answer stated that all the allegations of the petition were not true without specifying those that were untrue and did not verify the allegation that the damage sued for was to growing crops, the contention that the magistrate was without jurisdiction was not sustained.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Action by G. T. Williams against Jesse Evans. Judgment for plaintiff, and certiorari overruled by the superior court, and defendant brings error. Affirmed.

R. C. Jenkins, of Eatonton, for plaintiff in error.

Davidson, Callaway & De Jarnette, of Eatonton, for defendant in error.

BROYLES, C. J. It is well settled that an untraversed answer of the magistrate to a petition for certiorari, and not the petition, is controlling upon the superior court and this court, and that points made in the peti-

tion for certiorari, but not verified by the answer of the magistrate, cannot be considered by either court. In the instant case the only point that the petition for certiorari raises which was insisted upon before this court is that the justice who tried the case was without jurisdiction of the subject-matter, for the reason that the damage sued for was to growing crops that had never been severed from the realty, but the allegations as to these facts and the evidence in support thereof set out in the petition were not verified by the answer of the magistrate. Moreover, it is stated by the magistrate in his answer to the petition "that all the allegations [in the petition for certiorari] are not true," and it is not directly or clearly specified in the answer what allegations in the petition are untrue and what are true, and the answer was neither traversed nor excepted to. Under such circumstances this court is unable to say that the judge of the superior court erred in overruling the certiorari.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 487)

THOMPSON v. ATLANTIC COAST LINE R. CO. (No. 11948.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by the Court.)

1. Carriers \S 45—Measure of damages in suit under statute for failure to furnish cars to transport perishable freight stated; petition insufficient when not showing notice to carrier of intended market.

Although a shipper who has sustained damage by reason of a breach of the common-law duty of a railroad company, as a common carrier, to furnish cars for the transportation of freight within a reasonable time, is not prevented by the act of 1907 (Ga. Laws 1907, p. 84; Civil Code of 1910, \S 2774 et seq.) from instituting a common-law action for damages, instead of pursuing the remedy provided by that act, touching the failure of a railroad company to furnish cars to a grower of perishable products (Southern Railway Co. v. Moore, 133 Ga. 806 (67 S. E. 85, 26 L. R. A. [N. S.] 851), yet, where the suit is instituted under that act, the exclusive measure of damages is the market value of the product (with interest thereon, less cost of carriage and the usual expense of selling) in the market to which the shipper intended shipping it, on the day it would have arrived had it been carried in the usual course of transportation on schedule time for such freight. And in order to obtain damages in such a case the shipper must in writing notify the agent of the railroad company of the market to which he intended shipping his product. Civil Code 1910, \S 2774, 2775.

(a) It is clearly apparent from an examination of the act of 1907 that the General Assembly intended that the measure of damages prescribed therein should be the exclusive and sole measure of damages in any suit brought under that act.

(b) In the instant case the petition, properly construed, manifestly shows that the action was instituted under the act of 1907, and not under the common law, and as the petition failed to allege that the railroad company had been notified in writing by the shipper of the market to which he intended the goods to be shipped, and as this defect in the petition was pointed out by a timely special demurrer, and was not cured by any amendment, the court properly sustained the general demurrer interposed and dismissed the suit. (Per Broyles, C. J.)

2. Carriers \S 45—Petition held not to state cause of action for failure to furnish cars when not alleging delivery for transportation.

Moreover, even if the action were based upon the common-law liability of a carrier for the failure to furnish cars upon demand, the petition still fails to set out a cause of action, since it does not allege that the goods were properly offered for transportation. It is not alleged in the petition that the goods were ever carried to the defendant railroad line or offered in any way to the railroad company for transportation. On the contrary, it appears from the allegations of the petition (properly construed most strongly against the plaintiff) that the goods in question—watermelons—were never removed from the plaintiff's farm where they were grown. And these defects in the petition were pointed out by timely special demurrers and were not cured by any amendment. See, in this connection, Southern Railway Co. v. Moore, 133 Ga. 806, 67 S. E. 85, 26 L. R. A. (N. S.) 851; Chattanooga Southern Railroad Co. v. Thompson, 133 Ga. 127, 65 S. E. 285; Wadley Southern Railway Co. v. Kent, 145 Ga. 690, 89 S. E. 765.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by H. W. Thompson against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The record shows the following petition:

"H. W. Thompson brings this his petition against the Atlantic Coast Line Railroad Company, as defendant, and herein shows the court:

"(1) That the defendant railroad company is a common carrier by railroad, having a line of railroad through an office and agent in said county.

"(2) Your petitioner is a grower of watermelons.

"(3) During the spring of the year 1920 your petitioner grew watermelons for shipment in carload lots, growing them upon his farm near Ochlocknee, in said county.

"(4a) A ventilated car, great numbers of which are and were in use by the defendant railroad company, is the only kind of freight

car suitable for the transportation of such products.

"(5) Being such grower of watermelons, and having a carload of same ready for shipment from Ochlocknee, Ga., said county, your petitioner, on the 6th day of July, 1920, made written application to the defendant railroad company, through its agent at Ochlocknee, Ga., to wit, C. A. Welch, for a ventilated car to be loaded on the 8th day of July, 1920, at Ochlocknee, for immediate shipment.

"(6) The following is a copy of the application so served upon the said defendant, to wit: 'Georgia, Thomas County—To the Atlantic Coast Line Railroad Company: In compliance with [section] 2774 of the Civil Code of Georgia, adopted in 1910, and as a grower of watermelons, I hereby make application for a ventilated car for the transportation of such watermelons, that being the only car suitable for such purpose; and you are hereby advised that I desire to load such car on the 8th day of July, 1920, beginning at the hour of 4 o'clock, p. m., at Ochlocknee, Georgia. This the 6th day of July, 1920.

[Signed] H. W. Thompson.'

"(7) The defendant company failed and refused to furnish a ventilated car to your petitioner in accordance with the foregoing demand, either within the 24-hour period contemplated by law for such case or within any other period.

"(8) The defendant company failed and refused to respond to the said application by furnishing to your petitioner any car of any kind whatever for the loading and transportation of such melons, persisting in such failure and refusal for more than five days following next after the service upon its said agent of the said written application.

"(9) The fair market value of such melons, loaded in a ventilated car at Ochlocknee, Ga., was then and there, on the 8th and 9th days of July, 1920, the sum of \$175.

"(10) By reason of the defendant's failure and refusal to furnish a ventilated car as aforesaid, your petitioner failed to receive any sum whatever for his said melons, and the same became a total loss.

"(11) By reason of the defendant's failure and refusal to furnish a suitable car for the transportation of the melons aforesaid, it has injured and damaged your petitioner in the sum of \$175, and now fails and refuses to pay the said sum or any part thereof.

"Wherefore, your petitioner brings this suit to recover his said damages, and prays process and judgment accordingly."

The Code sections referred to in the headnotes are as follows:

"It shall be the duty of the railroad companies of this state to furnish to any grower of peaches, apples, cantaloupes, watermelons, or other perishable products, suitable icing and refrigerator cars, or other suitable cars for

the transportation of such products, whenever application is made therefor in writing by the shipper twenty-four hours in advance of the time such car or cars are wanted for loading. Such application to be filed with the nearest agent of the railroad company to the point from which shipment is to be made, and it shall state the time and place from which shipment is desired." Civil Code 1910, § 2774.

"Whenever any railroad company shall fail to furnish such icing and refrigerator cars as required in the preceding section, and the shipper places his product in carload lots, or, in cases of less than carload lots, expresses to the agent of the railroad company his willingness to pay charges for carload lots, then such railroad company shall be liable for the market value of such product with interest thereon. The market value to be determined by the market value of the product less the cost of carriage and the usual expense of selling in the market to which the shipper intended shipping same, on the day such product would have arrived, had the same been carried in the usual course of transportation on schedule time for such freight. In order to avail himself of this rule of damage, the shipper shall in writing notify the agent of the railroad company of the market to which he intended to ship his product. Payment shall be made by the railroad company for such product within thirty days after written claim has been filed with the company therefor. In the event that such railroad company shall fail to make payment as herein provided, or tender the correct amount thereof, it shall be liable for an additional fixed sum of fifty dollars for each car as liquidated damages for failure to perform its duty in the premises; such liquidated damages to be recovered in any cause brought for the recovery of damages on the main claim, in the event recovery is had thereon." Civil Code 1910, § 2775.

Clifford E. Hay, of Thomasville, for plaintiff in error.

Bennet & Branch, of Quitman, and Merrill & Moore, of Thomasville, for defendant in error.

BROYLES, C. J. Judgment affirmed.

BLOODWORTH, J., concurs.

LUKE, J., disqualified.

BLOODWORTH, J. (concurring specially). While I cannot concur in all that is said by the Chief Judge in the first headnote, I do agree with him that the declaration does not set out a cause of action either under the statute (Civil Code of 1910, §§ 2774, 2775), or under the common-law duty of a railroad company, as a common carrier, to furnish cars for the transportation of freight within a reasonable time after proper notice.

(28 Ga. App. 341)

ATLANTA POST CO. et al. v. McHENRY.
(No. 11544.)(Court of Appeals of Georgia, Division No. 2.
Feb. 26, 1921.)*(Syllabus by the Court.)*

1. Appeal and error \S 917(3)—No presumption of ruling on any particular ground of demurrer to petition containing general and specific grounds.

Where a demurrer to a petition contains general and specific grounds, and the court passes an order on the demurrer, there is no presumption that the ruling was based on any particular ground, but the order will be treated as passing on the entire demurrer and on all its grounds. *McClaren v. Williams*, 132 Ga. 352, 64 S. E. 65.

2. Appeal and error \S 853—Ruling on demurrer held law of case as to right to relief and as to libelous character of language employed.

In a suit for libel, where the defendant admits the use of the language charged, and fails to enter a plea of justification, but files a special ground of demurrer, setting up specifically that the words used in the article were not per se libelous, and that no special damages were asked for, and this demurrer is overruled, and no exception taken to such order, the ruling on the demurrer becomes the law of the case, in so far as it amounts to an adjudication to the effect that the plaintiff is entitled to relief, and that the words used in the article were libelous per se. The only question in such a case remaining for the jury to determine is the amount of the damages to which the plaintiff is entitled. *Ga. Northern Ry. Co. v. Hutchins & Jenkins*, 119 Ga. 504, 46 S. E. 659; *Johnson v. Wheelock*, 63 Ga. 624; *Miller v. Central of Ga. Ry. Co.*, 16 Ga. App. 855(3), 87 S. E. 303. The defendant by his demurrer having invoked a ruling upon the precise question indicated, and having failed to preserve exceptions taken pendente lite, or to enter direct exceptions upon such ruling, he cannot, upon exception to the judgment overruling the motion for a new trial, be heard in effect to attack the judgment on the demurrer, which he himself invited, and which had become the law of the case. *American Grocery Co. v. Kennedy*, 100 Ga. 462, 28 S. E. 241.

3. Libel and slander \S 124(7)—Instruction as to mitigation of damages by proof of absence of malice held not erroneous.

The charge of the court relative to the mitigation of damages, by proof of the absence of malice, was in accordance with the provisions of section 4429 of the Civil Code of 1910, to the effect that in all actions for printed or spoken defamation, malice may be inferred from the character of the charge, and that, should its existence be rebutted, such proof shall go in mitigation of damages. *Shipp v. Story*, 68 Ga. 47.

4. Libel and slander \S 33—In action for general defamation by words libelous per se, special damages need not be alleged or proven.

The court did not err in rejecting testimony offered by the defendant for the purpose of

showing the absence of special damages. In an action for general damages on account of words spoken or written about another which are libelous per se, it is not necessary to allege or prove special damage, and where they are not claimed, the defendant is not entitled to show the absence of special damage. *Civ. Code* 1910, \S 4433; 25 Cyc. 509.

Stephens, J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Jackson McHenry against the Atlanta Post Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

T. J. Ripley, of Atlanta, for plaintiffs in error.

C. D. Maddox, of Atlanta, for defendant in error.

JENKINS, P. J. In the demurrer to the suit for libel the following statement is made:

"Nothing is alleged to base the damages upon the article not being per se libelous, and defendants move to dismiss said suit."

The court overruled the demurrer, and in the charge to the jury stated that the article was libelous per se, as had already been thus previously determined. The defendant excepts to the charge, on the ground that the jury should have been allowed to pass upon the question whether the article was libelous per se.

[1] It is urged that the judgment on the on the demurrer, which set up specifically, as the necessary basis of its ground, that the language used in the article was not libelous per se, did not necessarily pass upon that question; and that consequently there has been no adjudication to the effect that the words contained in the published article were libelous per se. If this contention be correct, then the conclusion stated in the second division of the syllabus would not follow, since, as was held in *McElmurray v. Blodgett*, 120 Ga. 9, 47 S. E. 531, such a judgment does not conclude a party upon any question not necessarily involved in the decision on the demurrer, citing *Ga. Northern Ry. Co. v. Hutchins & Jenkins*, 119 Ga. 504, 46 S. E. 659. As we see it, however, the distinction between the instant case and the *McElmurray* Case is clear and well defined. In that case the court held that the decision on the demurrer did not necessarily include a construction as to the nature of the instrument there involved, although the demurrer may have itself urged, as a reason why the petition should be dismissed, that the paper was of a certain named and definite character; this because there were other allegations in the petition, setting up fraud, such as would have authorized a re-

covery, even though the defendant's construction of the contract was correct, and that for this reason the court did not necessarily have to pass upon the character of the instrument in overruling the demurrer. In the instant case, as stated in the demurrer itself, the plaintiff has failed to set up or ask for special damages; and, as stated by the demurrer, the suit was for this reason not maintainable, unless the petition showed the use of language by the defendant which amounted to a libel per se. Thus, as urged by the demurrer itself, there could be no recovery under any other theory. It follows, therefore, that, in overruling the demurrer, the court necessarily had to determine whether the language of the published article amounted to a libel per se; this being the sole and precise question upon which a ruling was invoked.

[2-4] The real difficulty of the case strikes somewhat deeper, however, and is presented by a consideration of the question as to whether, in ruling upon the demurrer, the judge necessarily determined that the words of the published article *were* libelous per se, or whether he only necessarily determined that they *authorized* such a construction, thus leaving it for the jury to say whether the innuendoes, which the petition sets up by way of explanation, set forth the true and actual meaning of the language used. The petition sets forth by way of innuendo an explanation as to the meaning of the language, which it is alleged charged the plaintiff with a crime, and it appears to be the general rule in such a case that where the alleged defamatory statement is ambiguous, that is, where it is capable, as a matter of law, of being understood in more than one sense, it is the office of the innuendo to designate the meaning which the plaintiff proposes to establish as the true and actual intent of the language, and such as was understood by those who read it. It is not the office of an innuendo, when thus pleaded by way of interpretation, to add to or take from the meaning of the language itself. It cannot be made to operate as an averment imputing to the statement anything which is not in keeping with the usual and natural meaning of the language used. Whether the plaintiff by setting up the innuendo has assigned to a defamatory statement a meaning of which it is not logically capable is a question of law for the court; but after the court has determined, as a matter of law, that the statement is capable of the construction placed upon it by the plaintiff, it then becomes a question of fact for the jury to say whether or not the alleged defamatory statement was in fact used and understood in the sense charged. Thus it will be seen that if all the court did in passing upon the demurrer was to say that the language, as a matter of law, was legally capable of being understood as defamatory, that it was legally

capable of being construed as set up by the pleaded innuendo, then the ruling would not amount to a holding that the language in fact charged a crime. In other words, if all that the judgment did was to rule that the language to the publication was legally susceptible of being understood *according to the interpretation set forth by the petition*, the judgment on the demurrer would not preclude the defendant on the question as to whether the language itself was or was not actually libelous per se. It follows that, if this were a case where the petition had set up and claimed special damages, the reasoning just stated would have proper application; and in a case of that sort a ruling on a demurrer, which sought merely to deny that the words were legally capable of the meaning charged, would decide nothing more than that such language might be taken and understood in accordance with the explanation plead by way of innuendo. In a case such as that, the judgment would have no need to pass upon the question as to whether or not the libel was such per se.

The case before us is, however, of a different nature. Here, we have a libel suit, setting up and praying for general damages only. It could not thus be maintained at all unless the language were libelous of itself and as a matter of law. No special damages being set up, the language of the publication must be such as would itself import injury and damage. Dismissal of the case was sought on the specific ground of demurrer that the language used was not libelous per se. Unless the language used were libelous as a matter of law, without the aid of any explanatory pleading or extraneous proof, the court should have sustained the demurrer. Not having sustained it, the contrary ruling necessarily carries with it an adjudication to the effect that the language used was not only libelous when taken in connection with the pleaded innuendo, but libelous per se.

But, it may be urged, does not the ruling, after all, go only to the extent of holding that the language is legally *susceptible* of being construed as libelous per se? If this were true, the effect would be to hold that the language, though necessary to be taken in connection with and supported by the explanation and interpretation pleaded by way of innuendo, could nevertheless, as a matter of law, be construed as a libel of itself and within itself. That is to say, the language itself is libelous within itself and of itself, although it is required that this construction of the language be supported by explanatory pleading and extraneous proof. This would seem to be an anomaly. It would be similar to saying that a given act could be accounted as negligence per se, although it required the finding of a jury to determine its character as such. Negligence which is negligence per

se, and words which are libelous per se, are such as a matter of law. In either case, if the finding of a jury is necessary to determine the character of the act or of the words, this is proof positive that its character is not fixed as a matter of law. Words which require support, interpretation, and explanation by pleading and extraneous proof cannot therefore be taken as libelous within themselves merely because the charge, *when thus supported*, relates to a crime. If it takes the verdict of the jury to establish the fact that it is libelous at all, it necessarily follows that it cannot be so accounted simply as a matter of law. When the judge, passing upon the specific question raised by the demurrer, ruled that the language used in the publication was itself libelous per se, he must necessarily have determined that this was true without the aid of any interpretation pleaded by way of innuendo. This being true, whether his decision was right or wrong makes no difference; no exception having been made thereto. Having decided that the language of the publication was libelous per se, he necessarily determined that it charged a crime independently of the innuendo pleaded in its support. His holding on the exact point raised by the defendant, to wit, that the words themselves were libelous per se, was equivalent to a holding that the innuendo pleaded in the petition was mere surplusage, since words which are libelous per se must be able to stand alone without the aid of any innuendo pleaded in their support.

In *Central of Georgia Railway Co. v. Sheftall*, 118 Ga. 865, 867, 45 S. E. 687, 688, the Supreme Court, speaking through Mr. Justice Lamar, said:

"Words which are clearly not defamatory cannot have their natural meaning changed by innuendo. *Words which are libelous per se do not need an innuendo.* [Italics ours.] But between these two extremes are found many expressions which may be ambiguous, and the real meaning can then be explained by reference to the circumstances. It is for the jury in such instances to say whether, in view of all the facts, the writing was libelous. It then becomes a part of the plaintiff's case to prove the allegations in the innuendo, and to show that the words were really libelous under the circumstances, and that those who read understood them in the sense alleged."

Following the principle thus laid down by the Supreme Court, it is our opinion that when the trial judge ruled that the words of the article were libelous per se, he necessarily must have determined that they should be so taken independently of any innuendo set up by the petition, since, under the authority quoted, if the words were not libelous per se without it, it could not be so accounted when thus supported. A petition cannot be based upon ambiguous language which is manifestly uncertain as to whether

the meaning of the words was intended to be libelous, except where the petition is supported by innuendoes pleaded by way of interpretation. It would seem to be equally true that if the petition cannot stand without the aid of explanatory interpretation, such ambiguous language standing by itself alone would not be sufficient to impute injury and damage as a matter of law. In this case, there being no special damages prayed for, the judge *must* have held that the language was not ambiguous, and that it charged a crime—not that it could have charged it as set forth by the pleaded innuendo, but that it did so independently of such pleaded interpretation. In order to render the ruling he made, it was necessary that he treat as mere surplusage the innuendo pleaded by way of interpretation, and to hold that the language itself charged a crime.

Judgment affirmed.

HILL, J., concurs.

STEPHENS, J. (dissenting). "A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule." Civil Code 1910, § 4428. There is authority to the effect that any defamatory charge amounting to a libel is actionable without proof of special damage to the person against whom the charge is directed. Bigelow on Torts (8th Ed.) 285. Be that as it may, it is certainly true that a libel which imputes to a person a crime punishable by law is actionable without proof of special damage. Such a charge is inherently harmful and injurious to the person against whom it is directed, and damage is therefore presumed. Such a libelous charge is actionable per se. This is so whether the words directly, *ex vi termini*, or indirectly by intimation or innuendo, make the charge. The charge is just as effectually harmful without proof of special damage, and therefore actionable per se, whether it results from words which directly and unequivocally make the charge, or from words which do so indirectly or by inference. It is therefore the harmful effect of the defamatory language which renders it actionable per se, and not its directness or unequivocal nature. To indirectly intimate, as in the instant case, that one is an embezzler or a thief, by charging that he wants to get his paws upon the money, if such language can be construed as making such charge, is just as inherently harmful without proof of special damage as to directly and unequivocally and in express language make the charge. See, in this connection, Odgers on Libel & Slander (5th Ed.) 39 et seq.; Pollock on Torts (10th Ed.) 249 et seq.; Bigelow on Torts (8th Ed.) 284; Cooley on Torts (3d Ed.) 376, 400; Newell on Libel & Slander (3d Ed.) 334, 352; *Cooper v. Perry Dudley* (Ga.) 247; 18 Am. & Eng. Ency.

of Law, 865 et seq., 969; 25 Cyc. 250, 452. Whether or not in any case the court can without the aid of a jury construe the meaning of alleged defamatory words, yet, where the words are reasonably susceptible of a defamatory meaning as well as an innocent one, and where the defamatory meaning must be supplied by inference or innuendo, the question then as to what meaning attaches to the language is clearly and without doubt one for the jury. *Beazley v. Reid*, 68 Ga. 380; *Morgan v. Black*, 132 Ga. 67, 63 S. E. 821; *Odgers on Libel and Slander* (5th Ed.) 110, 116, 129, 688; *Newell on Libel and Slander* (3d Ed.) 352. The trial judge therefore erred, as contended by the defendant, in eliminating this question from the consideration of the jury, unless his ruling upon the defendant's demurrer can be construed, as claimed by my colleagues in the majority opinion, as having adjudicated that the alleged defamatory words directly and *ex vi termini* made a defamatory charge actionable *per se*. I am of the opinion that no such question was adjudicated upon the demurrer, and therefore must dissent from the judgment of affirmance.

I submit that the trial judge, in overruling the defendant's demurrer to the petition, has adjudicated only that the alleged defamatory publication was actionable *per se* in the sense above stated, and that therefore the petition set out a cause of action without alleging special damage. The demurrer was based upon the ground that no cause of action was set out in the petition, since the alleged defamatory publication was not "*per se libelous*" and no special damage was alleged. The expression "*not being per se libelous*," as used by the defendant in the demurrer, can only mean that the alleged defamatory words are not actionable *per se*. It is not to be construed as meaning that the words are not unequivocal or not directly defamatory. Since defamatory language may be actionable *per se* without proof of special damage, whether the language directly or by inference makes a charge which is in itself defamatory without proof of special damage, a demurrer, based upon the ground that a petition in a suit for libel sets out no cause of action because the alleged defamatory publication is not "*per se libelous*" and no special damage is set out, can only be construed as meaning that the alleged defamatory charge is not actionable *per se*. If, therefore, the order overruling the demurrer adjudicates only that the alleged defamatory charge upon which the suit is based is actionable *per se*, it is not an adjudication that the language directly and unequivocally makes a defamatory charge. Despite such an adjudication, it was nevertheless error to withdraw from the jury the question as to the meaning of the language used.

Conceding, however, that the language in the demurrer that the publication was not

"*per se libelous*" means that the words are not directly or *ex vi termini* libelous, it cannot be said that the trial judge, in overruling the demurrer, adjudicated that the words were directly and *ex vi termini* libelous. An order upon a demurrer is an adjudication of those questions only which must necessarily have been adjudicated to sustain the order. It is not an adjudication of any question the decision of which is not necessary for the purpose of sustaining the order. *McElmurray v. Blodgett*, 120 Ga. 9, 47 S. E. 531; *Wheeler v. Board of Education, etc.*, 12 Ga. App. 152, 76 S. E. 1035. Therefore, the judgment overruling the demurrer to the petition, and thereby sustaining the petition, cannot be an adjudication that the alleged defamatory words were directly and unequivocally libelous, since it was not necessary so to decide in order to sustain the petition. The order overruling the demurrer and sustaining the petition adjudicates only that the petition sets out a cause of action, and a cause of action may be set out, without alleging special damage, whether the defamatory words directly and unequivocally make the libelous charge, or whether they do so indirectly or by inference.

(26 Ga. App. 462)

ALLEN v. ARMSTRONG. (No. 11938.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error \Rightarrow 719(10)—Error must be assigned on exceptions *pendente lite*.

Exceptions *pendente lite* to an order refusing to open a default cannot be considered when error was not assigned thereon in the main bill of exceptions and is not assigned by counsel in the appellate court before the argument begins.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by Adolphus Armstrong against W. M. Allen. Judgment for plaintiff, and defendant brings error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiff in error.

M. L. Felts, of Warrenton, for defendant in error.

LUKE, J. 1. Exceptions *pendente lite* cannot be considered unless error is assigned thereon, either in the main bill of exceptions or in this court by counsel for plaintiff in error, before the argument begins. See *Shaw v. Jones Newton & Co.*, 133 Ga. 446 (1), 66 S. E. 240, and cases cited. In the instant case the bill of exceptions recites that to the order of the judge refusing to open the default which had been entered the plaintiff in error "then and there filed his bill of

exceptions pendente lite to the order and judgment of said judge refusing to open said default." Nowhere in the bill of exceptions is there error assigned upon the exceptions pendente lite; nor was error assigned upon the exceptions pendente lite in this court by the counsel for plaintiff in error before argument. The decisions of the Supreme Court, which bind this court, control this question. Therefore the point which it is sought to raise by these exceptions cannot be considered.

2. Although the evidence for the plaintiff might have authorized a verdict for a greater amount than that found, or for a lesser amount, this fact will not necessitate a reversal, at the instance of the defendant, under the facts of this case. For no reason assigned did the court err in overruling the motion for a new trial, which was based only on the general grounds.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(129 Va. 423)

DU PONT ENGINEERING CO. v. BLAIR.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Pleading §430(2) — Variance waived by failure to object.

In employé's action for personal injuries, the employer waived variance between the declaration pleading negligence in failure to provide employé safe place in which to work and proof of negligence in failure to warn inexperienced employé of danger incident to the work by failure to make timely objection to variance under Code 1919, § 6250, where, if such objection had been made, the declaration could have been amended so as to conform to the theory that the negligence consisted in the failure to warn employé instead of the failure to provide safe place to work.

2. Pleading §387—Proof must correspond to the allegations.

Proof must correspond to the allegations.

3. Master and servant §289(27)—Contributory negligence of operator of hoisting machinery held for jury.

In an action for injuries to an employé struck by a shell which fell from an overhead track, after he had been engaged in elevating shells with the machinery for several hours, the question of contributory negligence held for the jury.

4. Master and servant §288(3)—Assumption of risk by operator of hoisting machinery held for jury.

In an action for injuries to an employé struck by a shell which fell from an overhead track after he had been engaged in elevating shells with the machinery for several hours, the question of whether he assumed the risk held for the jury.

5. Evidence §244(7)—Declarations of employer's head safety man admissible in action for injuries to servant.

Testimony as to statement by the head of employer's safety department that the employer had had a great deal of trouble with the machinery at which plaintiff had been working at time of injury held admissible as against objection that the employer was not bound thereby.

6. Master and servant §264(4) — Testimony as to defective hoisting held admissible under pleading.

In an action for injuries to an employé struck by a shell which fell from an overhead track, complaint alleging that employer negligently furnished a defective air pressure elevator with which to work held to warrant admission of expert testimony as to whether the shell would have fallen if the machine had not been defective.

7. Appeal and error §1050(2)—Erroneous admission of evidence harmless in view of issue.

In action for injuries to employé struck by heavy shell which had fallen from overhead track suspended from ceiling, in which the only issue was whether the failure of the employer to warn and instruct employé as to the danger incident to his work was the proximate cause of the accident, the admission of testimony that the accident could not have taken place if the machine had not been defective, if error, was harmless.

8. Appeal and error §1066—Instruction held harmless in view of issue.

In action for injuries to employé in which only issue was whether employer failed to properly warn and instruct employé with reference to the proper operation of machine at which he was working at time of injury, instructions as to master's duty to provide servants with reasonably safe machinery, though not appropriately worded, held harmless.

9. Trial §252(1)—Instructions should be applicable to evidence.

Instruction should be applicable to the evidence and the giving of instructions not applicable thereto, if the jury is misled thereby, constitutes reversible error.

Error to Circuit Court, York County.

Action by Nicholas M. Blair against the Du Pont Engineering Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henley, Hall, Hall & Peachy, of Williamsburg, and Plummer & Bohannon, of Petersburg, for plaintiff in error.

E. V. Farinholt and David Meade White, both of Richmond, for defendant in error.

KELLY, P. This is a writ of error to a judgment in favor of Nicholas M. Blair against the Du Pont Engineering Company in an action to recover damages for personal injuries sustained by Blair while in the employment of that company.

At the time of the accident the Du Pont Engineering Company was engaged in the business of loading large caliber shells for the United States government at Penniman, in York county. These shells, very much in the shape of an ordinary pistol cartridge, were about 8 inches in diameter, about 28 inches in length, and weighed in the neighborhood of 200 pounds. Blair went to work for the company on the 12th of August, 1918, and worked for two days at the very simple task of cleaning rust from the shells by means of sandpaper or a wire brush. On the third day he was assigned to the work of attaching and elevating shells to an overhead track suspended from the ceiling of the building in which he was employed. This operation was perhaps not very difficult for a man who understood it, nor very complex in its nature. To describe the work, however, so that the operation may be clearly visualized from a description, without any ocular demonstration, is not an easy task.

The overhead track referred to consisted of a single rail, in the shape of an I beam, suspended from the ceiling of the building. On this track were a number of four-wheeled carriers, called in the record "pulleys," or "trolleys," or "gigs." Each carrier was complete in itself and independent of the others. To each of them on the lower side was attached a steel cable, extending toward the floor of the building, and used for elevating or moving the heavy shells. By means of the cable, whether the same was merely hanging loose or was attached to the nose of a shell, the carriers could be moved by hand back and forth along the track. At the lower end of each cable was a hook which could be fastened into a hook on the small end of the shells. The wheels of the carriers moved on two flanges at the lower side of the rail (a pair of wheels on each flange), and were so adjusted that they could not separate and slip off the flanges.

At certain points along the overhead track were located air holsts, which were operated by compressed air, and at those points a short section in the track was so constructed and adjusted that it could be detached and lowered several feet from its position in the permanent track. Each of these short sections was about 3 feet long. The proper and safe method of elevating and moving the shells was about as follows: The operator would take hold of the cable, move the carrier, which was about 9 inches in length, to a position practically in the center of the short and movable section, then by the use of a lever, lower the short section, thus bringing the hook of the cable in reach of the shell as it stood on its end, attach the hook to the nose of the shell, and then again, by the use of a lever, release the short section so that it would by air pressure go back to its place in the permanent track, carrying the weight of the shell with it. When the

short section assumed its place in the permanent track, the shell as thus suspended could be moved forward or backward on the track by means of the cable and pulley.

On the short or movable section of the track, at a distance of about a foot from each end, there was a device known as safety catches, or safety dogs, which automatically came in place as the short section was lowered from its position in the permanent track, and thus operated as a stop or brace to prevent the carrier from rolling off at either end while the short section was disconnected.

There was a conflict in the evidence as to whether the foreman, a youth 19 years of age, who put Blair to work at these carriers, explained to him the imperative importance of seeing that the carrier was between the safety dogs before he lowered the short section. To one who understood the mechanism, it would be readily apparent that, if the trolley was not in proper position—that is, if it was allowed to be entirely clear of the safety dogs at either end—it would be likely to run off of the end of the track as soon as it was lowered, or certainly when, with the heavy shell attached, it started back towards the ceiling. The foreman who directed Blair to take up this new work says that he fully instructed and warned him in this respect. Blair says he gave him no warning whatever, but simply told him to raise and lower the track by means of the lever, and did not intimate to him that there would be any danger of the trolley running off under any circumstances.

Blair had been working at this job for several hours, and had elevated quite a number of shells. While so engaged, however, and after the lapse of several hours, he lowered a section of track, attached a shell to the hook in the cable, and, as the track was ascending in response to his use of the lever, the trolley, which instead of being between the dogs was entirely outside of them and near the end of the section, rolled off and thus allowed the shell to fall, inflicting the injury for which this suit was brought.

We have stated that the accident was due to the fact that the trolley was at the end of the short section instead of being properly placed between the safety dogs. This does not seem to have been the plaintiff's original theory, nor did his testimony in the outset tend to establish any such theory. Upon the contrary, he testified at one or more points in his evidence that the short section of track itself came down with the trolley. It is stated in substance in the opening brief for the company that the plaintiff abandoned the latter contention before the end of the trial, and was brought to rely upon the theory that, although the mechanism itself was in proper working order and free from defects, it was dangerous to an operator who did not understand that the trolley could

move from the center of the track and fall, and that the plaintiff had no such knowledge, and was not properly instructed and warned in that respect by the defendant before he was put to work. This position does not seem to be controverted, seems to be borne out by the general course of the trial, as shown in the record, and, as it was insisted upon by the plaintiff in error, we may safely assume that to decide the case accordingly cannot operate to its prejudice. We shall therefore deal with the case upon that theory.

There were two counts in the declaration.

In the first the negligence charged was:

That the defendants "did negligently, carelessly, and wrongfully furnish and provide the said plaintiff with a defective, unsafe, and dangerous air pressure elevator with which to work, which said air pressure elevator the said defendants on the day and year aforesaid knew was defective, unsafe, and dangerous, or they could have known it by the exercise of ordinary care on their part."

The negligence charged in the second count was:

That the defendants "did negligently, carelessly, and wrongfully fail and neglect to furnish and provide the said plaintiff with a reasonably safe place in which to work while in the discharge of his said duties in the exercise of ordinary care on his part, all of which the said defendants knew, or could have known by the exercise of ordinary care on their part, * * *" and "that the said place where he was required to work in the discharge of his duties aforesaid was dangerous and exposed him to extraordinary hazard to his life and limb, without knowledge on his part. The place was rendered dangerous by reason of the defective condition of the said air pressure elevator, which, by reason of the defect, was liable to fall upon and injure the said plaintiff without default on his part and while he was in the discharge of his duties aforesaid in the exercise of ordinary care."

The first error assigned is that the trial court improperly refused, upon the motion of defendant, to enter final judgment in its favor, pursuant to the provisions of section 6251 of the Code. This section provides that, when the verdict of the jury in a civil case is set aside by a trial court upon the ground that it is contrary to the law and the evidence, or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper.

[1, 2] In support of this assignment it is contended: First, that the plaintiff failed to prove any actionable negligence on the part of the defendant. The gist of the argument is that there was no proof of any defect in the machinery rendering the place unsafe, and that, as these were the only allegations of negligence in the declaration, the plaintiff

has failed to make out his case. In dealing with this contention we are assuming, as already indicated, that there was no proof to show that the machinery was not in good working order and reasonably safe for one acquainted with the dangers ordinarily incident to the work. Upon this assumption it may be said, as a general proposition of law, that there would be no liability in the absence of allegation and proof that the defendant failed properly to warn and instruct the plaintiff in respect to such hazards of the operation as he would not be bound to know because of their open and obvious character. It is elementary and familiar law that the proof must correspond to the allegations. But to avail itself of this rule the defendant was required to make timely objection to the variance. See Code 1919, § 6250; Va. & S. W. R. Co. v. Bailey, 103 Va. 205, 227, 49 S. E. 33; Conrad v. Ellison-Harvey Co., 120 Va. 458, 463, 91 S. E. 763, Ann. Cas. 1918B, 1171.

In this case the plaintiff himself, who was the first witness in the case, testified directly to the fact that he was put to work without any instructions as to the dogs, and without any warning as to the necessity of placing the trolley in the center of the movable track to insure the operation of the safety catches. After testifying at some length, and stating very emphatically that he had been operating the machinery exactly as he had been shown by the foreman, and without in any way disregarding any of his instructions, he was asked the following question and gave the following answer:

"Q. I understood that you told the jury—I do not want to keep on repeating questions, but I believe you told the jury that Mr. Taylor did not warn you at all?

"A. Not in the slightest degree of any danger that might possibly happen even."

Again, when he had been recalled, and before the testimony in chief in his behalf had been completed, he was asked the following questions and gave the following answers:

"Q. Mr. Crandall (plaintiff's witness), whom you heard testify, told the jury that this gig or trolley, if it got near your right-hand corner, was always liable to slip or fall off. Did you know that?

"A. Not until Mr. Crandall said so.

"Q. You told the jury that Mr. Taylor (defendant's foreman) showed you how to operate the machine. Did he tell you about that?

"A. Not a word.

"Q. All he told you to do was to work the levers?

"A. Yes, sir."

If the defendant had objected to this testimony, or had moved to strike out, it is quite probable that the court would have sustained the objection on the ground that it did not appear to be within the allegations of the declaration, but the plaintiff would then have had an opportunity to amend his allegations to conform to the proof, and doubtless would

have made such amendment. The defendant, however, neither objected to the evidence nor moved to strike it out, but, on the other hand, introduced proof to the contrary, and the conflict thus arising was a question for the jury. The question of variance between the allegation and the proof was waived, and cannot now be raised.

[3, 4] It is further contended that the court ought to have set aside the verdict and entered final judgment for the defendant because the plaintiff: (1) Assumed the risk of the danger which resulted in his injury; and (2) was guilty of contributory negligence. As to these contentions, it is sufficient to say that the machinery and its operation, though simple enough when explained and understood, was unusual in its character, and that from the testimony before us we think the questions of whether the plaintiff assumed the risk or was guilty of contributory negligence were properly referred to the jury.

[5] The next assignment of error is as to the admission in evidence of a certain statement alleged to have been made out of court by one Miller. The plaintiff in the course of his examination in chief testified that Miller "was the head safety man at the plant while I was there," "the chief safety man for the whole plant"; that while the plaintiff was at the hospital at Penniman, where he had been sent by the defendant for treatment, he was asked by the physician who was treating him, in the presence of Mr. Miller, to state how and under what circumstances he was injured; that he replied "that I was elevating shells and as this shell that hit my foot went up, the safety had failed to catch and it came down on my foot"; and that thereupon Miller turned to the doctor and said, "Doctor, we have had a great deal of trouble with that machinery." This testimony was objected to upon the sole ground, so far as the record shows, that "it had not been shown that Mr. Miller had any right to bind the defendant here, although he was an employé. Miller ought to have been brought here."

We are of opinion that the court did not err in the admission of this evidence. In the absence of proof to the contrary, which, if it existed, could easily have been produced by the defendant, it is a perfectly natural and fair inference from what the witness said that Miller was an employé of the defendant company, was the head of its safety department, and was present at the hospital in connection with the plaintiff's injury in the regular course of his business. This being true, his statement was clearly admissible. *Lynchburg Telephone Co. v. Booker*, 103 Va. 594, 604, 50 S. E. 148; *Washington-Va. Ry. Co. v. Deahl*, 126 Va. 141, 145, 100 S. E. 840.

The admission in evidence of a statement by the plaintiff's witness Crandall is also assigned as error. This witness had worked

for defendant at Penniman for about six months, and while it appears that he had only actually worked eight days in the particular building in which plaintiff was injured, his testimony showed perfect familiarity with the machinery and its operation. At the conclusion of his testimony in chief, he was asked the following question, and, over the objection and exception of the defendant, was allowed to make the following answer:

"Q. Now, I will repeat the question: I want you to tell the jury whether or not this thing in here (indicating gig) could have fallen if the machine had not been defective.

"A. I do not see how it could."

[6, 7] The first objection urged against this testimony is that the witness had not qualified as an expert, and had not shown any particular knowledge, science, skill, or art in the construction or the operation of air pressure elevators not possessed by ordinary persons. The objection does not appear to be sound. Upon the contrary, the witness gave perhaps the best description of the operations to be found in the record, and evinced very great familiarity with and very accurate knowledge of the machine. A further objection urged against this evidence is that it did not relate to any allegation in the declaration. The mere reading of the allegations above set forth and a comparison thereof with the question and answer will show that this point is not well taken. In any view of the matter, however, the evidence was immaterial, and its admission, even if erroneous, was harmless. The case quite plainly appears to have narrowed down at the trial to the question of whether the proximate cause of the accident was or not the failure of the defendant to warn and instruct the plaintiff. Crandall himself admitted on cross-examination, and it was conclusively proved, that the trolley could run off if not placed in the center of the short section and between the dogs; and before the case went to the jury it must have been understood by everybody connected with the trial that the accident was due to the fact that the trolley was not properly placed, and that the sole question for determination was whether the defendant was liable to the plaintiff for a failure of duty in warning and instructing him in this particular.

This brings us to the question of instructions. Plaintiff's instruction No. 1, the giving of which is assigned as error, was as follows:

"The court instructs the jury that it is the paramount duty of the master to use ordinary care and diligence to provide his servants with reasonably safe machinery and appliances and such as are reasonably calculated to assure his safety, and to inspect and examine their machinery from time to time for the purpose of discovering and repairing defects therein. If, therefore, the master knew, or could have known, if he had used such care to ascertain

the fact, that the air pressure and elevator or appliances which he had provided for his servants were defective and unsafe, and that the servant, without any negligence upon his part, was injured thereby, the master is liable, and the jury should find for the plaintiff."

[8] This instruction was not appropriately worded, but, in view of the fact that the issue as developed by the evidence was as to whether the defendant failed in its duty with regard to plaintiff's safety by its failure properly to warn and instruct him with reference to the proper position of the trolley on the short section of track, we do not think the jury could have been misled by the instruction.

Plaintiff's instructions Nos. 2, 3, and 4, objected to, were brief abstract statements with reference to the law of negligence as applied to the relation of master and servant, and were so manifestly correct and free from error that we deem it unnecessary to make further comment upon them.

Plaintiff's instruction No. 5 told the jury that it was the duty of the defendant to exercise ordinary care to provide a reasonably safe place in which the plaintiff was required to work, and that, if they believed that the defendant knew, or by the exercise of ordinary care on its part could have known, that the trolley could move from the center of the track which came down, and thus be liable to fall with the suspended shell attached, and thereby rendered the place dangerous to the person operating the machine, and did not use reasonable care to warn the plaintiff of the danger, and that the plaintiff was ignorant of this fact and could not by the exercise of ordinary care on his part have discovered the danger, then the defendant is liable, and the jury should find for the plaintiff.

Plaintiff's instruction No. 6 told the jury that it was the duty of the defendant to provide a reasonably safe place in which the plaintiff was required to work, and that, if they believed from the evidence that the place was not reasonably safe, that the plaintiff was ignorant of this fact and could not by the exercise of ordinary care discover the danger, it was the duty of the defendant to warn and inform him of it, and that in the absence of an official of higher grade this duty devolved upon the foreman under whom he was working.

These two instructions are objected to on the ground that there was no charge in the

declaration, except with reference to the defective, unsafe, and dangerous condition of the machinery, and that therefore these instructions dealt with questions outside of the allegation, and were for that reason erroneous. We have, however, seen that the case was tried upon a theory as to which the declaration might have been amended, upon testimony which would have been applicable to the declaration as so amended, and without any objection to such evidence. In this view of the case the instructions complained of, while not as accurately phrased as they might have been, could not have been misunderstood by the jury, and cannot be made the ground of reversal.

[9] There should be this further comment made with reference to the instructions: The plaintiff asked for eight, the defendant for twelve, and the court gave all of them exactly as offered. These instructions, taken literally, covered practically every question of law which could have arisen as to the respective legal rights and duties of the plaintiff and defendant, even if the case had been one in which the evidence tended to show some defect rather than a mere inherent danger of the machinery. Why they were asked for and given in this form, in view of the narrow question of fact presented by the evidence, is not easy to understand. It is possible that they were prepared in advance of the actual introduction of the evidence, and afterwards offered and given without much consideration or scrutiny. Undoubtedly one of those given for the plaintiff and several of those given for the defendant might be construed to assume that a defective condition of the machinery was involved and relied upon by the plaintiff. The latter was true under the allegations of the declaration, but not true, as we think, under the issue as developed at the trial. Of course, it is well understood that instructions ought not to be given which are not applicable to the evidence, and that to give them constitutes reversible error where there is reason to suppose that they probably misled the jury. We do not think there was such probability in this instance.

Upon the whole case, we are of opinion that there has been a fair trial upon a narrow issue fully understood by the parties, the court, and the jury, and that we ought not to interfere with the verdict and judgment.

Affirmed.

(29 Va. 774)

FIELDS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Homicide §140—Indictment for attempt to murder held sufficiently to charge overt acts.

Indictment charging that accused did feloniously attempt to commit the crime of murder by discharging and shooting off a pistol at and towards another, etc., *held* sufficiently to charge the overt acts done toward commission of the offense.

2. Homicide §131—Indictment sufficiently informed accused of person upon whom attempt made.

Indictment charging an attempt to commit the crime of murder by discharging a pistol at another *held* sufficiently to inform accused whether she was charged with attempt to murder the person named or some one else.

3. Homicide §139—Indictment for attempt to commit murder not invalid for failure to specify degree.

Indictment charging attempt to commit the crime of murder by discharging a pistol at another *held* not invalid because failing to specify that the murder alleged to have been attempted was murder in the first degree.

4. Homicide §9—Intent to kill essential element of first degree murder.

The intent to kill is an essential element of the crime of murder in the first degree.

5. Homicide §128—Indictment for murder need not allege intent to kill.

An indictment for murder need not expressly allege the intent to kill, and an indictment for murder at common law which does not expressly charge such intent is valid and sufficient to support verdict of murder in the first degree, if the evidence is sufficient to establish the murder was of such degree.

6. Homicide §313(1), 330—Verdict convicting of attempt to murder not invalid because not finding degree.

In a prosecution under indictment charging attempt to commit the crime of murder, verdict of guilty *held* not invalid because it did not expressly appear therefrom that the jury found defendant guilty of attempt to commit murder in the first degree, and, in the absence of the evidence or instructions, the appellate court must presume that the jury in fact found defendant guilty of an attempt to commit murder in the first degree, in which case alone it could have lawfully fixed the punishment named in the verdict.

7. Criminal law §1144(16)—General verdict presumed to be responsive to all issues affecting its correctness.

Even in civil cases a general verdict is presumed to be responsive to all issues affecting its correctness, and it is only where it affirmatively appears from the record that it is uncertain whether the verdict responds to all such issues that it will be held to be invalid, which rule is still stronger in criminal cases.

Error to Circuit Court, York County.

Lou Emma Fields was convicted of an attempt to commit murder, and she brings error. Affirmed.

Omitting the formal and immaterial parts, the indictment in this case contains the following allegations, namely:

That the accused "did feloniously attempt to commit the crime of murder by taen and there, with a pistol, then and there charged and loaded with gunpowder and leaden bullets, which said pistol she, the said Lou Emma Fields, in her hand then and there held, then and there feloniously, willfully, and of her malice aforethought did discharge and shoot off at and towards one David Tabb, she, the said Lou Emma Fields, at the time of said shooting being close enough to the said David Tabb to be within carrying distance of said pistol. * * *

The accused demurred to the indictment. The court overruled the demurrer, and the point was duly saved. There was a trial by jury, which resulted in the following verdict:

"We, the jury, find the accused, Lou Emma Fields, guilty as charged in the within indictment and fix her punishment at two years' confinement in the penitentiary."

Whereupon the accused moved the court to set aside the verdict on the ground that it was contrary to the law and the evidence, which motion the court overruled, entered judgment, and passed sentence upon the accused in accordance with the verdict, and the accused appeals.

None of the evidence introduced on the trial and none of the facts proved thereon is shown in the record. Further, it appears from the record that the jury "received the instructions of the court," but they do not appear in the record.

The indictment was found under the Virginia statute of attempts (Code 1919, § 4767, being section 3888 of the Code of 1887), which, so far as material, is as follows:

"How Attempts to Commit Offenses Punished.—Every person who attempts to commit an offense, and in such attempt does any act towards its commission, shall, when not otherwise provided, be punished as follows: If the offense attempted be punishable with death, the person making such attempt shall be confined in the penitentiary not less than two nor more than five years; * * * if it be punishable by confinement in the penitentiary, he shall be confined in jail not less than six nor more than twelve months; if it be punishable by confinement in jail or fine, he shall be confined in jail not exceeding six months or fined not exceeding one hundred dollars. * * *

Ashton Dovell, of Williamsburg, for plaintiff in error.

Jno. R. Saunders, Atty. Gen., and J. D. Hank, Jr., Asst. Atty. Gen., for the Commonwealth.

SIMS, J. (after stating the facts as above). The assignments of error raise the questions,

which will be disposed of in their order as stated below:

[1] 1. Does the indictment sufficiently charge the overt acts done towards the commission of the offense?

This question must be answered in the affirmative.

The indictment is informal in some respects. It, however, follows the statute in its use of the word "attempt," and further charges that the attempt was "to commit the crime of murder," and that the overt acts done towards the commission of that offense were, in terms or in substance, that the accused, on a certain day, feloniously, willfully, and of her malice aforethought, did discharge and shoot at and towards one David Tabb a pistol, then and there held in her hand, charged and loaded with gunpowder and leaden bullets, she being at the time of the shooting close enough to said Tabb, with respect to the range of the pistol, to have rendered the shooting at and towards said Tabb effective of the aforesaid attempt to commit the crime of murder.

Concerning the overt acts in question, we have here a similar situation involved in Cunningham's Case, 88 Va. 37, 13 S. E. 309, where the indictment under consideration was for an attempt to commit rape and was found under the same statute concerning attempts as that under which the indictment was found in the instant case. There the indictment was held sufficient in its charge of the overt acts done towards the commission of the offense, although it merely charged an assault, without charging any of the specific acts constituting the assault. The indictment before us charges the acts constituting the assault, and therefore both charges the assault and descends into the particulars of that charge. A fortiori, under the ruling in the Cunningham Case, the indictment in the instant case sufficiently charges the overt acts in question. See, also, Broadus' Case, 126 Va. 733, 101 S. E. 321.

[2] 2. Did the indictment inform the accused whether she was charged with the attempt to murder David Tabb, or some one else?

We are of opinion that the indictment plainly charges and hence informed the accused that she was charged with the attempt to murder David Tabb.

The following position is taken for the accused in the petition for the writ of error, namely:

"The indictment first charges an 'attempt to commit the crime of murder,' alleging the same in the form of a conclusion, * * * then goes on by descriptive language, and alleges that the accused fired a loaded pistol at and towards one David Tabb, * * * but nowhere is the allegation made that the attempt was to murder David Tabb or assault him. We submit that the descriptive language is not sufficient to support the conclusion of the first part of

the indictment that the accused attempted to commit the crime of murdering David Tabb."

The allegations of the indictment must be read as a whole. When so read, we think they unmistakably charge not only the conclusion in the first part of the indictment that the accused attempted to commit the crime of murdering David Tabb, but also, where they descend to the particulars of fact on which that conclusion is based, charge unmistakably that the attempt was to assault and murder David Tabb.

[3] 3. Is the indictment invalid because it fails to specify that the murder alleged to have been attempted was murder in the first degree?

The question must be answered in the negative.

[4, 5] The petition of the accused correctly takes the position that the intent to kill is an essential element of the crime of murder in the first degree. See Williams' Case, 128 Va. —, 104 S. E. 853, and authorities cited. And it is said in the petition that—

"The indictment says that the accused fired a pistol at and towards David Tabb while within range, but does not allege that the intent existed to kill him."

But it is the settled law of this state that an indictment for murder need not expressly allege the intent to kill, and that an indictment for murder at common law (which does not expressly charge the intent to kill) is valid and sufficient to support a verdict of murder in the first degree, if the evidence introduced on the trial is sufficient to establish that the murder was of that degree. Livingston's Case, 14 Grat. (55 Va.) 592, 596; Cluverius' Case, 81 Va. 787. On the same principle we are of opinion that an indictment for an attempt to commit murder at common law is valid and sufficient to support a verdict, such as that rendered in the instant case, convicting the accused of an attempt to commit murder in the first degree, if the evidence was sufficient to prove the commission of that crime. As the accused has not brought before us the evidence introduced on the trial, we must presume that it was sufficient to establish that the attempted murder was murder of the first degree. Therefore we are of opinion that the indictment is valid in the particular in question.

We come now to the only question raised by the assignments of error which remains for our consideration, namely:

[8, 7] 4. Is the verdict invalid because it does not expressly appear therefrom that the jury found the accused guilty of the attempt to commit murder of the first degree?

This question also must be answered in the negative.

It is true that under the statute the jury could not in this case have lawfully fixed the punishment named in the verdict, unless they

in fact found the accused guilty of an attempt to commit murder in the first degree. But, in the absence of the presentation to us either of the evidence or the instructions, we must entertain every reasonable presumption in support of the validity of the action of the jury, and must conclude that the attention of the jury was properly called to the issue as to the degree of the attempted crime, and that they in their verdict responded to that as well as to all the other issues in the case which affected the correctness of the verdict. Even in civil cases a general verdict is presumed to be responsive to all the issues in the case affecting the correctness of the verdict (Burks' Pl. & Pr. § 300, p. 535), and it is only where it affirmatively appears from the record that it is uncertain whether the verdict responds to all such issues that it will be held to be invalid (Winn Broa. & Baker, Inc., v. Lipscombe, 103 S. E. 623). This rule is still stronger in criminal cases, for reasons which we need not enter into here.

The case will therefore be affirmed.

(129 Va. 354)

BRAGG v. JUSTUS et al.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Exceptions, bill of \S 43(1)—Bill must be filed within time or court is without jurisdiction.

The filing of bills of exception within the time prescribed by law is of the very essence of the jurisdiction of the trial court, and, if not filed in such time, the trial court cannot make the bills a part of the record thereafter, nor can the matter be affected by consent of counsel.

2. Exceptions, bill of \S 41(5)—Bill must be filed within 60 days after rendition of judgment.

Where judgment was rendered February 2, a bill of exceptions filed May 18 comes too late, and cannot be considered, for the bill of exceptions, under Code 1919, § 6252, must be filed within 60 days after rendition of judgment, notwithstanding the term was in session for more than 60 days, and the provision of Code 1919, § 6338, authorizing the trial judge to suspend execution of judgment does not authorize the extension of time for filing bill of exceptions beyond 60 days.

3. Appeal and error \S 637—Writ of error dismissed where bill of exceptions was not filed in time, and the only errors assigned were dependent thereon for support.

Where the only errors assigned were dependent on the bill of exceptions for support, a writ of error will be dismissed where the bill of exceptions was not filed in time.

Error to Circuit Court of City of Richmond.

Action by John W. Justus and Hunter M. Martin, partners as the Manchester Mills, against W. G. Bragg. There was a judgment for plaintiffs, and defendant brings error. Writ dismissed.

A. H. Sands, of Richmond, for plaintiff in error.

F. T. Sutton, Jr., of Richmond, for defendants in error.

BURKS, J. The defendants in error (plaintiffs below) proceeded by motion for a judgment against W. G. Bragg for breach of contract. On December 11, 1919, there was a verdict in favor of the plaintiffs for \$900. This verdict the defendant moved the court to set aside as contrary to the law and the evidence. The court took time to consider of its judgment, and on February 2, 1920, overruled the motion, and entered final judgment for the plaintiffs for \$900, with interest and costs. The following is the language of the entry:

"This day came again the parties, by their attorneys, and the court, having considered the defendant's motion heretofore made to set aside the verdict of the jury rendered herein on the 11th day of December, 1919, doth overrule the same, to which action and ruling of the court the defendant, by his attorney, excepted.

"Therefore it is considered by the court that the plaintiffs recover against the defendant the sum of \$900, the damages assessed by the jury in their verdict aforesaid, with interest thereon to be computed after the rate of 6 per centum per annum from the 11th day of December, 1919, until paid, and their costs by them about their motion in this behalf expended.

"Memorandum: Upon the trial of this action the defendant, by his attorney, excepted to sundry opinions and the judgment of the court given against him, and leave is given him to file his bills of exceptions at any time within the time prescribed by law. And on motion of the defendant, by his attorney, it is ordered that this judgment be suspended for the period of 60 days from this day to enable the defendant to apply for an appeal from the said judgment upon condition that he or some one for him enter into a bond before the clerk of this court with good and sufficient security in the penalty of \$1,000 within 10 days from this day, conditioned according to law."

Afterwards, on March 22, 1920, the trial court entered the following order:

"This day came again the defendant, by his attorney, and on his motion the time given him to file his bills of exceptions is extended to 60 days from the rising of the court, and the judgment entered herein on the 2d day of February, 1920, is suspended for the same period, to allow the defendant to apply for an appeal from the said judgment, upon condition that he or some one for him enter into a bond before the clerk of this court with good and sufficient security in the penalty of one thousand dollars within ten days from this day conditioned according to law."

[1] On May 18, 1920, the bills of exception were filed. The only errors assigned are founded upon these bills of exception, and it is necessary to decide in the outset whether or not they are a part of the record. The subject was not mentioned either in the briefs of counsel or in the oral argument, and when it was brought to the attention of counsel after the case was submitted, counsel for the defendants in error, in a written communication to the court, stated that he had consented to the extension of the time within which the bills of exception were to have been filed. But it is not a matter that counsel could affect by consent. If the bills were not filed within the time prescribed by law, the trial court was without jurisdiction to receive them and have them made a part of the record at a later date. The filing within the time prescribed by law was of the very essence of the jurisdiction of the trial court. *Dallas Wright's Case*, 111 Va. 873, 69 S. E. 956; *Battershall v. Roberts*, 107 Va. 269, 58 S. E. 588; *Standard Peanut Co. v. Wilson*, 110 Va. 650, 66 S. E. 772, and cases cited.

[2] Prior to the Code of 1887, and for some years thereafter, bills of exception could not be filed after the adjournment of the term at which final judgment was entered. Afterwards the Legislature made changes in the statute, and finally allowed the bills to be filed within 30 days after the term "or at such other times as the parties, by consent entered of record, may agree upon." Code 1904, § 3385. This led to such loose practice as to evoke from this court the statement that—

"More miscarriages, in the effort to bring the rulings of trial courts under review in this court, have occurred in the six years since the amended statute, *supra*, has been in force than in all the years prior to its passage. And why? Simply because the statute has not, in the cases where the miscarriages have occurred, been strictly followed, as is absolutely necessary, in order to confer authority upon the judges of trial courts, to sign a bill of exception, and make it a part of the record, after the adjournment of the term at which the final judgment in the case is entered." *Battershall v. Roberts*, *supra*.

With full knowledge of the situation, the revisors of 1919 limited the time within which bills of exception might be filed to "sixty days from the time at which such judgment is entered." Code 1919, § 6252. In a note to this section the revisors say:

"It should be observed that sixty days are given instead of thirty, as was the case for-

merly, but that the time may not be increased by consent entered of record. It was thought that this period would be sufficient for all purposes, and that by making it a fixed, definite, unchangeable period, difficulties formerly encountered would be obviated."

[3] The provision of section 6338 of the Code permitting the trial court or the judge thereof in vacation to suspend the execution of a judgment under the circumstances mentioned in that section does not extend the time for filing bills of exception. The time for filing such bills is definitely fixed by section 6252, and the trial courts are without power or authority to extend it. Final judgment was entered in the case at bar February 2, 1920, but the bills of exception were not filed till May 18, 1920, more than 60 days after the final judgment. The bills of exception, therefore, are no parts of the record before us. It does not appear from the record, but we are informed by counsel on both sides, that when the order of March 22, 1920, was entered the February term of the court was still in session; in other words, the court still had control over the judgment. The fact that the court still had control over the judgment did not render the judgment any less a final judgment within the meaning of section 6252 of the Code. That section permits bills of exception to be filed "at any time before final judgment is entered, or within sixty days from the time at which such judgment is entered." This language, taken in connection with what the revisors say in their note to the section, makes it fairly plain that the bills of exception were to be filed within 60 days from the date of the judgment, whether the court continued in session or not. The sixty days is to be computed, not from the adjournment of the term at which the judgment by operation of law becomes final, but from the date of the judgment which becomes final by such adjournment. The fact is that the judgment of February 2, 1920, was the only judgment ever entered in the case. If it is not a final judgment, then the writ of error would have to be dismissed because such a writ lies only to a final judgment. If it is a final judgment within the meaning of the section, then the bills of exception were not filed in time. As the only errors assigned are dependent upon the bills of exception for support, the writ of error will be dismissed as having been improvidently awarded. It is not surprising that this error should have occurred, as the statute did not go into effect till January 13, 1920.

Dismissed.

(129 Va. 323)

ATLANTIC COAST LINE R. CO. v.
SOUTHERN OIL & FEED
MILLS, Inc.

HINES, Director General of Railroads, v.
SAME.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Waters and water courses §119(4)—Ordinary care to be exercised by railroad in constructing a culvert.

The degree of care and foresight a railroad company should use in putting a pipe under its roadbed to carry off water to prevent flooding of lands of adjoining landowners is that which an ordinarily prudent man would exercise under the conditions and circumstances existing at the time.

2. Waters and water courses §119(4)—Inadequacy of culvert need not be affirmatively brought to railroad's attention.

A railroad's duty as to construction of culverts under its roadbed is not fully discharged by careful original construction of a pipe, and it was error, in an action for damages from flooding, to instruct in effect that such was the law unless and until an inadequacy of the pipe was affirmatively brought to the road's attention in some notice given by or on behalf of the adjoining landowner.

3. Trial §296(2)—Erroneous instruction as to inadequacy of culvert cured by following instruction.

In an action for damages by flooding, due to inadequacy of culvert under railroad roadbed, an instruction, objectionable as being susceptible of the meaning that any "want of proper construction of the said culvert" would have rendered defendant liable, was cured by an instruction immediately following it, correctly stating the rule as to the degree of care required of a railroad in constructing a culvert.

4. Railroads §5½, New, vol. 6A Key-No. Series—Director General had no right to permit injury by faulty culvert.

The Director General of Railroads had no more right to permit a faulty constructed culvert to operate injuriously to property owners than the railroad company itself, although he had nothing to do with the original construction of the culvert.

Error to Circuit Court of City of Suffolk.

Actions by the Southern Oil & Feed Mills, Incorporated, against the Atlantic Coast Line Railroad Company and against Walker D. Hines, Director General of Railroads, respectively. Judgments for plaintiff, and defendants separately bring error. Affirmed.

Wm. B. McIlwaine and Bernard Mann, both of Petersburg, for plaintiffs in error.
Lewis & Harris, for defendant in error.

KELLY, P. This is a writ of error to two judgments in favor of the Southern Oil &

Feed Mills, Incorporated, one thereof against the Atlantic Coast Line Railroad Company, and the other against the Director General, operating that company's lines. The judgments were rendered in two actions at law instituted at the same time by the Southern Oil & Feed Mills, Incorporated, against the Atlantic Coast Line Railroad Company and the Director General, respectively, and both actions were tried together by consent.

The damages sought to be recovered were alleged to have resulted from an insufficient pipe or culvert under the railroad, causing the damming or ponding of water on the plant and property of the plaintiff.

Some time prior to June, 1915, the plaintiff leased from the owners, L. F. Bain & Son, the certain building and premises in the city of Suffolk which for some years previous had been used as a warehouse for the storage of peanuts, and still earlier as a planing mill. This property, as described in the declaration and as shown by the evidence, was—

"near to and adjoining a certain gorge, drain, ditch, and water course which forms the southern boundary of the said premises, and has for all time, as far as is known, constituted a natural drain for the collection and passage of water, which flows from, over, and under a large area of land in the said city of Suffolk, including the premises of the plaintiff, and numerous accepted streets in said city, to wit, Johnson avenue, Culloden street, Spruce street, Tynes street, and Oak avenue, to, by, through, and beyond the same, and in an easterly direction under the tracks of the Norfolk Southern Railroad Company, the tracks of the Southern Railway Company, thence to the railroad right of way property of the Atlantic Coast Line Railroad Company, through which last-mentioned right of way property said gorge, drain, ditch, and water course passed before the said Atlantic Coast Line Railroad Company constructed its right of way and tracks thereon."

To be a little more specific, it appears from the allegations and proof that the plaintiff's property was situated immediately west of three parallel lines of railroad tracks, the first and nearest being the Norfolk Southern, the second the Southern, and the third the Atlantic Coast Line. These tracks had been there for 25 or 30 years, having been constructed in point of time in the order last above named. From the time of their original construction until about the year 1908, the Norfolk Southern and Southern Railroads maintained an 18-inch pipe under their tracks connecting with the drain or gorge above mentioned, making a continuous pipe line of that size under both tracks for a distance of 117½ feet. This pipe line emptied into an opening or manhole between the tracks of the Southern and the tracks of the Atlantic Coast Line, and from this hole the latter company maintained a 15-inch

pipe under its tracks for a distance of about 80 feet to a point east of the tracks, where it emptied on the surface. All of the tracks were on a fill elevated very considerably above the bottom of the aforesaid drain or gorge.

In about the year 1908, the Norfolk Southern Railroad Company substituted a 30-inch pipe in place of the 18-inch pipe under its tracks, and shortly thereafter the Southern Railway Company made a similar change. The Atlantic Coast Line at a much later date did the same thing, but not until after the damages herein sued for had been sustained.

These two actions were for damages sustained in four several floods, in which the water backed up on the plaintiff's property, one thereof occurring in June, 1915, one in March, 1917, one in April, 1918, and one in June, 1918, the last two after the railroads had been taken over by the Director General.

The first assignment of error is to the action of the court in refusing to set aside the verdict of the jury as being contrary to the law and the evidence.

Under this assignment, the argument of the defendants is addressed solely to the proposition that the evidence is insufficient from the plaintiff's stand point to support the verdicts; their main contention being summed up in their opening brief as follows:

"In conclusion, it is evident that the floods of 1915, 1917, and 1918, four in number, were caused by some one of the pipes under the railroad embankment becoming stopped up by debris, etc., and, as we have seen, it is just as probable, if not more so, that this stopping was at the mouth of one of the other pipes referred to in the evidence as that it occurred at the mouth of the A. C. L. pipe."

It would serve no good purpose to review the evidence in detail. We have examined it scrupulously, and are fully satisfied that it was amply sufficient to warrant the jury in finding that the damage was caused by the insufficient size of the pipe line under the Atlantic Coast Line track.

The second assignment of error relates to the giving and refusing of instructions. The plaintiff asked for 5 instructions, all of which were given. The defendant Atlantic Coast Line asked for 11, 7 of which were given, and the defendant Director General asked for 13, 9 of which were given. To the action of the court in giving the 5 instructions for the plaintiff, and in refusing 4 of those asked for by the railroad company and 4 asked for by the Director General, the defendants noted a general exception, but only 5 of the instructions, as given or refused, are discussed or referred to in the assignments of error, and we shall confine ourselves to a consideration of the latter.

[1] Instruction No. 4, asked for by the

railroad company and refused, was as follows:

"That the degree of care and foresight which the Atlantic Coast Line Railroad Company should have used in putting a pipe under its roadbed to carry off the water in question was that which an ordinarily prudent man would have exercised under the conditions and circumstances existing at the time that said pipe was put in, and if the jury believe from the evidence that such care was used by said company, and further believe from the evidence that not until after the two floods complained of in the declaration, to wit, the one in June, 1915, and the one in March, 1917, was it brought to said company's attention that the pipe that had been installed by it was believed to be the source of damage to the plaintiff, then the jury cannot find a verdict against said company in this case."

[2] The first part of this instruction accurately defined the railroad company's duty in respect to the original installation of the pipe line. *American Locomotive Co. v. Hoffman*, 108 Va. 363, 370, 61 S. E. 759, 128 Am. St. Rep. 953. The latter part of the instruction, however, was inappropriate and misleading. To have given it would have been equivalent to telling the jury that the company's duty was fully and finally discharged by the duly careful original construction of the pipe, unless and until the inadequacy of the pipe was affirmatively brought to its attention in some notice given by or on behalf of the plaintiff. This is not the law.

There is evidence tending to show that the smaller pipe was reasonably adequate for some time after its installation; but, be that as it may, it is clear that in process of time the drainage area was subject to material changes, particularly by reason of the growth of the city of Suffolk, the improvement of its streets, etc., and that these changes augmented the flow of water into the culvert in question. The changes referred to were such as to be reasonably anticipated, they were readily apparent as they progressed, and their probable effect on the watershed was as open and obvious to the railroad company as they were to the owners of the property liable to be affected thereby. Both the Norfolk Southern and the Southern Railroad Companies had installed larger pipes some years before the damage here complained of had occurred. Whether this change was made because the pipe was originally too small, or because it had been rendered inadequate by changed conditions, may not be entirely clear; but it convincingly appears that the change was in fact made because the pipe was too small. The Atlantic Coast Line, in all reasonable probability, knew of the change made by the other roads; but, whether so or not, the conditions making it reasonably necessary were open to that company. The duty of a

railroad company with respect to culverts to take care of surface water coming through a natural drain does not end with the original installation, but is a continuing one. 3 Farnham on Waters, p. 2669; Indiana, I. & I. R. Co. v. Patchett, 59 Ill. App. 251; 27 R. O. L. pp. 1148, 1149; Soules v. Northern Pacific R. Co., 34 N. D. 7, 157 N. W. 823, L. R. A. 1917A, 501, 509. Defendants' instruction No. 4 was properly refused.

[3] Complaint is made of plaintiff's instruction No. 4, given over defendants' objection, as follows:

"The court instructs the jury that, if from the evidence, they believe that the direct cause of the alleged disaster was the want of proper construction of the said culvert under the tracks of the Atlantic Coast Line Railroad Company, then they shall find for the plaintiff."

It is said, first, that this instruction ignores the degree of care with which the defendants are chargeable as defined in the Hoffman Case, supra. It appears, however, by reference to the plaintiff's instruction No. 5 that the court told the jury plainly:

"That the degree of care and foresight which the defendants should have used in constructing their culvert was in proportion to the nature and magnitude of the injury which would likely have resulted from the water being backed upon the plaintiff's property, and it should have been that care and prudence which a reasonably discreet and cautious individual would, or ought to have used for the purpose of protecting himself from injury."

This, as we understand it, is substantially the rule as to the degree of care laid down by the Hoffman Case, and while it would have been proper to have made a similar statement in instruction No. 4, there was no necessary conflict between the two, and when read together, they constitute a correct statement of the law. Instruction No. 4, standing alone, might have been objectionable as being susceptible of the meaning that any "want of proper construction of the said culvert" would have rendered the defendants liable, but instruction No. 5, immediately following it, cured the objection. Miller v. Newport News, 101 Va. 432, 44 S. E. 712; C. & O. Ry. Co. v. McCarthy, 114 Va. 181, 188, 76 S. E. 319; Eastern Export Corporation v. Beazley, 121 Va. 4, 9, 92 S. E. 824.

[4] Another objection urged against plaintiff's instruction No. 4 is that it applied to both defendants, whereas the Director General had nothing to do with the original construction. It is a sufficient answer to this objection to say that both cases were heard together, and, if there were anything in the objection here urged, the jury would not have been misled because they fully understood that the proceeding, in so far as it affected the Director General, was aimed at the con-

dition and maintenance of the road during his administration. As a matter of fact, however, the instruction was right, and is free from objection as to both defendants. The Director General had no more right to permit a faulty construction to operate injuriously to property owners than the company itself. In this respect he stood in the company's shoes.

Instructions 1, 2, 3, and 5, given at the request of the plaintiff, are objected to on behalf of the Director General of Railroads on substantially the same ground as the second objection to plaintiff's instruction No. 4 above. For the reasons stated in the discussion of that instruction, there was no error in giving the three here in question, and no merit in the objection thereto.

The judgments complained of are affirmed. Affirmed.

(129 Va. 781)

WATTS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Indictment and Information \S 110(31)—Indictment following statutory form not open to attack.

Where an indictment followed the statutory form previously adjudged sufficient, it is not open to attack, though charging a second offense in violation of the Prohibition Law.

2. Indictment and Information \S 121(4)—Bill of particulars sufficient in a prosecution for violation of prohibition law.

In a prosecution for a second offense against the Prohibition Law, the bill of particulars, informing accused with clearness and certainty of the cause and nature of his accusation, which named the persons to whom and designated the place where he was alleged to have illegally sold ardent spirits, is sufficient.

3. Jury \S 58—Statute requires jurors to be drawn from lists furnished by jury commissioners.

Laws 1918, c. 340, requiring jurors to be drawn from a list furnished by a judge, was expressly repealed by Act Jan. 29, 1920 (Laws 1920, c. 1), and providing for juries to be drawn from lists furnished by jury commissioners and therefore defendant cannot complain that the venire facias was selected in that manner.

4. Criminal law \S 1144(12)—Presumption in favor of regularity of proceeding, where no certificate of evidence.

On writ of error to review a conviction under the Prohibition Law for a second offense, where there was no certificate of evidence, a certified copy of order of corporation court of Newport News, showing the defendant's previous conviction, must be deemed to have been regularly admitted, and the complaint in that connection that a witness should not have been allowed to testify to what could have been proven by the record in that court will be disregarded.

5. Criminal law §1144(14)—In the absence of certificate of evidence, instructions will be presumed warranted by evidence.

Where there was no certificate of evidence, it will be presumed on error that an instruction given was warranted by the evidence, and a complaint of such instruction is unavailable; there being nothing on its face to indicate illegality.

6. Criminal law §894—After discharge defendant cannot complain that the court did not poll the jury.

The accused, when the foreman returns the verdict in open court, may have each juror polled before it is accepted, and if he does not the clerk, after reading the verdict, addresses the jury, "and so say you all," and if none of the jurors expresses dissent the verdict is recorded, hence it is too late, after acceptance and discharge of the jury, for accused to complain that they were not polled.

Error to Corporation Court of Hopewell.

Joe W. Watts alias J. D. Watson was convicted of second offense under the Prohibition Law and he brings error. Affirmed.

David A. Harrison, Jr., and J. Toomer Garrow, both of Hopewell, for plaintiff in error.

Jno. B. Saunders, Atty. Gen., and J. D. Hank, Jr., Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The accused was convicted of a second offense under the Prohibition Law (Laws 1916, c. 146) and his punishment fixed at \$5 fine and six months in jail. The writ of error would not have been allowed but for the recent statute, requiring such allowance in all criminal cases, because it is manifest from the petition and record that no error is assigned or appears which would justify a reversal or a review of the case.

[1] One of the assignments of error is that the court overruled a demurrer to the indictment. As the indictment follows the statutory form, which has been adjudged sufficient in *Pine & Scott v. Commonwealth*, 121 Va. 812, 93 S. E. 652, the question must be considered as settled. The only difference between this indictment and that prescribed by the statute is that, inasmuch as this was a prosecution for a second offense, the indictment so stated. This allegation was made clearly and distinctly as required by the statute, and the demurrer was properly overruled.

[2] Upon motion of the accused the commonwealth was required to file a bill of particulars, and objection is made to this bill as insufficient. This objection rests upon no sufficient ground, for the bill of particulars informs the accused with clearness and certainty of the cause and nature of his accusation. It named the persons to whom, and designated the house, street, and city in

which, he was alleged to have illegally sold ardent spirits.

[3] Exception was also taken to the venire facias, upon the allegation that the jury was improperly selected. This assignment is based upon the claim that the act of 1918 (Laws 1918, c. 340) requiring jurors to be drawn from a list furnished by the judge was in effect, whereas in fact that act had been expressly repealed by the act of January 29, 1920 (Acts 1920, p. 4). This later act provided for drawing of juries from lists furnished by the jury commissioners, and the jury in this case was selected strictly in accordance with its provisions; so that the jury was properly constituted.

[4] It is also assigned as error that the court should not have admitted a certified copy of the order of the corporation court of the city of Newport News, showing that the accused had been previously convicted of unlawfully having and transporting ardent spirits; and in this connection it is said in the petition that a certain witness should not have been allowed to testify to what could have been proved by the record of the corporation court of the city of Newport News. Inasmuch as there is no certificate of the evidence, we must disregard this suggestion. We know of no principle of law by which the court would have been justified in refusing to admit the certified copy of the order. Nor do we perceive how the prisoner was prejudiced by its introduction. In the absence of a certificate of the evidence, we must presume the regularity of the proceeding.

[5] Objection is made to the giving of an instruction, but, inasmuch as the evidence is not certified, there is the presumption that there was sufficient evidence in the case upon which to base it; certainly, there is nothing upon the face of the instruction to indicate its illegality.

[6] Again and finally, it is urged that the court erred in not polling each and every member of the jury, the polling of the jury not having been waived by the accused. It is not necessary in this state to poll each juror. When the foreman, in the presence of each member of the jury, returns a verdict in open court, the rule is that if the accused doubts whether each member of the jury has agreed to such verdict, he may have each one polled before it is accepted. If he does not, the clerk, after reading the verdict, addresses the jury and says, "And so say you all." If none of the jury expresses any dissent from such verdict, it is recorded. It is certainly too late, after the verdict has been thus accepted and the jury discharged, to complain that they were not polled, and the court properly overruled the motion to set it aside. *Commonwealth v. Gibson*, 4 Va. (2 Va. Cas.) 73; *Bull v. Commonwealth*, 55 Va. (14 Grat.) 633.

The statute (Acts 1920, p. 416) requires this court to allow writs of error in all criminal cases, without reference to their merits. The Virginia courts have for many years been rightfully commended because, while all the natural and constitutional rights of persons accused of crime have been respected, the administration and execution of the criminal laws have been prompt and efficient without any sacrifice of due and orderly procedure. This statute is manifestly retrogressive and harmful in its effects. It is injurious, not only to the public, but also to those litigants rightfully entitled to invoke the jurisdiction of this court for the correction of errors in the trial courts. The injustice to the public grows out of the consequential delay in the administration of justice, as well as the inevitable and unnecessary increase of those criminal expenses which are a charge on the public treasury. The wrong to the other litigants is that the time and attention of the judges of this court which could be better spent and is needed for the consideration and determination of their legal rights must be consumed in hearing futile argument and, in writing opinions (as required by the Constitution) in such cases as this, in which it is clear from the record presented that no right has been denied, and that justice has already been done in the trial court. For those thus rightfully convicted it accomplishes nothing except delay, while it impedes, hinders, and delays all other litigation.

Affirmed.

(129 Va. 331)

ATLANTIC COAST LINE R. CO. v. WARRINGTON.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Stipulations ¶21—Evidence held not to establish an agreement permitting grounds of demurrer to be filed subsequently to demurrer.

Evidence held insufficient to establish that, on defendant's oral announcement that it demurred to the evidence, it was expressly agreed in open court that the grounds of demurrer should be filed after conclusion of the evidence and retirement of jury, instead of prior thereto, as required by Acts 1912, c. 42.

2. Trial ¶154 — Plaintiff held not to have waived timely filing of grounds of demurrer to evidence.

Plaintiff, by failure to demand that defendant file the grounds of the demurrer to the evidence at the conclusion of the evidence and before the jury retired, as required by Acts 1912, c. 42, and by expressly agreeing that the argument on the demurrer should be in writing and filed later, did not by implication waive the filing of the grounds at the time required by such statute.

3. Trial ¶154—Statute as to submission of grounds of demurrer to evidence is mandatory.

Acts 1912, c. 42, requiring grounds of demurrer to evidence to be submitted in writing at the conclusion of the evidence and before the jury retires, is mandatory.

4. Trial ¶154—Requirement of timely written grounds of demurrer to evidence may be waived.

The submission in writing of grounds of demurrer to evidence at the conclusion of the evidence and before the jury retires, under Acts 1912, c. 42, may be waived by agreement between the parties; but such agreement, being in derogation of the statute, must be clearly established.

Error to Circuit Court, Nansemond County.

Action by S. F. Warrington against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Mann & Townsend, of Petersburg, for plaintiff in error.

Smith & Smith, of Richmond, and Saunders & Hutton, of Suffolk, for defendant in error.

SAUNDERS, J. This case is brought before us by a writ of error to a judgment of the circuit court of Nansemond county on the petition of the Atlantic Coast Line Railroad Company, plaintiff in error.

S. F. Warrington, defendant in error (plaintiff below), brought an action of assumpsit against the above company, claiming damages in the sum of \$1,200, on account of loss suffered on certain shipments of Irish potatoes, due to the alleged unreasonable delay in the transportation of the same by the said company. The jury trying the issue returned a verdict in favor of the plaintiff for \$981.50, which the court refused to set aside. A petition assigning various errors alleged to have occurred in the progress of the trial was thereupon presented to one of the judges of this court, and a writ of error and supersedeas secured.

The petition presents the case of the plaintiff in error, first, on the merits, and, second, on a question of procedure. Reversing the order in which the alleged errors are discussed in the petition, we will first consider and dispose of the question of procedure.

The following statement of facts by the court appears in the record:

"The evidence in this case was given the court and the jury on March 23, 1919. After the evidence was all in, the defendant announced that it demurred to the evidence of the plaintiff.

"The plaintiff did not ask for the grounds of the demurrer, and did not state whether he joined in the demurrer or not, but the case

proceeded as if there had been a joinder in the demurrer, and the jury were told by the court to find a verdict for the plaintiff for such sum as would compensate him for the loss he had sustained, if any, and thereupon the question of damages was argued to the jury by counsel for demurrant and demurree, as upon a demurrer to the evidence. After their retirement, the jury returned into court and rendered an unconditional verdict for the sum of \$931.50, which the court now certifies should have been a conditional verdict, and subject to the opinion of the court on the demurrer to the evidence. Thereupon the defendant moved the court to set aside the verdict of the jury, upon the ground that it was excessive, which motion was continued, and it was further understood between counsel on both sides that the demurrer should be argued in writing at some later date after the evidence was transcribed, and that the demurrant should file the opening brief, the demurree should file a reply, and the demurrant should file the closing brief. The demurrant filed in the clerk's office of this court on April 17, 1919, a demurrer to the evidence, in writing, with the grounds thereof incorporated therein, and its opening brief in support thereof, and furnished a copy thereof to demurree's counsel. Counsel for demurree filed their reply brief in said clerk's office on the ____ day of ____, 1919, in which they made the point that the demurrer in writing and grounds thereof had not been filed at the trial, as required by law, and that therefore the court could not consider the case upon its merits, but should enter judgment for the demurree upon the verdict of the jury. The demurrant filed its reply brief on the ____ day of ____, 1919.

"It is therefore considered by the court that, the grounds of the demurrer in writing not having been filed by the demurrant as provided by law, the court, without considering the case upon the merits, is of opinion that the law is with the demurree. It is therefore considered by the court that the plaintiff recover of the defendant the sum of \$931.50, with interest from March 28, 1919."

When counsel for the railroad company handed Mr. J. R. Saunders, counsel for the plaintiff, the demurrer in writing and copy of his brief, he was at once advised that—

"Objection would be made to the filing of any demurrer, on the ground that counsel for the defendant company, on the day of trial simply 'made an oral statement that they demurred to the evidence, and did not state any reasons in writing.'"

Further that—

"As the law required the demurrant to put his reasons for the demurrer in writing, and he had failed to do so before the court closed, objection would be made to his filing a demurrer at all."

The above appears from a letter of Judge Rawles, of counsel for the defendant company (plaintiff in error) to his associates, Messrs. Mann & Townsend. Quite an interchange of letters followed between these gentlemen, and also between them and coun-

sel for the plaintiff. The latter insist that these letters are not properly a part of the record, and were read over their objection. A letter from Judge McLemore to counsel for the railway company also appears in the record. From the letters that were exchanged between counsel for the plaintiff in error, it appears that they were of the opinion that, as there was an express agreement in open court that the argument upon the demurrer to the evidence should be in writing and should be filed after the evidence had been transcribed, it was a necessary implication from said agreement that the ground of demurrer could be filed at that time. A letter was also written by Messrs. Mann & Townsend, counsel for the plaintiff in error, to Judge McLemore, in which the statement was made that there had been—

"an agreement in open court that the defendant company should file the grounds of demurrer later, and that the demurrer would be argued in writing."

A copy of this letter was sent by defendant's counsel to counsel for the plaintiff. On receipt of this copy Messrs. Smith and Smith wrote at once to Mann & Townsend as follows:

"Gentlemen: We beg to acknowledge copy of letter sent by you to Judge McLemore. * * * and in reply thereto we desire to say that there was no agreement on our part that you should file the grounds of demurrer later, and when Judge Rawles recently handed to Mr. Saunders, of Suffolk, a statement of the grounds of demurrer, he was promptly notified that we would object to the same being filed. The only thing that came up was that the court would hear argument on the demurrer to the evidence later, and we have been waiting to hear from you to that end, and it was only recently that we had any information from you on the subject. A brief of considerable length and grounds of demurrer were then presented for the first time to Mr. Saunders, and we wish it distinctly understood that we shall object strenuously to the filing of the grounds of demurrer at this time, when under the law they can only be filed in writing and the grounds assigned before the jury retires from the bar. The waiver of this right is heard for the first time, and after Judge Rawles has been notified that we would object to the filing of a demurrer to the evidence at this late day."

Messrs. Saunders & Hutton also received a copy of the letter to Judge McLemore, and made the following reply on their part:

"Gentlemen: Yours of June 7, inclosing copy of a letter to Judge Jas. L. McLemore, received. This letter mentions an agreement that grounds of demurrer in the case of S. F. Warrington v. Atlantic Coast Line Railroad Company should be filed later. Permit me to say that there was never any agreement that the grounds of demurrer should be so filed; that neither Mr. Mann, Mr. Townsend, nor Judge Rawles requested me to make such an agree-

ment, and I am informed that they did not so request my associate, Mr. J. Sidney Smith.

"The grounds of demurrer were not presented to me until after that term of the circuit court was closed. At the time the paper was handed to me by Judge Rawles, I distinctly told him that we would object to the filing of the demurrer, because I was under the impression that it should have been filed before the argument to the jury, and that we would not waive, nor had we agreed to waive, the filing of any demurrer on any ground therein stated. We shall claim advantage of the statute and the decisions in this state on that point."

Messrs. Mann & Townsend replied as follows to the above letter of Saunders & Hutton:

"We are in receipt of your letter of the 12th instant, and note its contents.

"There certainly can be no question about the fact that there was an express agreement in open court that the argument upon the demurrer to the evidence should be in writing and should be filed later when the evidence had been transcribed. It would have been impossible to file the demurrer in writing at the time of the argument before the jury, because the evidence was a part of the demurrer, and it could not have been inserted in the demurrer until it had been transcribed by the stenographer. It was a necessary implication from the aforesaid agreement that the grounds of demurrer would be filed later. We think this equally clear. Moreover, the plaintiff joined in the demurrer voluntarily and without calling for the grounds of the demurrer, which were simple, and would have prepared and tendered at once at the bar of the court, if called for. Within a few days after the evidence was transcribed by the stenographer, the demurrer, grounds of demurrer, and written memorandum of argument upon the grounds of demurrer were filed, and a copy was furnished the plaintiff's counsel.

"We have demurred to the evidence a great number of times, and in hardly an instance that we can recall has the demurrer and the grounds thereof been filed at the time the damages were argued to the jury.

"In view of the express agreement above mentioned that the demurrer should be argued at a later date, and of the implied agreement that this embraced the filing of the grounds of demurrer, because the written argument was to be based upon the grounds of demurrer, and in view of the fact that the demurrer was joined in voluntarily by plaintiff's counsel without any suggestion that they desired the grounds of demurrer in advance of the written argument thereon, we think it very remarkable that you should state in your letter: 'We shall claim advantage of the statute and the decisions of this state on that point.'

"As the court will doubtless recall what transpired in the courtroom, we have no idea that it will allow the plaintiff to reap any benefit from such a technical objection.

"We are sending copies of this letter to Judge McLemore, Judge Rawles, and Messrs. Smith & Smith."

These citations sufficiently show the relative attitudes of counsel with respect to the alleged agreements in court at the time the

defendant demurred to the evidence. The letter of Judge McLemore, referred to supra, is to the following effect:

"Messrs. Mann & Townsend, Attorneys, Petersburg, Va.—Gentlemen: In the matter of Warrington v. A. C. L. Ry. Co., I have decided to overrule the demurrer. Plaintiff's counsel are positive in their statement that they did not waive the right to have the grounds of demurrer filed as required by the statute. With the record silent, I am unable to say they waived the filing, although I had the impression the entire matter would wait for the transcript of the evidence, and that no advantage would be taken of the failure to file the grounds of demurrer that day. It seems to me, in the face of the record, the statute and last construction of it by our court precludes a consideration on the merits.

"I need hardly say I always regret having a case disposed of under such circumstances."

On April 17, 1919, before the term expired, defendant filed its demurrer to the evidence, with the grounds thereof; also its opening brief. The plaintiff filed his reply brief, arguing the case on the merits, but "denying the right of the court to consider the merits, on the ground that the demurrer had not been filed in time." After consideration of the briefs, the court refused to consider the case on its merits, and entered judgment for the plaintiff for the amount of the verdict of the jury, on the ground "that the grounds of the demurrer were not filed in writing at the trial, and that therefore the case could not be heard upon the demurrer to the evidence." To this action of the court the defendant excepted.

From the foregoing citations, it appears that what took place when the evidence was concluded was that counsel for the defendant orally announced that they demurred to the evidence, not stating in writing the grounds of demurrer relied upon. The plaintiff did not ask for the grounds of demurrer, or state whether he joined in the demurrer or not, but the case proceeded as if there had been a joinder in the demurrer, and the jury were told by the court to find a verdict for the plaintiff for such sum as would compensate him for the loss he had sustained, if any. Thereupon the question of damages was argued to the jury by counsel for demurrant and demurree, as upon a demurrer to the evidence. (See statement of facts by the court, supra.) Later it was agreed between counsel for the parties that the demurrer should be argued in writing at a later date after the evidence was transcribed. The letter of Messrs. Mann & Townsend to Judge McLemore states that there was an express agreement in open court that counsel for the defendant should file the grounds of demurrer later. As soon as this claim of an agreement in the respect alleged was brought to the attention of Messrs. Smith & Smith and Saunders & Hutton, they explicitly and positively denied that it was ever made. Further, when Judge Rawles handed Mr. Saunders the de-

murrer in writing and copy of brief, he was told by the latter that—

"He would object to the filing of any demurrer, stating that counsel for the company simply made an oral statement in court on the day of trial that they demurred to the evidence, and did not state any reasons in writing."

[1] The court does not certify that any agreement was made before him in relation to giving time within which to state the grounds of demurrer in writing, or in any wise waiving the requirement of the statute, though he had the impression that no advantage would be taken of the failure to file the "grounds of demurrer" at the prescribed time.

We therefore are of opinion that the evidence does not establish "an express agreement in open court that the grounds of demurrer should be filed later."

[2-4] But counsel for plaintiff in error insist that it was a necessary implication, from the express agreement that "the argument upon the demurrer to the evidence should be in writing and filed later," that the grounds of demurrer could also be filed later; in other words, that by necessary implication this secondary agreement was included in the agreement supra. But would this follow? Evidently the trial court, which heard all that took place, did not consider that a waiver, either by express agreement or necessary implication, had been established. The positive statement of the judge is that he is—"unable to say that the plaintiff waived the filing of the grounds of demurrer, and that, in the face of the record, the statute and the last construction of it by our court precludes a consideration on the merits."

The court could hardly have made that statement if it had been of opinion that counsel, by explicit compact or necessary implication, had agreed that the grounds of demurrer could be filed later. When a defendant demurs to the evidence, the statute prescribes what shall be done. The statute is mandatory in this respect, and positive in its statement of the penalty attached to a failure to conform to its mandate. But while we consider that the statute is mandatory upon one party, when the other stands upon his legal rights, we do not mean to say that the parties, by agreement inter se, cannot waive its requirements as to the precise time for filing the grounds of demurrer in writing. Such an agreement can be made, but, as it is in derogation of the statute, it should be clearly made and clearly established. In the case in judgment the plaintiff waited on the defendant to take the steps required by the statute. In order for the defendant to secure the benefits of the statute, it was necessary for it to comply with its requirements. This was a case of parties dealing at arm's length. We would draw the conclusion, from the silence of counsel for the plaintiff in this case, that they had waived their right to have

the grounds of demurrer filed as required by the statute, if it appeared that on other and prior trials between them and counsel for the defendant company, upon an oral statement by the latter that they demurred to the evidence, the grounds of demurrer were permitted to be filed on a later day. If such had been the practice hitherto prevailing between counsel, then the silence of counsel for the plaintiff in the instant case under the circumstances supra, would have been misleading, and justified the contention of the defendant that an agreement had been made by implication. But there is nothing of this sort before us. Counsel for the plaintiff simply allowed the defendant to make out its own case, without aid or suggestion. Counsel for the defendant company may have thought, and doubtless did think, that they would be allowed to file their grounds of demurrer later, but they had no right so to conclude from the plaintiff's silence, to the latter's prejudice, or in derogation of his legal rights. If the plaintiff did not ask for the grounds of demurrer, neither did the defendant ask the plaintiff if he waived the requirements of the statute in this regard. Doubtless it was in the mind of counsel demurring to the evidence that they would be allowed to file the grounds of demurrer at a later time, but counsel for the plaintiff apparently did nothing to justify this state of mind. When counsel for defendant announced that they demurred to the evidence, it was not necessary for counsel for the plaintiff to demand the grounds of the demurrer in writing. On the contrary, it was necessary for the defendant to follow the statute, which explicitly prescribes that the—

"party tendering the demurrer to the evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in said demurrer until the specific grounds upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not so specifically stated be considered."

Hence, in order to secure the benefit of the statute, a demurrant must comply with its terms, and, if time is needed for such compliance, must secure that time from the court, by a postponement, or by agreement with opposing counsel. The record does not show in the instant case compliance with the statutory requirements at the time the motion was made, or that time was secured for later compliance, either from the court or by agreement with adversary counsel.

Petitioner contends that the agreement to argue the demurrer carries by implication the agreement to allow the grounds to be filed later, since otherwise there would be but little to argue. But the agreement speaks for itself. It was an agreement to argue in writing the demurrer as submitted by the defendant. The extent of that argument would depend upon the ruling of the court.

Should the court deny the subsequent effort of the defendant to file the grounds of demurrer, there would be but little room for argument. But, should the court hold that under the statute the grounds not filed at the time the defendant demurred could be filed at a later day of the court, the argument would be directed to the case on the merits. Hence the agreement was in substance an agreement to argue by briefs whatever under the ruling of the court could be argued on the defendant's demurrer, and the fact that in the result the court, upon the state of the record, excluded the grounds of demurrer tendered by the defendant, is not a determining factor in the construction of the agreement that the—

"argument upon the demurrer to the evidence should be in writing, and filed later when the evidence had been transcribed."

The statute on the subject of demurrers to evidence, and from which citation has been made, is the statute of February 19, 1912 (Acts 1912, p. 75), and is as follows:

"In all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not thus specifically stated be considered, except that the court may, in its discretion, allow the demurrant to withdraw the demurrer; may allow the joinder in demurrer to be withdrawn by the demurree, and new evidence admitted, or a non-suit to be taken until the jury retire from the bar."

This act has been construed by this court in the cases of *McMenamin v. Southern Ry. Co.*, 115 Va. 822, 80 S. E. 596, *Saunders v. Southern Ry. Co.*, 117 Va. 396, 84 S. E. 650, and *Virginia I. C. & C. Co. v. Asbury's Adm'r*, 117 Va. 683, 86 S. E. 148.

In the *Saunders Case*, 117 Va. 399, 84 S. E. 651, the court said:

"These statutory provisions are mandatory and preclude the idea of jurisdiction to consider a demurrer to evidence, unless the grounds of such demurrer are specifically stated in writing. The statute is a wise one that should be upheld and enforced as it is written. Its salutary purpose would be defeated and the statute practically abrogated if it were permissible to modify it by engrafting exceptions upon it."

And on page 400 of the same case (84 S. E. 651) we find the following:

"The grounds of the demurrer to the evidence filed by the defendant company, not having been specifically stated in writing, as required by statute, we are of opinion that the court was without jurisdiction to consider the same."

As stated *supra*, the statute plainly requires that the grounds of demurrer must be in writing, and submitted at the conclusion of the evidence and before the jury retires from the bar. The grounds of demurrer were not submitted in writing in the case in judgment, and there was no agreement between counsel waiving this requirement, or any postponement by the court of the case to afford opportunity to prepare and submit such grounds.

Plaintiff in error cites the case of *Du Pont v. Smith*, 249 Fed. 403, 161 C. C. A. 377, but that case is not in conflict with the conclusions that we have reached in the instant case. In the *Du Pont Case* the court did not consider that the action which it took was precluded by the statute. This appears from the following citation from the opinion:

"We have the strong conviction that the extreme penalty of dismissal of a cause without a hearing on the merits should not be imposed upon a litigant for the inadvertence of his counsel, except in flagrant cases of neglect, or where the court is compelled by statute or clearly established practice to do so."

The time fixed in this case for the filing of the bill of exceptions was by an order of court, and the court held that—

"The evidence of consent to the allowance of the bill of exceptions, and waiver of the time, was very strong."

Judge Pritchard elaborately dissented.

In the case before us, but for the restraining and mandatory provisions of the statute, prescribing how a demurrant shall proceed, we would be disposed to disregard technicalities and decide this case on its merits. But when a statute plainly prescribes what must be done to enjoy its benefits, and the penalties for nonconformity, the courts are constrained to enforce the law as it is written. The trial court was more intimately in touch with what passed in its presence and within its hearing than this court can possibly be from the cold and formal record. That court could not certify that an express agreement had been made to waive the requirements of the statute, nor could it derive an agreement by implication to that effect from the agreement actually made. After setting out the facts the trial court announced the following conclusion:

"It is therefore considered by the court that, the grounds of demurrer in writing not having been filed by the demurrant as required by law, the court, without considering the case on the merits, is of opinion that the law is with the demurree. It is therefore considered by the court that the plaintiff recover of the defendant the sum of \$921.50, with interest thereon from March 28, 1912."

In that finding this court concurs, and the judgment of the trial court is therefore affirmed.

Affirmed.

(129 Va. 346)

BARNARD v. GARDNER INV. CORPORATION.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Principal and agent §33 — Contract of agency revocable by principal at will, unless coupled with interest based on consideration.

A contract expressly creating the relationship of principal and agent, unless coupled with an interest based on valuable consideration, is generally revocable by the principal at will.

2. Brokers §44 — Principal may revoke contract of agency unsupported by consideration at any time prior to sale.

A real estate broker's contract of agency may be revoked in good faith by his principal any time prior to sale; the purported consideration of \$1 for the contract not having been paid.

3. Brokers §88(5) — Fraud inducing agency contract held jury question.

In a real estate broker's action for commissions on a sale made after revocation of the agency by the principal, evidence that the broker, by fraud and misrepresentation as to the value of the property and the price obtainable therefor, induced the principal to enter into the agency contract, held sufficient to justify the submission of the issue to the jury.

4. Brokers §6 — Fiduciary relation exists between real estate agents and their clients.

Real estate agents occupy a fiduciary relation to their clients, and so long as that relation continues the agent is under a legal obligation, as well as under a high moral duty, to give his principal loyal service and the benefit of information as to the property entrusted to him for sale; the principal being frequently at a disadvantage, and hence entitled to the utmost frankness, fidelity, and fair dealing from the agent.

Error to Circuit Court of City of Norfolk.

Action by the Gardner Investment Corporation against Alice T. Barnard. Verdict for defendant was set aside, and judgment in favor of plaintiff entered, and defendant brings error. Reversed and rendered.

Rumble & Rumble, of Norfolk, for plaintiff in error.

Jas. G. Martin, of Norfolk, for defendant in error.

PRENTIS, J. Gardner Investment Corporation, engaged in the real estate brokerage business, through its president, J. W. Gardner, solicited and obtained from Alice T. Barnard the following contract:

"June 27, 1919.

"To Gardner Investment Corporation:

"For and in consideration of one dollar (\$1.00), the receipt of which is acknowledged, I hereby appoint you exclusive agent to make sale of the real property herein described as

715 Boissevain avenue, for the price of \$17,000 upon the following terms: \$ — cash; \$ — secured by mortgage thereon for — year at — per cent. And you are hereby authorized to accept a deposit to be applied on the purchase price, and to execute a binding contract for sale on my behalf.

"In case the above described property is sold or disposed of within the time specified, I agree to make the purchaser a good and sufficient warranty deed to the same, and to furnish a complete abstract of title, if required; and it is further agreed that you shall have and may retain from the proceeds arising from such sale no commission on the above price and 100 per cent. of all of the consideration for which said property is sold over and above price above specified, amount for which said property may be sold.

"This contract to continue until July 27, 1919, and thereafter until terminated by me giving you as agent one day's notice in writing."

While the contract recites the consideration of \$1 the evidence shows that the recital of such consideration is in print on one of the blanks of the company, and that no consideration was either paid, considered, or discussed. Before any sale of the property had been made, Mrs. Barnard wrote this letter to the company:

"715 Boissevain Ave.,

"Norfolk, Va., July 3, 1919.

"Gardner Investment Corporation, 330-333 Seaboard Bank Building, Norfolk, Va.

"Gentlemen: Having reconsidered the matter of selling my home on Boissevain Ave., I beg you to allow me to withdraw the option on said property. Thanking you for your kindness, I am

"Very truly yours,

"[Signed] Alice T. Barnard."

On July 5th, when Gardner visited the property, Mrs. Barnard refused to allow the prospective purchaser, who accompanied him, to enter the house or to inspect its interior, and discussed with Gardner her change of purpose and desire to revoke the authority of the company under the written contract. This was on Saturday, but, notwithstanding these clear indications of her intention to revoke the agency, thereafter, on Monday, July 7th, the company, through Gardner, undertook to exercise the authority conferred by the agreement by selling the property to D. T. I'Anson for \$18,000. This purchaser sued Mrs. Barnard for specific performance of the contract, but for reasons satisfactory to himself dismissed his suit. Then the company instituted its action in assumpsit against her for the recovery of \$1,000 as its compensation for finding such purchaser, claiming under the contract. The defendant pleaded non assumpsit at the trial; there was a verdict in her favor, which, upon motion of the company, was set aside; thereupon judgment was entered in favor of the company for \$1,000, and of this judgment she is here complaining.

1. One of the questions raised is whether or not the defendant could prove by parol that notwithstanding the recital of a consideration in the agreement there was in fact no consideration, and hence that the contract was revocable by her will. The trial court excluded this evidence, and refused to instruct the jury that the defendant had such power to revoke. It is not controverted by the company that an acknowledgement of a consideration in a written contract may be denied for many purposes, but it is claimed that it cannot be denied as to this contract because the effect of such denial is to nullify it.

One of the cases cited to support this view is *Lawrence v. McCalmont*, 43 U. S. (2 How.) 452, 11 L. Ed. 366, but what is said in that case is said with reference to a written guaranty of credit, and the court held that the guarantor, having expressly acknowledged the receipt of consideration in the contract, could not prove the lack of consideration for the purpose of showing that she was not thereby bound.

The other case chiefly relied upon is *Watkins v. Robertson*, 105 Va. 284, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880. That case involved a written option under seal, whereby the owner of certain shares of capital stock of a corporation agreed with another to sell him such stock at a fixed price, to be delivered if the purchase price was paid on or before a certain date named therein. It was an option to buy, such as is commonly used, and the court there held that the owner was estopped to deny that such option was based upon a valuable consideration, in view of the fact that the contract itself recited such consideration, and for the reason that to permit such a denial would be to nullify the contract. So far as we are advised, however, it has never been held that it is not permissible to introduce evidence to contradict such a recital for any proper purpose in a contract not under seal.

Stephen's Digest of Evidence (2d Ed.) p. 220, on this subject, states these among the exceptions to the rule excluding oral evidence for the purpose of varying or contradicting a written contract:

"Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto."

Statements to the same effect, fully supported by authority, may be found in 2 Elliott on Contracts, § 1642; 1 Greenleaf on Evidence (16th Ed.) § 284.

[1] In this case the evidence was not introduced for the purpose of nullifying the

contract, but in order to show its true character. The paper itself is in express terms a contract between an agent and a principal. Such a contract, unless coupled with an interest, based upon valuable consideration, is generally revocable by the principal at will, and it is not necessary to cite authority to establish this proposition. If in fact there was no consideration, this fixes the true nature of such a contract; establishes it according to its true intent, purpose, and meaning, but does not nullify it.

[2] We think, therefore, that the evidence should have been admitted, and that the jury should have been instructed, in accordance with the request of the defendant, that she had the right to revoke the contract in good faith at any time prior to a sale. The refusal of the trial court to take this view is reversible error.

The case of *Perrow v. Rixey*, 119 Va. 192, 89 S. E. 101, is in our view conclusive of this question. The only difference between that case and this is that there the written agreement did not recite a consideration. It did fix the net price and allowed the agent 30 days in which to make a sale; but the court held that, inasmuch as it was an agency to sell land, which was neither coupled with an interest nor founded upon a valuable consideration, it might be terminated by the principal at will on giving notice, in good faith, before the agent found a purchaser, and that "coupled with an interest," under such circumstances, means an interest in the land itself, as distinguished from an interest in the proceeds of sale.

The contract in this case, illuminated as it is by the parol evidence showing that there was no consideration therefor, is identical in its legal effect with the contract which was involved in the case last cited.

2. The case may also be considered from another aspect, with the same result. There was evidence to the effect that Gardner, when he solicited the contract, told Mrs. Barnard, in response to her statement that she thought she ought to get at least \$17,500 for the property; that she would never get it, that he did not think she would get \$17,000, because it was not worth so much; that on July 3d he, the president of the company, came to her house and tried to buy the property for \$15,000; and that on the same date he wrote to one Duncan, who had asked him for a description of the property, that the value of the ground was \$12,500, of the building \$20,000, and the total value of the property \$32,500, while three real estate agents, who were not contradicted, testified that at the time a conservative estimate of the value of the property would be from \$25,000 to \$30,000.

This being the state of the evidence, the trial court instructed the jury as follows:

"The court instructs the jury that if they believe from the evidence that J. W. Gardner,

president of the plaintiff corporation, was on June 27, 1919, a dealer in real estate, familiar with real estate values in the city of Norfolk, and that he then knew the value of the defendant's property mentioned in the contract sued on in this case; that said Gardner, in order to induce the defendant to enter into the said contract, represented to her in substance and effect that said property was then worth not to exceed \$17,000 and that said sum was as much as she could possibly sell it for, and if the jury also believes from the evidence that defendant was not familiar with real estate values in said city and did not know the value of said property; that she relied upon the representations so made to her by said Gardner, and on the faith thereof entered into and signed the said contract authorizing said plaintiff to sell said property at the price of \$17,000; and if the jury further believes from the evidence that said property was then in fact worth much more than \$17,000, and that that fact was then known to the said Gardner, then the said contract was not binding on the defendant, and the jury should find for the defendant. When fraud or misrepresentation is relied on as a defense, it must be proved by clear and convincing evidence."

[3, 4] So that the only issue submitted to the jury upon that evidence and instruction was whether or not the defendant was relieved from the obligation of her contract by the fraud and misrepresentation of the company's agent in inducing her to enter into it. While the evidence of intentional fraud may be doubtful and unconvincing, at the same time there was evidence sufficient to justify the submission of the issue thus raised to the jury. Real estate agents occupy a fiduciary relation to their clients, and so long as that relation continues the agent is under a legal obligation, as well as a high moral duty, to give to his principal loyal service and the benefit of his information as to the property entrusted to him for sale. Under such circumstances the principal is frequently at a disadvantage, and hence is entitled to the utmost frankness, fidelity, and fair dealing from the agent. It is not surprising that under this very proper instruction, and with this evidence, the jury found in favor of the defendant. The trial court, however, set aside their verdict, and this is also assigned as error. What we have said is sufficient to indicate that we think the court's first impression, when giving the instruction, was correct, and that afterwards, when the verdict was set aside, apparently upon the ground that the instruction was not justified by the evidence, the defendant was denied a substantial right.

Our conclusion, therefore, is to reverse the judgment, which was in favor of the company, and to enter judgment here upon the verdict in favor of the plaintiff in error.

Reversed.

SIMS and BURKS, JJ., absent.

(129 Va. 763)

AMBROSE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Criminal law §1159(3)—Verdict on conflicting evidence will not be disturbed.

A verdict on conflicting evidence will not be disturbed.

2. Larceny §1—Taking of husband's automobile with consent of wife, to obtain funds to elope with her was larceny.

Where defendant, who was planning to elope with a married woman, as part of the scheme, with her consent, took the husband's automobile, intending to sell it to obtain funds to finance the elopement, he was guilty of larceny.

3. Criminal law §834(3)—Modification of instruction in prosecution for stealing automobile proper.

In a prosecution for the theft of an automobile, where defendant contended that it belonged to a married woman, and that she intrusted it to him for sale, and requested an instruction that, if such woman intrusted the machine to him for sale and if not to return it, and that, he having failed to sell the car, he was returning it, he could not be convicted, an addition that, if defendant received the automobile fraudulently and was knowingly aiding the woman in depriving her husband of his property, they should find him guilty, was not error.

4. Criminal law §829(1)—Refusal of requested instruction covered by one given not error.

The refusal of a requested instruction covered by one given is not error.

5. Criminal law §823(4)—Error in instruction in prosecution for larceny harmless.

In a prosecution for the theft of an automobile which defendant claimed belonged to a married woman who had intrusted it to him, error in the state's instruction, to the effect that an oral gift of the automobile by the husband to his wife, etc., would not pass title, was harmless, where the instruction later informed the jury that though the woman was not the owner, yet if defendant honestly thought she was, and acted on that belief, he could not be convicted.

Error to Hustings Court of Portsmouth.

F. M. Ambrose was convicted of larceny and he brings error. Affirmed.

R. H. Bagby and Jno. W. Happer, both of Portsmouth, for plaintiff in error.

Jno. R. Saunders, Atty. Gen., and J. D. Hank, Jr., Asst. Atty. Gen., for the Commonwealth.

BURKS, J. F. M. Ambrose, the plaintiff in error, was convicted of stealing an automobile, the property of F. J. Schmoele, of the value of \$1,000, and sentenced to confinement in the penitentiary for two years. A writ

of error was awarded to the judgment of conviction, and we are asked to review it.

The petition for the writ of error states that from the record two questions arise:

"(1) Was the automobile alleged to have been stolen the property of F. J. Schmoele or the property of his wife, Holmes Pretlow Schmoele? and

"(2) If it was the property of F. J. Schmoele, could petitioner be legally convicted of larceny under the facts in this case?"

[1] Without going into the details of the evidence, it is sufficient to say that F. J. Schmoele, a witness for the commonwealth, testified positively that the automobile was his property. His wife testified for the defendant that it was her property, and that she delivered it to the defendant and asked him to sell it for her. The verdict of the jury settled the conflict in favor of the commonwealth, and that verdict cannot be disturbed.

[2] In answer to the second question propounded in the petition, it may be said that the evidence was such that the jury was well warranted in believing that the defendant and Mrs. Schmoele, wife of F. J. Schmoele, had planned an elopement and partially carried it out, and that the sale of the automobile was a part of their scheme to finance their plan. If, therefore, the automobile was the property of F. J. Schmoele, the defendant could "be legally convicted of larceny" thereof, and there is ample evidence in the record to sustain his conviction.

The defendant asked for three instructions which the court refused to give. The refusal to give his instruction No. 3 is not assigned as error.

[3] Instruction No. 1 was as follows:

"The court instructs the jury that if they believe from the evidence that the defendant received the automobile mentioned in the indictment from Mrs. Schmoele, the wife of F. J. Schmoele, to sell for her under instructions to pay to her the money from the sale, if made, and if not made to return to her the automobile, and, not having made the sale he went to Raleigh, N. C., where Mrs. Schmoele then was, for the purpose of returning the car, then they must find the defendant not guilty."

This instruction the court refused to give as asked, but added the following:

"But if they find from the evidence that the defendant received the automobile fraudulently, and was knowingly aiding Mrs. Schmoele in permanently depriving her husband of his property, then they should find the defendant guilty; but the jury are further told that, in order to convict the accused, they must find him guilty under the evidence beyond all reasonable doubt."

There was no error in making the addition, which correctly stated the law.

[4] Instruction No. 2 was as follows:

"The court instructs the jury that they cannot convict the accused, unless they believed from the evidence beyond all reasonable doubt that he came into possession of the car in question by fraudulent means, or that he intended to convert it to his own use."

If it be conceded that the instruction correctly stated the law, it was not error to refuse it, as it was fully covered by instruction No. 4, given for the commonwealth. It is not desirable to multiply instructions, and is not error to refuse even a correct instruction on a point upon which the jury has already been fully and correctly instructed.

[5] Exception was taken to the giving of instruction No. 4 at the instance of the commonwealth. This instruction was as follows:

"The court instructs the jury that chattels and personal property, when the donor and donee reside together, can only be conveyed by deed or will, and that if they believe from the evidence beyond a reasonable doubt that F. J. Schmoele made an oral gift of the automobile in this case to his wife, with whom he was living at the time, it did not operate to pass the title, and the property remained that of F. J. Schmoele; but the court further instructs the jury that 'intent' is the essence of the crime of larceny, and if they believe that the defendant honestly thought the automobile was the property of Mrs. Schmoele, and that she had full right to dispose of the same and receive the proceeds, and that he was not merely aiding her in wrongfully carrying away her husband's property, and that he was without guilty knowledge of any wrongful or illegal purpose on the part of Mrs. Schmoele towards her husband in placing the automobile in his possession, then they should acquit him; but if they believe from the evidence beyond a reasonable doubt that the defendant acted with dishonest intent in carrying the automobile away, thereby fraudulently contriving to deprive the said F. J. Schmoele permanently of his property, then they should convict him."

The sole objection to this instruction is that the jury were misled by the statement in the first part of the instruction:

"That if they believe from the evidence beyond a reasonable doubt that F. J. Schmoele made an oral gift of the automobile in this case to his wife, with whom he was living at the time, it did not operate to pass title, and the property remained that of F. J. Schmoele."

Conceding the error of the words quoted, the jury could not have been misled by their use, for the instruction proceeds at once to tell the jury that, although Mrs. Schmoele was not the owner, yet if the defendant honestly thought she was, and acted on that belief, they should acquit him.

We find no error to the prejudice of the plaintiff in error, and the judgment of the hustings court will therefore be affirmed.

Affirmed.

(129 Va. 621)

WHITE v. WHITE.(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Libel and slander §94(5)—Plea of justification to part only of defamatory charge not a complete defense.

A plea of justification in a slander suit cannot operate as a complete defense if it pleads the truth of a part only of the defamatory charge.

2. Libel and slander §55 — Defendant may justify one or more of separate libelous or slanderous charges.

Where the defamatory matter is divisible and contains several distinct libelous or slanderous charges, defendant may justify one or more of the separate charges.

3. Libel and slander §94(5)—If part of charge sought to be justified is actionable in itself, it need not be of a different offense from the remainder.

On a plea of justification in a slander suit to part only of the defamatory charge, the imputation covered need not be of a different offense from that imputed by the rest of the words charged, provided the defamatory matter is itself actionable.

4. Libel and slander §94(5)—Justification to a part of charge not in itself actionable not a good plea.

In a slander suit a plea of justification to part of the charge not in itself actionable *held* not a good plea.

5. Libel and slander §94(5)—Charge covered by plea of justification held not severable as actionable in itself.

A statement by defendant in a slander suit relative to a man's visit to plaintiff, who was a married woman, and that defendant asked her about it, "and she acknowledged it," *held* not to convey any meaning of insult or tend to violence and breach of the peace, and therefore was not in itself actionable, and hence not severable from the rest of the charge under a plea of justification.

6. Libel and slander §94(4)—Plea neither denying plaintiff's construction was true nor justifying words as used in ordinary meaning held insufficient.

In a slander suit a plea of justification to alleged charge of adultery neither denying that plaintiff's declaration puts the true construction on the admitted words nor justifying them as having been used only in their natural and ordinary meaning *held* insufficient.

7. Libel and slander §54—"Truth" admissible as defense is truth in sense words charged ordinarily understood.

The truth which is admitted as a defense in a slander suit is the truth of the alleged words in substance and in fact in the sense in which they were used and intended to be understood or were reasonably understood in accordance with the usual construction and common

acceptation of the meaning of the words as used, in the light of all the surrounding circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Truth.]

8. Libel and slander §100(3)—Truth as defense not admissible under general issue.

Truth of defamatory matter charged in a declaration in a libel suit is not admissible under a plea of the general issue.

9. Appeal and error §867(2) — Illegal evidence on which new trial was granted may be complained of by plaintiff in error.

The rule that on a writ of error to an order setting aside a verdict and awarding a new trial plaintiff in error cannot, to have such order reversed, complain in the appellate court of the admission of illegal evidence, improper instructions or error in the reception of a special plea on which the jury gave no recovery over *held* inapplicable, where the trial court set aside the verdict on inadmissible evidence establishing the truth of the matter charged in a slander suit.

10. Trial §296(7)—Instruction held not erroneous as imposing undue burden of proof in view of another instruction given.

In a slander suit an instruction for defendant if words covered by plea of justification "and such inferences and insinuations as may be drawn therefrom according to the usual construction and common acceptation of such language" were true *held* not erroneous in view of another instruction that the words must be construed in their plain and popular sense.

11. Libel and slander §112(2) — Evidence supporting finding that defendant intentionally charged plaintiff with adultery.

In a slander suit based on a charge of adultery, evidence *held* to sustain a verdict that the slanderous statements were made by defendant with the intention to charge adultery.

12. Evidence §593—Setting aside verdict in slander case on ground that evidence established truth of charge erroneous where such evidence inadmissible.

In a slander suit, where a special plea of justification as to part of the charge was improperly admitted, and the truth of the defamatory words was inadmissible under the remaining pleadings, it was error for the trial court to set aside a verdict for plaintiff on the ground that the truth of the words admitted by the special plea was established by the evidence.

Error to Circuit Court, Accomack County.

Action by Mamie C. White against Thomas Bernard White. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

This is an action for slander. It was tried in the court below on the second and sixth counts of the declaration, which charged the speaking and publishing by the defendant of insulting words under the statute.

The plaintiff in error was the plaintiff, and the defendant in error the defendant,

in the court below, and they will be herein-after referred to as plaintiff and defendant in accordance with their positions as parties in that court.

The defendant pleaded not guilty and filed a special plea of justification as to the speaking and publishing of a part of the words set out in the second count of the declaration.

Thereupon the plaintiff demurred to said special plea, and, on the grounds that such plea "is not coextensive and as broad as the defamatory charge made in the declaration [and] attempts to justify a part of the charge only which in itself imports no slander and omits no attempt to justify the slanderous part of the said charge," moved the court to reject such plea.

Such demurrer and motion were overruled. Whereupon there was a trial by jury, which resulted in a verdict for the plaintiff for the sum of \$1,000 damages. Thereupon the defendant moved the court to set aside the verdict and grant him a new trial on the grounds that the verdict was contrary to the law and the evidence, for misdirection by the court of the jury, and also because the damages awarded by the verdict were excessive. This motion the court sustained upon the grounds that the verdict was contrary to the law and the evidence, and because the verdict was excessive in the amount of the damages awarded. The court refused, however, to sustain such motion on the ground of misdirection of the jury. The opinion of the court, giving the reasons for such action, is in writing, filed and made a part of the record.

Thereafter, upon the calling of the case for a new trial, neither the plaintiff nor defendant demanding a jury, and the plaintiff having declined to introduce any evidence, judgment was entered by the court for the defendant, and the plaintiff brings error.

The assignments of error of the plaintiff (so far as material to the decision of the case) are mentioned below in the opinion of the court.

The defendant assigns as cross-error the action of the trial court in giving a certain instruction which appears below in the opinion of the court.

The insulting words alleged in the second count of the declaration as having been spoken and published by the defendant, together with the innuendoes there alleged, are as follows:

"'Edgar Smith and Mamie' (meaning the plaintiff) 'were sitting in the dining room' (meaning the dining room of plaintiff's home) 'talking, and the children' (meaning plaintiff's children) 'were in the cook room' (meaning the cook room of plaintiff's home), 'and afterwards the children come in the dining room, and I' (meaning the defendant) 'had not been home long before the children' (meaning the plaintiff's children) 'come to my house' (meaning the defendant's house). 'I' (meaning the

defendant) 'asked the children' (meaning plaintiff's children) 'where their mother' (meaning the plaintiff) 'was, and they' (meaning the plaintiff's children) 'said she' (meaning the plaintiff) 'had gone over to Mrs. Sallie White's. Then I' (meaning the defendant) 'goes back' (meaning to plaintiff's house) 'to see if Irving' (meaning plaintiff's husband, Irving White) 'had come home about putting the hay away. When I' (meaning the defendant) 'got there' (meaning to plaintiff's house) 'I' (meaning the defendant) 'heard somebody in the hall' (meaning the hall of plaintiff's home). 'All at once Smith' (meaning Edgar Smith) 'come out of the hall door' (meaning the hall door of plaintiff's home) 'and went down town way. Mamie' (meaning the plaintiff) 'blew the light cut and went over to Mrs. Sallie White's. We' (meaning the defendant and his wife) 'sent for her' (meaning the plaintiff) 'and asked her' (meaning the plaintiff) 'about it, and she' (meaning the plaintiff) 'acknowledged it' (meaning the plaintiff acknowledged she had committed adultery with Edgar Smith), 'and got down on her' (meaning the plaintiff's) 'knees to us' (meaning the defendant and his wife) 'and said it was the first time she' (meaning the plaintiff) 'ever did it' (meaning it was the first time plaintiff ever committed adultery with Edgar Smith) 'and would never do it again' (meaning the plaintiff would never commit adultery with Edgar Smith again), 'and she' (meaning the plaintiff) 'said she' (meaning the plaintiff) 'had rather see Irving' (meaning the plaintiff's husband, Irving White) 'dead than for him' (meaning the plaintiff's husband, Irving White) 'to know it, and she' (meaning the plaintiff) 'promised not to let him' (meaning Edgar Smith) 'come any more.'" (Italics supplied.)

The plea of justification embraces only that part of the words and innuendoes above set out which are not italicized. The plea alleges the truth of such part of such words, merely with the meaning that they constituted a true narrative of what is stated by the words as having occurred and as having been said, but does not allege that they were used with that meaning only, nor deny that the declaration put the true construction on them.

The insulting words alleged in the sixth count of the declaration as having been spoken and published by the defendant, together with the innuendoes there alleged, are as follows:

"'He' (meaning the defendant) 'went over there' (meaning plaintiff's home) 'when the children' (meaning plaintiff's children) 'were sent to his' (meaning defendant's) 'house. He' (meaning the defendant) 'suspected something was wrong, the curtains were down, and he' (meaning the defendant) 'saw motions. That old snower' (meaning Edgar Smith) 'was hanging around there' (meaning plaintiff's home)."

S. James Turlington, of Accomac, for plaintiff in error.

Roy D. White, of Parksley, and Stewart K. Powell, of Onancock, for defendant in error.

SIMS, J. (after stating the facts as above). The questions presented for our decision by

the assignments of error will be disposed of in their order as stated below.

1. Is or is not the plea of justification interposed by the defendant a good plea?

This question must be answered in the negative.

It is urged in behalf of the plaintiff that the plea is bad in two particulars: (1) Because it admitted a part only of the defamatory matter charged in the second count of the declaration, and so was not as broad as the charges; and (2) it does not justify the admitted words with their natural and ordinary meaning according to the usual construction and common acceptance of such language, nor deny that the plaintiff's declaration puts the true construction on such words, and hence also is not as broad as the charge of such words in the declaration.

With respect to the first-mentioned particular, this should be said:

[1] It is true that a plea of justification cannot operate "as a complete defense" to the action if it pleads the truth of a part only of the defamatory charge. 25 Cyc. § 3, p. 460; note in 31 L. R. A. (N. S.), p. 138; *Gault v. Babbitt*, 1 Ill. App. 130; *Woodruff v. Richardson*, 20 Conn. 238; *Sanford v. Gaddis*, 13 Ill. 329; *Thompson v. Pioneer Press Co.*, 37 Minn. 285, 33 N. W. 856; *Fero v. Ruscoe*, 4 N. Y. 162.

[2] But "where the defamatory matter is divisible and contains several distinct libelous or slanderous charges, defendant may justify one or more of the separate charges." 25 Cyc. (K) p. 464; *Townshend on Slander and Libel* (4th Ed.) pp. 311, 319; note in 31 L. R. A. (N. S.) p. 137; *Odgers on Libel and Slander* (1st Am. Ed.) p. 176; and other authorities above cited.

As said in *Odgers on Libel and Slander* at page 176:

"So he may justify as to one part, and demur or plead privilege as to the rest, or deny that he ever spoke or published the rest of the words. But in all these cases the part selected must be severable from the rest so as to be intelligible by itself and must also convey a distinct and separate imputation against the plaintiff."

[3] The imputation referred to in the quotation just made need not be of a different offense from that or those imputed by the rest of the words charged. The defendant may justify as to any part of the defamatory matter which is of itself actionable.

[4, 5] Therefore the plea in this case would not be bad merely because it is not as broad as the whole of the charges in the second count of the declaration. It does not purport to be that broad. It does not interpose a complete defense to the action, but only a partial defense, to wit, to the action in so far as based on that part of the words charged which are admitted by the plea to have been spoken. This would be permissible if such words were of themselves actionable. It

is plain, however, from a reading of them that these words do not of themselves, without the innuendo following them, which is not covered by the plea, convey any meaning of insult or tend to violence and breach of the peace, and hence they were not of themselves actionable. It is only when they are read in connection with the residue of the defamatory words charged in that count of the declaration that their meaning of insult and their tendency to violence and breach of the peace become apparent. Therefore the words covered by the special plea, in the sense in which they were admitted by the plea to have been spoken, were not severable from the rest of the words charged in the second count, and hence the plea was bad.

[6] We are also of opinion that the plea is bad in the second particular urged against it in behalf of the plaintiff above mentioned, namely, in that it does not either deny that the plaintiff's declaration puts the true construction on the admitted words, or justify them as having been used only with their natural and ordinary meaning according to the usual construction and common acceptance of such language.

In *Odgers on Libel and Slander*, at page 176, this is said:

"Again, where the words are laid with an innuendo in the statement of claim, the defendant may justify the words either with or without the meaning alleged in such innuendo, or he may do both; that is, he may deny that the plaintiff puts the true construction on his words, and assert that, if taken in their natural and ordinary meaning, his words will be found to be true, or he may boldly allege that the words are true even in the worst signification that can be put upon them. But it seems that a defendant may not put a meaning of his own on the words, and say that in that sense they are true; for, if he deny that the meaning assigned to his words in the statement of claim is the correct one, he must be content to leave it to the jury at the trial to determine what meaning the words naturally bear."

[7] The truth which is admitted as a defense in such an action as this is the truth of the alleged words in substance and in fact, in the sense in which they were used and intended to be understood, or were reasonably understood in accordance with the usual construction and common acceptance of the meaning of the words as used, in the light of all the surrounding circumstances.

We are therefore of opinion that the trial court should not have admitted the plea of justification to be filed over the aforesaid objections of the plaintiff.

[8] As the only other plea of the defendant was the plea of the general issue, no evidence of the truth of any of the defamatory matter charged in the declaration was properly admissible in evidence; and we must consider the record as if there was therein no issue and no evidence upon the question of the

truth of the defamatory words charged in the declaration.

[9] It is urged before us in behalf of the defendant that, notwithstanding the filing of the defendant's plea of justification, as the verdict was in favor of the plaintiff, and the latter is content with that verdict as rendered, as is shown by the plaintiff's seeking on appeal to maintain such verdict, the defendant is entitled to the benefit of the rule established by the following authorities, namely: *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13; 2 *Barton's Law Pr.* (2d Ed.) pp. 724, 725; *Chapman v. Va. Real Estate Co.*, 96 Va. 177, 31 S. E. 74; *Sutherland v. Wampler*, 119 Va. 800, 89 S. E. 875—which rule bars the plaintiff's right to have the appellate court consider whether there was error in the action of the trial court in admitting such plea to be filed. These authorities establish the general and correct rule that, upon a writ of error to an order of a trial court setting aside the verdict of a jury and awarding a new trial, the plaintiff in error cannot, for the purpose of having such order reversed, complain in the appellate court that the trial court admitted illegal evidence, or gave the jury improper instructions, or erred in the reception of a special plea of the defendant on which the jury gave no recovery over against the plaintiff. But, as appears from such authorities, this general rule is applicable only where it is clear that the plaintiff in error has not been prejudiced by the rulings of the court with respect to these matters. Where, as in the case before us, it appears from the opinion of the trial court, as will be hereinafter mentioned, that he set aside the verdict in question solely as the result of his conclusions from what he considered was the evidence in the case on the question of the truth or falsehood of certain of the defamatory words charged in the declaration, when, as we must regard the case as aforesaid, there was no issue and no evidence whatsoever on this subject which could have been properly considered by the trial court, it is at once apparent that the general rule aforesaid invoked by the defendant is inapplicable.

We will next consider the question arising on the cross-assignment of error of the defendant to the action of the trial court with respect to instructions, namely:

2. Was there error in the action of the trial court in giving the following instruction to the jury on the first trial of the case, to wit:

"Instruction 01. The court instructs the jury that, if they believe from the evidence that the language and words justified by the defendant's special plea of justification, and such inferences and insinuations as may be drawn therefrom according to the usual construction and common acceptance of such language, were true, then they must find for the defendant to the extent of such special plea." (Italics supplied.)

The defendant asked for this instruction without the words which we have italicized.

The trial court modified the instruction as asked by inserting the italicized words, and gave it as so modified. It is of this that the defendant complains. It is contended that such language was misleading and imposed upon the defendant the burden of proving "the truth of any inference, without limit or restriction, whether proper or improper, fair or unfair, reasonable or unreasonable, that may be drawn from the language used according to its usual construction and common acceptance." In support of this position the case of *Williams Printing Co. v. Saunders*, 113 Va. 156, 73 S. E. 472, Ann. Cas. 1913E, 693, is cited, and the following part of instruction 10 approved by the court in that case is referred to, namely, "But as to this article, as to buying votes in Manchester, the jury are instructed that the language used means, in its fair interpretation, according to the usual construction and acceptance of the language that," etc. (stating the construction given by the court to the language there involved according to the usual construction and common acceptance of it).

The instruction in question in the case before us was not, however, the only instruction given on the subject. Instruction 1 given by the court at the request of the plaintiff was as follows:

"(1) The court instructs the jury that, in determining whether or not the language complained of in the declaration is insulting and tending to violence and breach of the peace, the words and sentences must be construed in the plain and popular sense in which the rest of the world would naturally understand them; that is, they are to be construed according to their usual construction and common acceptance. The charge or insult need not be in express terms; it may be by insinuation."

[10] In view of the fact that this instruction was also given to the jury, we are of opinion that there is no merit in the contention of the defendant with respect to instruction 01, involved in the question under consideration.

We come now to the question for our consideration presented by the plaintiff's chief assignment of error, which is as follows:

3. Did the trial court err in setting aside the verdict of the jury on the first trial of the case on the grounds that the verdict is contrary to the law and the evidence and is excessive?

This question must be answered in the affirmative.

[11] There was no material variance between the allegations of the declaration and the proof introduced in evidence in behalf of the plaintiff as to the speaking and publishing of the defamatory words, in the sense in which they were alleged to have been used and intended to be understood, both as charged in the second and sixth counts of the declaration, on which the case was tried. There was ample evidence before the jury to support their verdict in so far as it was

based on the finding that all of such words were spoken and published by the defendant as alleged. As alleged in the declaration and as shown by the proof, there was an interval of some 10 months between the publishing of the words alleged in the second count of the declaration and the publication of those alleged in the sixth count, which in substance repeated the charge of the same offense as having been committed by the plaintiff. There is in evidence also a letter written by the defendant and his wife to the husband of the plaintiff about 11 months after the publishing of the words covered by the second count of the declaration and about one month after the publishing of the words covered by the sixth count of the declaration, which in substance reiterated the charge that the plaintiff had been guilty of adultery. There is also in evidence the testimony of a witness for the plaintiff to the effect that after this action was instituted and before the trial the defendant repeated to him, in substance, the same charge, to wit, that the plaintiff had been guilty of adultery. The defendant, it is true, in his testimony denies that he used on this occasion many of the words in question, and claimed that he did not use the words he admits having then used with the meaning alleged by the plaintiff. This indeed was the claim of the defendant in his testimony with respect to the words used by him according to the testimony for the plaintiff, on all of the occasions of publication above mentioned, and with respect to the contents of the letter aforesaid; but that was a question for the jury in the light of certain admissions made by the defendant himself in his testimony and of all the other evidence in the case; and there was ample evidence to sustain the verdict of the jury based on a finding contrary to such claim of the defendant. Further, on the first trial of the case the defendant in testifying with respect to what he saw and heard on the occasion in March, 1918, referred to in the words alleged in the second count of the declaration, and in connection with his testimony that "it didn't look good to me right at that time," added the following statement before the jury, namely:

"She" (meaning the plaintiff) "had been accused of two parties and they are in this house" (meaning the courthouse) "to-day, and that would lead it right into my mind if nothing was done wrong right there—what I had seen."

There was therefore ample evidence before the jury on subjects mentioned in the next preceding paragraph to support the verdict in question to the extent of its full amount. It appears, indeed, from the opinion of the court below in the record, that the learned trial judge entertained that opinion on those subjects. As appears from his opinion, he did not set aside the verdict for any lack of evidence to support it in those particulars.

In the opinion of the trial judge this is said:

"The court concedes that, if from the evidence the jury were justified in basing a verdict upon the theory that the words spoken by the defendant, and which he admits in his plea that he spoke, were *utterly and absolutely* false, 'a frame-up' on the part of the defendant and his wife 'to blacken the character' of the plaintiff, then the court would not set aside the verdict on the ground that the damages were excessive; and the court does not believe that the jury would have given such damages, except upon that theory. But can it be said they were justified in basing a verdict upon such theory?"

The italics and the subquotations are those of the opinion of the court below, and the words embraced therein have reference to the position taken by counsel for plaintiff with respect to all of the defamatory words alleged in the declaration, particularly in his closing argument before the jury, to which reference is made in a preceding part of the opinion of the court below. It is there stated that in the opinion of the court such position, and certain violent denunciations on the part of such counsel in urging it with great vehemence, "were not justified by the evidence, aroused the 'passion' and 'prejudice' of the jury against the defendant and his wife; and the law is that, if the court believe that the amount of the verdict is so out of the way as to evince 'passion' or 'prejudice' on the part of the jury, it should be set aside."

As to the violent denunciations on the part of counsel for the plaintiff, it appears from the opinion under consideration that they were considered by the judge of the trial court as improper and misleading to the jury only because, in his view of the case, they were "not justified by the evidence" on the issue of the truth of the words sought to be justified by the special plea aforesaid. No other position has been taken in behalf of the defendant in the brief of counsel or in oral argument before us. And it further appears from said opinion that the trial court set aside the verdict in question as excessive and as contrary to the law and the evidence solely on the ground that the evidence in the case established the truth of the words admitted by the special plea aforesaid to have been spoken by the defendant.

[12] In view of our conclusion expressed above that the special plea aforesaid was improperly admitted, and that we must regard the case as if there was no plea of justification therein, and hence no issue upon and no evidence of the truth of any of the defamatory words alleged and proved to have been spoken by the defendant, which could properly be considered by the jury or by the trial judge, it is at once apparent that the trial judge was in error in his conclusion that the truth of the words admitted by the special plea was established by the evidence, and

hence he was in error in setting aside the verdict. There being no issue properly in the case except the general issue, under which the truth of the words could not be proved, there was nothing upon which the trial judge could base the conclusion on which he set aside the verdict. The presumption of falsehood which the law attaches to all defamatory words was un rebutted, and that they were false was the conclusion which the jury and the trial judge were compelled to reach as their only conclusion upon all of the evidence properly in the case.

Such being our view of the case, it is entirely unnecessary for us to review the authorities on the subject, which are cited in argument, or to set forth here the rules governing our action where there is conflict in the testimony, and where we are asked to reverse the action of a trial court in setting aside a verdict and granting a new trial, as distinguished from cases in which we are asked to reverse the action of the trial court in refusing to set aside a verdict and grant a new trial. These rules are now well established by the decisions of this court, and none of them are applicable so as to uphold the action of the trial court in setting aside the verdict in the case before us; for none of such rules warrant a trial court in setting aside a verdict upon an issue of fact which is not properly in the case, nor upon a conclusion of fact to support which there is no evidence whatever properly in the case.

There are other assignments of error by the plaintiff, but, in view of our above-stated conclusions, they become immaterial, and will therefore not be dealt with in this opinion.

The case will be reversed and judgment will be entered in favor of the plaintiff upon the verdict of the jury rendered on the first trial of the case.

Reversed.

(129 Va. 576)

TUCKER SANATORIUM, Inc., v. COHEN.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Negligence ⚡108(1)—Requisites of declaration stated.

A declaration in a negligence case should contain sufficient allegations of material facts to substantially inform the defendant of the nature and character of the demand against him, so that he may know how to present his defense, and should state such facts as would enable the court to say, if they are proved substantially as alleged, whether they establish a good cause of action, under Code 1919, § 6118.

2. Hospitals ⚡8—Declaration held to sufficiently allege negligence of hospital.

A declaration in an action by a patient for damages for a burn caused by hot-water bags upon his back held to contain sufficient allegations to inform defendant of the nature and

character of the demand, and such facts as would enable the court to say, if they were proved, that they establish a good cause of action, in view of the nature and extent of the burn alleged, under Code 1919, § 6118.

3. Hospitals ⚡8—Evidence of burning by hot-water bag held prima facie case of negligence against hospital.

Testimony, showing that an excessively hot-water bag was negligently placed at plaintiff's back by the attending nurse, a servant of the hospital, when the physician had not directed it, and while plaintiff was in a semi-conscious condition, which could not have occurred if the heat of the bag had been tested by the nurse, as was customary, and such bag was allowed to remain until it burned him seriously a half an inch deep, made a prima facie case of actionable negligence against the hospital.

4. Appeal and error ⚡1002—New trial ⚡71—Finding of jury on conflicting evidence conclusive on trial court and appellate court.

A finding by the jury, based upon conflicting evidence involving the veracity and credibility of respective witnesses, is conclusive on the trial court and the appellate court.

5. Hospitals ⚡8—Evidence sufficient to sustain finding that condition of patient was natural result of negligent burn.

In an action against a hospital to recover damages for loss and suffering occasioned by negligent burn caused by hot-water bag, evidence held sufficient to sustain a finding that condition of plaintiff's back and loss and suffering of which he complained at time of trial was natural result of burn received, and was not due to infection occurring from lack of care of the burn by plaintiff's physician.

6. Hospitals ⚡8—Instruction held properly refused as misleading.

Where plaintiff in action against hospital was seeking damages for negligent burn and natural consequences thereof, court properly refused as misleading defendant's requested instruction, predicated on the assumption that plaintiff was seeking to hold defendant liable for negligence of physician or nurses in failing to take proper precautions to protect the burned place.

7. Hospitals ⚡8—Modification of instruction as to cause of suffering from burn in negligence case held proper.

In an action against hospital for damages for alleged negligent burn by a hot-water bag, court did not err in modifying defendant's requested instruction by inserting the words, "is not the natural result of the burn received, but," so as to read, "that if the present condition of the plaintiff's back and the loss and suffering of which he complains is not the natural result of the burn received, but is due to infection occurring from the lack of care with respect to said burn in the operation performed by Dr. H. prior to the plaintiff's leaving the hospital of the defendant, or to reinfection after he left said hospital, the defendant cannot be held liable."

8. Hospitals — 8—Whether burned patient exercised good faith in not undergoing operation before trial held for jury.

In an action against a hospital for damages and suffering caused by burn on back from hot-water bag, good faith of plaintiff in not undergoing a surgical operation before the trial, or lack of good faith in that particular, and whether he more probably would or would not have been cured by the time of the trial if he had undergone the operation, *held* peculiarly questions for the jury.

9. Appeal and error — 1002—Finding of jury on conflicting evidence not disturbed on appeal.

Conclusion of the jury upon a conflict of evidence sufficient to sustain a verdict either way will not be disturbed on appeal.

Error to Hustings Court of Richmond.

Action by Henry Cohen against the Tucker Sanatorium, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action instituted by the defendant in error, Cohen, for damages alleged to have been occasioned, while he was an inmate of a hospital conducted by the plaintiff in error, by the negligent application or failure to remove hot-water bags from the back of Cohen, as the result of which negligence he received, as alleged, a serious burn on the back.

The respective parties will be hereinafter referred to as plaintiff and hospital.

There was a demurrer to the declaration which was overruled by the trial court.

The declaration contains two counts. After stating the facts concerning the receiving of the plaintiff by the hospital as an inmate, as a patient, for care and treatment, for a certain reward paid in that behalf to the hospital, from which relationship of the parties the duty of the hospital arose (about the extent of which there is no question raised in the case), to wit, the duty to use ordinary or reasonable care under the circumstances to provide proper care and treatment for the plaintiff while said relationship existed, the first count contains the following allegations, the sufficiency of which is challenged by the demurrer, namely:

" * * * The said defendant * * * did not use due, proper, and ordinary care to provide proper care and treatment for the said plaintiff, but on the contrary the said defendant and its duly authorized servants so negligently and carelessly behaved and conducted themselves in that respect that afterwards and whilst the said plaintiff so abided in the said hospital, as aforesaid, to wit, on the 10th day of December, 1918, the said defendant's duly authorized servants did negligently and carelessly apply hot-water bags to the back of the said plaintiff, whereby the said plaintiff's back was cruelly burned and scalded, to a great extent, to wit, about nine inches by four inches, and to a great depth, to wit, one-half inch," etc.

The second count contains practically the same allegations as those of the first count, except that the negligence alleged is stated to have consisted in this, to wit, that—

"The said defendant and its duly authorized servants negligently suffered, permitted, and allowed hot-water bags to be carelessly and negligently applied to the back of the said plaintiff, whereby the said plaintiff's back was cruelly burned and scalded to a great extent," etc., setting forth the same extent as is alleged in the first count, etc.

There was a trial by jury, which resulted in a verdict in favor of the plaintiff for \$2,000.

The hospital moved the court to set aside the verdict on the grounds that it was contrary to the law and the evidence and without evidence to support it, that the court misdirected the jury, erred in refusing to give and also in changing instructions asked for by the hospital, and because the damages assessed by the jury were excessive. This motion the court overruled, and entered judgment for the plaintiff in accordance with the verdict, and the hospital appeals.

After the evidence both for the plaintiff and the hospital was all in, the hospital moved the trial court to instruct the jury as follows:

(1) "That the defendant cannot be held liable in this case for any act, neglect, or failure to take proper precautions to protect the injured or burned place on the plaintiff's back after discovery thereof and before the operation by Dr. Henson, nor afterwards, whether such act, neglect, or failure was due to the nurse, Miss Wright, Dr. Vanderhoof, Dr. Henson, or some nurse employed by the defendant."

(2) "That under the case made by the declaration and evidence here, the question for them to consider is whether a bag or bottle of hot water was negligently placed under the back of the plaintiff at the time mentioned in the declaration, by some nurse employed by the defendant and placed in charge of the plaintiff, and that from a burn so received he suffered the loss and suffering of which he now complains.

"That it is incumbent upon the plaintiff to prove by affirmative evidence and by a preponderance of all the evidence in the case:

"(1) That one of the nurses employed by the defendant placed a bag or bottle of hot water under the back of the defendant at the time mentioned; and

"(2) That when it was so placed the said nurse knew, or by the exercise of ordinary care should have known, that it was so hot as to have caused the injury complained of.

"If the plaintiff has failed in either of the respects above mentioned, then they must find for the defendant."

(3) "That if the present condition of the plaintiff's back and the loss and suffering of which he complains is due to infection occurring from the operation performed by Dr.

Henson prior to the plaintiff's leaving the hospital of the defendant, or to reinfection after he left said hospital, the defendant cannot be held liable in this case."

(4) "That if they believe from the evidence that the plaintiff's back was at the time mentioned in the declaration, December 10, 1918, burned by a bag or bottle of hot water placed there by the plaintiff's wife, they must find for the defendant; and they must also find for the defendant if from the whole evidence before them it is just as probable that the said bag or bottle was placed by the plaintiff's wife as by one of the nurses of the defendant."

But the court refused to give said instructions as offered, and instructed the jury as follows:

(1) "That if the defendant accepted the plaintiff, Cohen, as a patient, and undertook to give him such care, nursing, and attention as was reasonably necessary in view of his known condition, and negligently failed to keep and perform its undertakings, then in that case the defendant is liable for any injury which naturally resulted to the plaintiff from such failure."

(2) "That if they believe from the evidence in this case that the plaintiff intrusted himself to the defendant's hospital for treatment, then the plaintiff, while under the care of the defendant had a right to expect of the defendant and its employees in charge of the institution ordinary care and skill in nursing and treatment such as his case required, and such degree of ordinary care and diligence should be in proportion to the physical or mental ailments of the patient; and, if they further believe from the evidence in the case that said hospital, its servants or employees, did not exercise such ordinary care and diligence as was required by the condition of the plaintiff's health, and either negligently applied or permitted to be applied to his person a hot-water bag which resulted in injury to him, that they must find for the plaintiff."

(3) "That if they believe from the evidence in this case and the instructions as to the law that the plaintiff is entitled to recover damages, then in estimating the same they may take into consideration the amount of money spent for medicine and nursing and medical bills, and what the evidence shows he may have to expend in being cured; also fair compensation for loss of time he sustained by reason of the said injury; also the impairing of his earning capacity, if any; also the bodily injuries sustained, including his mental and physical suffering and the effect on his health, and the probable duration of the injury, whether the same is likely to be temporary or permanent. Not to exceed the sum sued for, to wit, \$10,000."

(4) "That under the case made by the declaration in evidence here, the question for them to consider is whether a bag or bottle of hot water was negligently placed, or permitted to be placed, under the back of the plaintiff at the time mentioned in the declaration by some nurse employed by the defendant and placed in charge of the plaintiff, and that from a burn so received he suffered the loss and suffering of which he now complains.

"That it is incumbent upon the plaintiff to prove by affirmative evidence and by a preponderance of all the evidence in the case:

"(1) That one of the nurses employed by the defendant negligently placed, or permitted to be placed, a bag or bottle of hot water under the back of the defendant at the time mentioned; and

"(2) That when it was so placed, or permitted to be placed, the said nurse knew, or by the exercise of ordinary care should have known, that it was so hot as to have caused the injury complained of.

"If the plaintiff has failed in either of the respects above mentioned, then they must find for the defendant."

(5) "That if the present condition of the plaintiff's back and the loss and suffering of which he complains is *not the natural result of the burn received*, but is due to infection occurring from the lack of care with respect to said burn in the operation performed by Dr. Henson prior to the plaintiff's leaving the hospital of the defendant, or to reinfection after he left said hospital, the defendant cannot be held liable in this case." (Italics supplied.)

(6) "That if they believe from the evidence that the plaintiff's back was at the time mentioned in the declaration, December 10, 1918, burned by a bag or bottle of hot water placed there by the plaintiff's wife, without the knowledge or consent of the defendant, they must find for the defendant; and they must also find for the defendant if from the whole evidence before them it is just as probable that the said bag or bottle was placed by the plaintiff's wife as by one of the nurses of the defendant."

Further reference is made in the opinion of the court to the issues and to the evidence in the case.

Scott & Buchanan, of Richmond, for plaintiff in error.

J. R. Lenahan and D. C. O'Flaherty, both of Richmond, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions presented for our decision by the assignments of error will be disposed of in their order as stated below.

1. Does the declaration set out sufficient facts alleged concerning the negligent acts of commission and of omission of the hospital, in order to render the declaration valid under the rule on the subject established in this state by the decisions prior to the going into effect of section 6118 of the Code of 1919, beginning with the Hortenstein Case, 102 Va. 914, 47 S. E. 996?

This question must be answered in the affirmative.

[1] The rule referred to requires two things as essential to the validity of a declaration in a negligence case in the allegations of the imputed negligent acts of commission or of omission, namely: (1) That it should contain sufficient allegations of material facts to substantially (but not necessarily completely) inform the defendant of the nature and

character of the demand against him, so that he may know how to prepare his defense; and (2) that it should state such facts as would enable the court to say, if they are proved substantially as alleged, whether they establish a good cause of action.

The cases of *Lynchburg Traction Co. v. Guill*, 107 Va. 94, 95, 57 S. E. 644, *Newport News, etc., Co. v. Nicolopoulos*, 109 Va. 168, 63 S. E. 443, and *Hunter v. Burroughs*, 123 Va. 128, 129, 96 S. E. 360, are cited and relied on for the hospital as sustaining the position that the declaration in the case in judgment does not contain the essential allegations of fact required by the rule of the Virginia decisions aforesaid.

[2] Touching the consideration of whether the declaration is sufficient in the essential particular (1) above mentioned, we think it a pertinent fact that the hospital did not ask for a statement by the plaintiff of the particulars of his claim, as the statute entitles a defendant to ask, if the declaration of a plaintiff is deficient in its allegations of the particulars of the claim. As a matter of fact, the declaration in the instant case seems to have efficiently performed the office of informing the hospital of the nature and character of the demand against it, so that it knew how to prepare its defense. At least, we find nothing in the record to indicate the contrary.

And looking merely to the declaration, in our view of it, it is valid under the rule above referred to. As is said in the opinion of this court in *Houston v. Lynchburg T. & L. Co.*, 119 Va. 136, 89 S. E. 114, delivered by Judge Kelly:

"And it is * * * well settled that while it is not sufficient merely to allege negligence in general terms as a conclusion of law, it suffices if such facts are alleged as to show that the accident was not one that would ordinarily have occurred if the defendant had exercised reasonable care."

The first count of the declaration alleges the situation and circumstances surrounding the plaintiff from which the duty of the hospital arose, the breach of which is alleged as giving rise to the cause of action; and, with respect to the conduct of the hospital which is relied on as constituting such breach of duty, this count of the declaration alleges that the injury was caused by the conduct of the servants of the hospital in the application of the hot-water bags to the back of the plaintiff, stating the nature and extent of the injury, and alleging that such conduct of such servants, with such result, constituted actionable negligence for which the hospital is liable in damages to the plaintiff. The second count is substantially the same in its allegations, except that the conduct of the hospital alleged as constituting the breach of its duty is the allowing, i. e., the omission to prevent the application of the hot-water bags to the back of the plaintiff by the servants of the hospital.

We think that both counts of the declaration allege such facts as to show that the accident was not one that would ordinarily have occurred if the hospital (or what is the same thing, its servants having the care of the plaintiff) had exercised reasonable care. It seems plain to us that a burn of such character and extent, under such circumstances, would not have occurred unless the person having the care of the patient had been guilty of negligence in the matter of the application or removal of the hot-water bag or bags which caused the burn. The declaration notified the hospital that the demand of the plaintiff was based on the charge that the conduct of the servants of the hospital who had the care of the plaintiff, was in the matter in question negligent, and constituted actionable negligence for the result of which the hospital was liable in damages to the plaintiff. Hence the declaration was sufficient to inform the hospital of the nature and character of the demand against it, and stated such facts as would have enabled the court to say, if the facts were proved as alleged, that they established a good cause of action. This is not a case in which the nature of the injury alleged is such that ordinarily its cause would be obscure, or where the allegations of the declaration left that matter in any doubt. The declaration is explicit on that subject. The facts as alleged made a prima facie case against the hospital. If the hospital did in fact exercise reasonable care, and such accident occurred notwithstanding, the circumstances must have been very different from those alleged in the declaration, or there must have been other explanatory circumstances which do not appear from the allegations of the declaration, all of which were matters of defense, and doubtless could and should have been shown in evidence by the hospital at the trial, if they existed. So far as the declaration is concerned, it was therefore good on demurrer.

Such being our conclusion, it is unnecessary for us to construe the new provisions of the statute referred to in the question above stated (Code 1919, § 6118), and we therefore express no opinion on that subject at this time.

[3] 2. Was there evidence before the jury sufficient to sustain the verdict upon the issue of whether the hospital was guilty of the negligent acts of commission or omission alleged in the declaration?

This question must be answered in the affirmative.

Of the evidence we deem it sufficient to say that, while conflicting on the subject under consideration, there was ample testimony to warrant the jury in concluding that a hot-water bag was negligently placed at the back of the plaintiff by the attending nurse, a servant of the hospital, when the physician had not directed any hot-water bag to be applied to the back of the patient, and while

the plaintiff was in a semiconscious condition, due to the high fever accompanying pneumonia, with the water in the bag excessively hot, which could not have occurred if the heat of the bag had been tested by the nurse, as the uncontroverted testimony in the case showed was customary and usual; and such excessively hot bag was allowed by the nurse to remain against the back of the plaintiff until it burned the back of the plaintiff seriously, practically to the extent alleged in the declaration.

[4] This proof undoubtedly made a prima facie case of actionable negligence against the hospital upon the issue of whether the hospital was guilty of the negligent acts of commission or omission alleged in the declaration. *Houston v. Lynchburg T. & L. Co.*, supra, 119 Va. 136, 89 S. E. 114. See, also, as a similar case to that in judgment, *Williams v. Pomona Valley Hospital Association*, 21 Cal. App. 359, 131 Pac. 888. To rebut this prima facie case, the sole defense of the hospital upon this issue was that the nurse aforesaid did not place the hot-water bag at the back of the plaintiff, and did not know it was there until the plaintiff complained of its burning him, but that the wife of the plaintiff filled and placed the hot-water bag at his back when the nurse was not present. There was direct testimony for the hospital to sustain this defense, but there was also the direct testimony of the wife that she did no such thing. This conflict involved the question of the veracity and credibility of the respective witnesses for the plaintiff and the hospital. The verdict of the jury resolved this question in favor of the plaintiff, and this finding upon such an issue was conclusive upon the trial court, and is also conclusive upon us.

[5] 3. Was there sufficient evidence before the jury to sustain the conclusion, which is involved in the verdict, that the condition of the plaintiff's back and the loss and suffering of which he complained at the time of the trial was the natural result of the burn received, and was not due to infection occurring from lack of care with respect to said burn in an operation performed by Dr. Henson prior to the plaintiff's leaving the hospital, or to reinfection after plaintiff left the hospital?

This question must be answered in the affirmative.

The matters in question now under consideration involve the issues of whether the plaintiff, or Dr. Henson, who was employed by the plaintiff, or others who were employed by the plaintiff, were guilty of a lack of ordinary or reasonable care in the treatment of the burn after it occurred, and of whether, if there was such lack of care, it was the whole cause of the condition of plaintiff's back and suffering aforesaid.

We deem it sufficient to say on this sub-

ject that the lack of care in question does not affirmatively appear from the evidence for the plaintiff. The most that could be said is that the evidence for the plaintiff does not exclude the possibility that such lack of care might have existed. There is, however, in the evidence for the plaintiff and for the hospital, testimony to the effect that, after the wound from the burn had on two occasions entirely healed, the tissues subsequently broke down and ulcerated, which warranted the jury in inferring that the breaking down of the tissues at other times and the condition of the back of the plaintiff and his loss and suffering aforesaid were due to the recurring breaking down of the tissues caused by the lasting effects of the burn, and not to any infection from lack of care in its treatment at any time. And with respect to the testimony for the hospital on this subject this is true: It introduced two physicians, who are distinguished experts, and neither of them testified to the opinion, nor was there any testimony for the hospital tending to show the affirmative fact that the condition of the back of the plaintiff and his loss and suffering aforesaid were in any degree due to lack of care in the treatment of the burn having caused infection. And while the testimony of the two expert physicians, who were witnesses for the plaintiff, is to the effect that they would not say that the breaking down of the tissues on one occasion may not have been due to infection, this is not inconsistent with the inference which the jury were warranted in drawing, as we think, as aforesaid, that the breaking down was not due to infection at any time.

[6] 4. Was there error in the action of the trial court with respect to the instructions?

This question must be answered in the negative.

(a) The hospital complains of the refusal of the trial court to give instruction No. 1, asked by the hospital, which is copied in the statement preceding this opinion.

This construction as asked was predicated on the assumption that the plaintiff was seeking to hold the hospital liable for some negligence of the physician or nurses mentioned in failing to take proper precautions to protect the injured or burned place on the plaintiff's back. This assumption is negated by the plaintiff's declaration, and it would have misled the jury to give them such an instruction, by diverting their attention to an issue not in the case.

[7] (b) The hospital complains of the refusal of its instruction No. 3 as asked, and the giving of it as modified in instruction No. 5, as given, by the insertion by the court of the words italicized in the instruction as copied in the statement preceding this opinion. This modification of the instruction was plainly proper, and we find no merit in this complaint.

(c) The hospital complains of instruction No. 1, as given on motion of the plaintiff, as being "a general abstract statement of certain duties of the defendant, with no reference whatever to the cause of action set out in the declaration or the evidence in support thereof, and complains of instruction No. 2, as given, also on motion of the plaintiff, as containing merely "a more extended statement of the same character," and because it "then instructed the jury that if they believed from the evidence that the defendant failed in those duties, and either negligently applied, or permitted to be applied, the hot-water bag to the plaintiff, they must find a verdict for him." The basis for these complaints, as set out in the petition, is the position taken for the hospital that—

"There was * * * neither a charge in the declaration, nor any evidence which tended to show in the most remote degree that there was any lack of 'ordinary care and skill in nursing and treatment' of the plaintiff by the defendant, nor any lack of care 'such as his case required,' a degree of care which 'should be in proportion to the physical and mental ailments of the patient.'"

As appears from our conclusions above expressed, we do not consider the position mentioned as tenable, and hence we are of opinion that there is no merit in either of the complaints under consideration.

The sole remaining question for our consideration is the following:

5. Did the court below err in not setting aside the verdict on the ground that it was excessive?

This question must be answered in the negative.

The position of the hospital on this subject as set forth in the petition is, in substance and as presently quoted in part, that the evidence shows that the plaintiff was (a) guilty of lack of ordinary care in having his wound treated, and (b) that the Johns-Hopkins expert witnesses for plaintiff, who examined him in October, 1919, shortly previous to the trial in the lower court (which took place in January, 1920), testified that—

The wound on plaintiff's back "should then, with proper treatment, have been healed in the course of a week at a cost of \$100 and hospital fees," and "that the plaintiff was careful not to pursue this treatment. He evidently preferred to wait so that he could show to the jury his burn aggravated by some cause for which the defendant was not responsible, and thus enhance the damages which he expected to recover."

With respect to the position (a), just mentioned, we find no merit in it, for the reasons given in connection with question 3 above considered.

[8, 9] With respect to the position (b), just mentioned, we think it is also without merit.

The Johns-Hopkins expert witnesses for plaintiff testified that in October, 1919, the wound in question did not show "any tendency to heal at all"; that a surgical operation was necessary, and was indicated as the only method of cure, but that cure by that method was not certain; that if that method was pursued the wound "might heal up in the course of a month, or it may not heal up at all," as stated by one of such witnesses, Dr. Lord. The most that can be said in favor of the position of the hospital under consideration is that there was evidence in the case tending to support it. But there was also evidence in the case for the plaintiff to the contrary. The good faith of the plaintiff in not undergoing the surgical operation before the trial, or his lack of good faith in that particular, and whether he more probably would or would not have been cured by the time of the trial if he had undergone the operation, were all peculiarly questions for the jury, and their conclusion, upon a conflict of evidence, sufficient to sustain a verdict either way, will not be disturbed on appeal.

The case will be
Affirmed.

(129 Va. 506)

TRIPP v. CITY OF NORFOLK.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Municipal corporations \S 763(1) — City must keep streets in reasonably safe condition.

It is the duty of a city to keep its streets in a reasonably sound, safe, and serviceable condition for public use and travel.

2. Damages \S 26—Rule as to responsibilities of wrongdoer for negligent act stated.

A negligent person is liable for all the consequences which naturally flow from the wrongful act, regardless of whether they could have been reasonably anticipated; the test being whether, viewing the case retrospectively, the consequences were so improbable or unlikely to occur that it would not be fair and just to charge a reasonably prudent man with them.

3. Municipal corporations \S 800(1) — Rut in street held proximate cause of injuries to pedestrian.

Negligence of city in permitting rut in street held the proximate cause of injuries to pedestrian struck by wheel of truck, detached from truck because of the force of the impact when wheel of truck dropped suddenly and with great force into the rut.

Error to Circuit Court of City of Norfolk.

Action by Queenie Tripp against the City of Norfolk. Demurrer to declaration sustained, and plaintiff brings error. Reversed and remanded.

H. C. Nicholas and L. S. Parsons, both of Norfolk, for plaintiff in error.

R. W. Peatross, of Norfolk, for defendant in error.

SAUNDERS, J. This case is brought before us by a writ of error to a judgment of the circuit court of the city of Norfolk, sustaining a demurrer to the declaration of Queenie Tripp, plaintiff in an action of assumption against said city.

The plaintiff was injured on Holt street in the city, supra, under the following circumstances: She was walking on the sidewalk of said street when a heavy automobile fire truck traveling in her direction dropped its front wheel or wheels into a rut in the street. The force of this impact detached a front wheel of the truck from the axle. The wheel thus detached rolled forward, mounted the sidewalk, struck Miss Tripp, and inflicted injuries alleged to be of considerable severity.

The plaintiff's case is set out in detail in her declaration, which herewith follows:

"Queenie Tripp, plaintiff, complains of the city of Norfolk, a municipal corporation duly chartered and created under the laws of the state of Virginia, defendant, of a plea of trespass on the case for this, to wit:

"That heretofore, to wit, on and before the grievance here complained of, the city of Norfolk was a municipal corporation duly chartered and created under the laws of the state of Virginia, and as such a corporation, at the time of the grievance hereinafter mentioned, was clothed with the power and subject to the duty, among others, of keeping sound, safe, and serviceable for public use and travel its public streets, alleys, walks, and gutters, and particularly it was the duty of the defendant to keep sound, safe, and serviceable for public use and travel a certain public street in said city, known and designated as Holt street, in order that persons using the said Holt street for travel might not be injured. And also at the time of the grievance herein mentioned the defendant was the owner of certain trucks and apparatus, used and operated by the defendant for the purpose of extinguishing fires, and more particularly a certain fire apparatus, the same being a heavy and powerful automobile truck and more particularly designated as combination No. 1, which said combination wagon No. 1 was operated over and upon the public streets of the defendant en route to and returning from fire, and more particularly the said combination wagon was operated over and upon the said Holt street in said city en route to and returning from fires in that section of said city.

"And yet the said defendant, disregarding its duty as aforesaid, willfully, negligently, and unjustly permitted and allowed the said Holt street to become in a dangerous and unsafe condition, in that the said defendant, before and at the time of the grievance herein mentioned, suffered, permitted, and allowed a certain rut or defect to be in said street, the same extending about ten feet across the said Holt street, about two feet in width and about eight inches deep, the same being located on the said Holt

street at or near the intersection of another public street in said city known and designated as Chapel street; and the said rut or defect is particularly dangerous, in that the same is situated in the said Holt street at such an angle that persons traveling along the said Holt street in vehicles in the nighttime were unable to see or ascertain the dangerous character of said rut until within such close proximity to the same that striking the same was unavoidable, of all of which the said city then and there had notice, or by the exercise of reasonable care should have had notice. And on or about the 5th day of February, 1919, at about the hour of 10 o'clock p. m., the said combination wagon was being operated over and upon the said Holt street, and, though operated with reasonable care, the same was brought violently, suddenly, and with great force against the said rut or defect, and by reason of the force and violence of the contact, and the dangerous condition of said rut and its liability to damage and injure traffic over the same, one of the front wheels of the said combination wagon became detached and wrenched therefrom, and by reason of the momentum created by the forward movement of the said combination wagon, the said wheel, after having become detached and wrenched from the said combination wagon, was propelled with great force and speed over, upon, and along the said Holt street and also up on and upon the sidewalk of the said Holt street, where the plaintiff was then and there, in the observance of due care on her part, lawfully walking, and, continuing its progress, did with great force and violence crash into and against the plaintiff, by reason whereof the plaintiff was knocked violently to the ground and greatly sprained, bruised, cut, and maimed, and her nervous system greatly shocked and permanently disordered and otherwise permanently injured, to the damage of the plaintiff in the sum of \$3,000, and therefore she brings this suit."

The defendant city demurred to this declaration, and assigned the following grounds of demurrer:

"First. That the declaration shows on its face that the condition of the street complained of was not the proximate cause of the plaintiff's injury.

"Second. That the declaration shows on its face that the injury complained of was not the natural and probable result of the condition of the street, and could not have been foreseen and guarded against by the defendant.

"Third. That the declaration shows on its face that the alleged injury was caused by the fire department of the city of Norfolk, which is a governmental department of the said city, for whose negligence no right of action lies against the city."

The circuit court sustained the demurrer generally, and the plaintiff applied for and secured a writ of error.

The gravamen of the first two grounds of demurrer is that the condition of the street was not the proximate cause of the plaintiff's injury, so that upon the case stated there was no liability upon the city.

[1] Unquestionably it was the duty of the

municipality to keep its streets, including Holt street, in a reasonably sound, safe, and serviceable condition for public use and travel. This duty, the plaintiff asserts, was not discharged. The declaration alleges that the city negligently allowed Holt street to "become in a dangerous and unsafe condition," in that it permitted and allowed a rut, or defect, across said street of the following dimensions, to wit, about ten feet long, two feet wide, and eight inches deep. Further, it is alleged that this rut, or defect, is "particularly dangerous, in that the same is situated in Holt street at such an angle that persons traveling along said Holt street in vehicles at nighttime were unable to see, or ascertain, the dangerous character of said rut until within such close proximity to the same that striking the same was unavoidable, of all of which the city had notice, or by the exercise of reasonable care should have had notice." In addition, the declaration alleges that about 10 p. m., on February 5, 1919, a heavy and powerful fire truck was being operated with reasonable care on the above street, when it was brought violently and suddenly against the rut in the street. In other words, the front wheels, or a front wheel, of the moving vehicle dropped violently into the rut, or defect, described in the declaration. The consequences of this unexpected impact are described substantially in the following terms in the declaration:

"* * * By reason of the force and violence of the impact and the dangerous condition of said rut * * * one of the front wheels of the combination wagon [i. e., automobile truck] became detached and wrenched therefrom, and by reason of the momentum created by the forward movement of said wagon, the said wheel thus detached was propelled with great force and speed over, upon, and along Holt street and thence upon and along the sidewalk of said street, where with force and violence it crashed into and injured the plaintiff."

The proximate cause and causal chain relied on by the plaintiff to support her claim for recovery may be described as follows: (1) The city negligently maintained a dangerous rut, or defect, in Holt street; (2) moving vehicle, operated with reasonable care, dropped one or both front wheels into this rut; (3) the violence of this blow detached a front wheel of the vehicle; (4) the wheel thus detached moved forward under natural laws; and (5) in its forward movement the wheel, probably in consequence of a twist given it at the time of detachment, mounted the sidewalk and struck and injured Miss Tripp, who was using said walk in the exercise of due care. Hence the plaintiff contends that the city, being responsible for the defect, was responsible for the accident to the vehicle which this defect occasioned. Upon the basis of the latter responsibility, the plaintiff maintains that the city is liable for her

injury, which followed in due sequence from the accident to the vehicle.

The defendant insists, by way of defense, that the injury complained of was not the natural and probable result of the condition of the street, and could not have been foreseen and guarded against by the defendant. This defense of the city rests upon the rule of "foreseeability," as it is sometimes styled.

Widely different contentions have been advanced with respect to responsibility for tortious negligence. One contention has been that the proper rule in such cases is that the defendant should not be held responsible for any damages except such as he could have foreseen in the exercise of reasonable foresight as the probable consequences of his act. This statement of the rule of liability is obviously far too favorable to the party guilty of negligence, since there are many negligent injuries flowing very naturally and inevitably from the original negligent act, or omission, which would require prescience to anticipate. The ordinarily prudent and intelligent man may possess in a measure the power to estimate likelihood, but he is not endowed with prescience. Apparently the defendant appeals to the rule as stated supra, since its second ground of demurrer is that "the injury complained of could not have been foreseen and guarded against by the defendant."

Another statement of the rule is that a defendant should be held responsible for all damages which in fact result from his wrongful act, whether they could have been anticipated or not. A strict application of this rule would result in fixing responsibility in many cases, when the relation between the initial negligence and the subsequent injury was of the most tenuous character, and no human being, however prudent and intelligent, when acquainted with the circumstances and apprised of what actually did happen, would regard the ultimate injury as a likely present or remote consequence of the original negligent act.

[2] Virginia holds a middle ground with respect to the rule of liability in these cases. The latest statement of the principle in this respect in the Virginia Reports will be found in the case of *N. & W. Ry. Co. v. Whitehurst*, 125 Va. 263, 99 S. E. 568, Burks, J., delivering the opinion:

"We have discussed the subject of proximate cause in a number of cases, and it is not to be expected that the discussion shall be repeated in every case of tort brought to this court.
* * *

"The 'foreseeableness,' or reasonable anticipation of the consequences of a wrongful or negligent act is not the measure of liability of the guilty party, though it may be determinative of the question of his negligence. When once it has been determined that the act is wrongful, or negligent, the guilty party is liable for all the consequences which naturally flow therefrom, whether they were reasonably to have been anticipated or not, and in determining

whether or not the consequences do naturally flow from the wrongful act, or neglect, the case should be viewed retrospectively; that is to say, looking at the consequences, were they so improbable or unlikely to occur that it would not be fair and just to charge a reasonably prudent man with them. If not, he is liable. This is the test of liability, but, when liability has been established, its extent is to be measured by the natural consequences of the negligent or wrongful set. *The precise injury need not have been anticipated.* [Italics ours.] It is enough if the act is such that the party ought to have anticipated that it was liable to result in injury to others."

See, also, the cases cited, 125 Va. 264, 265, 99 S. E. 568.

To the same effect is *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568, which says:

"It is not necessary, in order to constitute proximate cause, that the precise injury should have been foreseen or apprehended as certain to occur. It is sufficient if an ordinarily careful and prudent person ought, under the circumstances to have foreseen that an injury might *probably* result from the negligent act." (Italics ours.)

Discussing proximate cause, in *Pulaski Gas Light Co. v. McClintock*, 97 Ark. 576, 134 S. W. 1189, 1199, 32 L. R. A. (N. S.) 825, the court says:

"It is not necessary that the particular injury should have been foreseen."

And in *Foster v. Chicago, etc., Co.*, 127 Iowa, 90, 102 N. W. 424, 4 Ann. Cas. 150, the court declared that—

"Doubtless the particular situation might not have been foreseen, but this was not essential to making out a charge of negligence. Accidents as they occur are seldom foreshadowed. Otherwise many would be avoided. If the act or omission is of itself negligent and likely to result in injury to others, then the person guilty thereof is liable for the natural consequences which occurred, whether he might have foreseen them or not. In other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen."

[3] An ordinarily careful and prudent person, conversant with the consequences to swiftly moving wheeled vehicles of a sudden and forcible drop into a rut of the dimensions given, would, if confronted with such a rut in a street of a populous city, readily foresee that accidents would result from its maintenance. Such a person, when advised of the circumstances of the accident in the case in judgment, as described in the declaration, would pronounce the plaintiff's injury to be a natural consequence of the city's negligence. And why not? Admittedly the city

was at fault with respect to the rut in Holt street, which is alleged to be particularly dangerous, in that travelers on Holt street in the nighttime (and this accident occurred in nighttime) were unable "to see or ascertain its dangerous character until within such close proximity that striking same was unavoidable, of which the city had notice." A powerful automobile truck, carefully operated, dropped "violently, suddenly, and with great force" into the above rut. The force of this impact wrenched off one of the front wheels of this truck. Under the impulse of its momentum, this wheel would naturally roll until the friction of the street's surface, or collision with animate or inanimate objects, would bring it to a standstill. It did roll forward. Unfortunately for the plaintiff, she crossed, without fault on her part, the course of the moving wheel, was struck down and injured. All of the consequences in this little tragedy followed in unbroken sequence. There was no intervening efficient cause. The chain of cause and effect is complete, and the city's negligence is established as the proximate cause, the *causa causans*, of the plaintiff's injury.

In the view of this court, the declaration clearly stated a case which should have been submitted to the jury.

If the defendant desired to be further informed as to the details of the accident, that information could have been secured through a bill of particulars.

In the opinion of this court, the trial court erred in sustaining the demurrer to the declaration, and for that error its judgment is reversed, and this cause is remanded for a new trial to be had not in conflict with the views herein expressed.

Reversed.

BURKS and SIMS, JJ., absent.

(128 Va. 768)

BIBBS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Infants $\S 20$ —in prosecution for causing girl to commit fornication, held not error to exclude evidence to prove her bad general reputation.

In a prosecution, under Acts 1914, c. 228, for causing and encouraging a girl under 18 to commit fornication with accused, there was no error in refusing to permit accused to introduce evidence to prove her bad general reputation for chastity.

2. Infants $\S 20$ —It is an offense to encourage a child to commit a misdemeanor, and participation in fornication with her makes accused guilty.

It is not essential to an offense, under Acts 1914, c. 228, making it a misdemeanor for a

person over 18 to "cause or encourage" a child under that age to commit a misdemeanor, that accused should have "caused" prosecutrix to commit the misdemeanor, and he is guilty if he encouraged her to do so, and participating in fornication with her encourages her, and makes him guilty, though she may have made the first advance.

Error to Circuit Court, Orange County.

William Bibbs was convicted of encouraging a minor under the age of 18 years to commit a misdemeanor, and he brings error. Affirmed.

Omitting the formal parts, the warrant in this case charged that the accused—

"did unlawfully and feloniously cause and encourage Clara Stuart, she being under the age of 18 years, to commit a misdemeanor, to wit, fornication with him, * * * he being over the age of 18 years, to wit, the age of 30 years. * * *

The warrant was issued under the statute (Acts 1914, c. 228), which, so far as material, is as follows:

"* * * Any person over eighteen years of age who shall cause or encourage any child under the age of eighteen years to commit any misdemeanor * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to punishment by a fine of not more than five hundred dollars, or by imprisonment in jail for a period not exceeding one year, or both."

There was a trial by jury, which resulted in a verdict and judgment finding the accused guilty and fixing his punishment at six months in the county jail.

It appears from the record that the accused was over 18 years of age, to wit, "over the age of 30 years"; that the prosecutrix "was under the age of 18 years, to wit, of the age of 15 years"; and that the accused "admitted that he had carnal intercourse" with the prosecutrix. The record further shows that there was a conflict between the testimony of the accused and that of the prosecutrix as to which made "the first advance"; the accused testifying, as certified in the record:

"That the first advance as between the accused and said Clara Stuart was made by her, in this: That she sat in his lap and hugged and kissed the said Bibbs, but Clara Stuart testified that he made the first advance."

It is further certified in the record that:

"The defendant introduced witnesses to prove the character of the said Clara Stuart, and on the objection of the commonwealth the defendant stated to the court that the object of the evidence was to show that the said Clara Stuart was a strumpet of the very worst sort, and had been long before the time and after the offense charged in the warrant, and further stated that the further purpose of such testi-

mony was to negative any inference or evidence that the said Clara Stuart was caused or encouraged by the accused to commit the act alleged in the warrant."

The court refused to allow the evidence last mentioned to be introduced, the accused excepted to this ruling of the court, and the action of the trial court in this particular is the sole assignment of error on this appeal.

Will A. Cook, of Madison, and Geo. L. Browning, of Orange, for plaintiff in error. John R. Saunders, Atty. Gen., and J. D. Hank, Jr., Asst. Atty. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

[1] It does not appear from the record whether the excluded evidence was concerning specific acts of, or the general reputation of the prosecutrix for, unchastity. By the great weight of authority, even if under the statute involved the accused had been entitled to introduce in his defense the bad character of the prosecutrix for chastity, the accused would have been restricted to proof of the general reputation of the prosecutrix in that regard; no evidence of specific acts of unchastity being admissible even in such case. We therefore assume that the excluded evidence offered by the accused was directed to the proof of such general reputation of the prosecutrix. So considering the matter, the sole question presented by the record in this case for our decision is the following:

1. Did the trial court err in refusing to permit the accused to introduce evidence to prove the bad general reputation of the prosecutrix for chastity?

This question must be answered in the negative.

[2] That the accused should have caused the prosecutrix to commit the misdemeanor mentioned in the warrant is not an essential element of the offense of which the accused was convicted. Under the statute involved, if the accused, who was over 18 years of age, encouraged the prosecutrix, who was under the age of 18 years, to commit the misdemeanor, he was guilty of the statutory offense. Now it appears from the record that the accused "admitted that he had carnal intercourse" with the prosecutrix. He therefore, in any aspect of the case, was a willing participant with her in the commission of the misdemeanor aforesaid. Such participation, in itself alone, as we think, encouraged the prosecutrix to commit such misdemeanor, and made the accused guilty under the statute. Even if it were true that the prosecutrix made the first advance, that did not justify the accused in encouraging her to commit the misdemeanor by yielding to her

solicitation. When read along with other humane statutes of the state on the subject of the reclamation of those of an age making that effort possible of success in some cases, it is apparent that the general purpose of the statute involved in this case is one in aid of such reclamation. One of the specific mischiefs and evils against which the statute is directed is manifestly the aiding or abetting, by any one who has reached the age of discretion named in the statute of over 18 years of age, the commission of "any misdemeanor" by a person who has not reached that age. The more depraved the latter person may be and the greater the disposition and inclination of the latter to commit the misdemeanor, the greater the need that all other persons, and certainly those who have reached an age of discretion, should not in any way encourage the immature person in the depraved conduct, least of all by participating in such conduct.

The assignment of error under consideration is based upon the mistaken position that although the prosecutrix was a child of the immature age mentioned in the statute, and the accused was of the age of discretion mentioned therein of over 18 years (being, indeed, 30 years of age), if she was so depraved as to make the first advance toward the commission of the misdemeanor, the child must be regarded as having caused or encouraged the commission of the misdemeanor and not the accused. This position regards the parties as of equal years of discretion, and as fitted to deal with each other on equal terms, and ignores the purpose of the statute aforesaid.

It is not claimed for the accused that there is any authority directly in point sustaining the assignment of error aforesaid; but the cases of *Brown v. State*, 72 Md. 468, 20 Atl. 186, and *State v. Gibson*, 111 Mo. 92, 19 S. W. 980, are relied on as strongly analogous. We do not consider these cases as in point. As appears from a reading of them, the statutes there involved were very different from the Virginia statute under consideration, and the offenses created by those statutes are different from that of which the accused, in the case before us stands convicted. The Maryland statute (Code, art. 27, § 1) involved in the *Brown Case* made it a crime to "entice or persuade" a girl under the statutory age "from the custody and control of her parents for purposes of prostitution"; whereas the Virginia statute makes it a crime to "encourage" any child under the statutory age "to commit any misdemeanor." The Missouri statute involved in the *Gibson Case*, as therein held, made the previous chaste character of the prosecutrix an essential element of the offense.

The judgment under review will be Affirmed.

(129 Va. 615)

WENNER v. GEORGE et al.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Wills \S 656—Whether a condition is subsequent or precedent is not determinable by technical words used.

There are no technical words to distinguish between conditions precedent and conditions subsequent; the distinction being a matter of construction.

2. Wills \S 823—Devises accepting life estate held personally liable to pay charge imposed.

Where testator devised lands to his son for life with remainders over on condition that the son should pay his sister the sum of \$4,000 within 10 years, interest to commence five years from the probate of the will, which further declared that any legatee who signified his intention not to abide by its provisions should forfeit any benefits, the son who accepted the life estate becomes personally liable for payment of the charge.

3. Wills \S 821(6)—Life estate held subject to lien to secure payment of charge, but remainder not.

Where testator devised land to his son for life, provided the son should pay to his sister a fixed sum of money, and the will further provided that any beneficiary not accepting the conditions should forfeit all interest under the will, the son who accepted the life estate became not only personally bound to pay the charge, but the life estate itself was subject to the lien of the charge, though the remainders over were not.

Appeal from Circuit Court, Loudoun County.

Bill by Leah Elizabeth Wenner against Ashland C. George and others. From the decree complainant appeals, and the named defendant appeals. Amended and affirmed.

Wm. H. Martin, of Leesburg, for appellant.

E. E. Garrett, of Leesburg, and M. J. Fulton, of Richmond, for appellee.

PRENTIS, J. The appellant filed her bill against Ashland C. George and others, the object of which was to establish a legacy under the will of her father, Samuel W. George, Sr., as a charge and lien upon the corpus of certain real estate which had been devised by her father, Samuel W. George, Sr., to her brother, Ashland C. George, for life, with remainder to his heirs at law.

Two of the children of Ashland C. George answered the bill, and denied that the legacy was a lien upon their interest in the property. The circuit court entered a decree, the substantial part of which reads thus:

"On consideration whereof, the court is of the opinion that the sum of \$4,000, required in the will of Samuel George, deceased, to be paid to Leah Elizabeth Wenner by Ashland C. George, is a mere personal charge on the said

Ashland C. George, and is in no wise a lien or charge upon the land devised the said Ashland C. George for life, nor on the interest in remainder.

"And, further, the court is of the opinion that the true construction of the following clause of the will of Samuel George: 'I will and bequeath to my son Ashland Clay the farm on which he at present resides known as the Hamilton farm, also to the said Ashland C. George the mountain lot known as the Hamilton and Cole land on the east side of Short Hill, provided the said Ashland C. George pays to his sister Leah Elizabeth Wenner the sum of \$4,000 within ten years, interest to be paid by the said A. C. George on any part of this sum that remains unpaid at the expiration of five years from the probating of this will'—is that this devise to the said A. C. George was subject to a condition, namely, the payment of the sum of \$4,000 to Leah Elizabeth Wenner within 10 years, and the payment thereof was a condition precedent to the said Ashland C. George taking any interest in the land. But it appearing to the court from the admissions in the pleadings that the said Ashland C. George has been in the occupancy of said land since the death of the testator, and has been in receipt of the rents and issues of the said land, the court is of the opinion that by his acceptance of the benefits of and the occupation of said land he, the said Ashland C. George, should in equity and good conscience be required to pay to the said Leah Elizabeth Wenner the said sum of \$4,000 with interest from September 9, 1918, until paid, and accordingly the court doth order and decree that said Ashland C. George do pay to Leah Elizabeth Wenner \$4,000 and interest from September 9, 1918, and her costs, and she shall have execution on this decree."

From this decree both Leah Elizabeth Wenner and Ashland C. George have appealed.

[1] The briefs raise questions as to whether the devise to Ashland C. George created a vested or contingent estate, was on condition precedent or subsequent, and direct attention to those subtle distinctions which have for so long taxed the intellects of the sages of the law, and continue to confound those of lesser men. We do not think it necessary in this case to undertake to solve all of the possible questions which might have arisen, because no useful purpose would be thereby accomplished. A careful and succinct summary of the doctrine as to such conditions may be found in Graves' Notes on Real Property, §§ 251, 252, and Riely, J., thus clarifies the subject in *Burdis v. Burdis*, 96 Va. 84, 30 S. E. 462, 70 Am. St. Rep. 825:

"There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is matter of construction. The same words may indifferently make either, according to the intent of the person who creates the condition. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and, unless it be

performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is subsequent. *Finlay v. King*, 3 Pet. 346; *Martin v. Ballou*, 13 Barb. 119; and 4 Kent's Com. 124."

[2] It is only necessary to consider the will of Samuel W. George, Sr., so as to ascertain and effectuate his intention. That will apparently disposes of his entire estate, giving his lands to his sons, and requiring them to pay his daughters specific sums of money. He did not intend to die intestate as to any part of his estate, or to withhold the possession, occupation, and use of the land here involved from his son Ashland C. George, who then resided upon the farm devised, and the language of the will clearly shows that he intended him to pay the legacy to his sister, Leah Elizabeth Wenner, within 10 years. In order to accelerate its payment, he provided that after 5 years the sum remaining unpaid should bear interest. The specific clause here involved is quoted in the decree, and the will also contains this language:

"Any legatee named in the foregoing will who may signify his or her intention not to abide by its provisions, shall be declared outside and I hereby ordain that he or she shall forfeit any or all of its provisions."

The conduct of these parties clearly shows that they accepted all of the benefits conferred by this will, which was probated September 9, 1889. Ashland C. George has continued in possession of the real estate devised ever since that time. He has never paid any part of the principal, but has paid the interest on the \$4,000 legacy to his sister up to September 9, 1918, and until this suit was instituted in April, 1919, the legatee has not asserted the right to charge her legacy as a lien upon the real estate.

Under these circumstances it seems to us that the decree complained of is substantially right; that the testator intended that his son, Ashland C. George, should personally pay the \$4,000 legacy seems to us uncontrovertible. His language is too plain to be misunderstood. Ashland C. George is by name directed to pay the amount, and when the testator disposes of the remainder, after the expiration of the life estate, there is no suggestion, in the language used and hereinbefore quoted, that the interest of the remaindermen is charged with any part thereof. At that time Ashland C. George was about 37 years old, and the will directed that the legacy should be wholly paid within 10 years, certainly a period well within his natural expectation of life according to the mortality tables. So that, in our view, the decree of the trial court which exonerated the remainder enforced the true intent of the testator.

Ashland C. George also appeals from the decree upon the ground that he is held personally liable for the legacy, insisting that the legacy should be adjudged to be a lien upon the corpus of the estate, and that the interest of the remaindermen should be charged with their just proportion thereof.

It appears from what we have previously said that we think the trial court rightly refused to sustain this contention. Ashland C. George took the life estate devised to him subject to the burden which the testator imposed upon him. He cannot now, and could not at any other time, have sustained his view. He was under no obligation to accept the life estate which was devised to him by his father, but when he accepted it he assumed therewith the obligation so clearly imposed by the will personally to pay the \$4,000 legacy.

[3] It is perhaps immaterial in this case that the trial court failed to hold that the legacy constituted a charge against the life estate of Ashland C. George, because the record appears to indicate that Ashland C. George is financially able to pay the amount. The trial court, however, should have followed the precedents indicated by the cases of *Jackson v. Updegraffe*, 1 Rob. (40 Va.) 114, and *Cockerille v. Dale*, 33 Grat. (74 Va.) 45, and held that the life estate devised to Ashland C. George was an auxiliary security for this legacy, and charged therewith as the only property indicated by the testator for its payment.

The decree will therefore be amended so as to show that the life estate vested upon the death of the testator, and that the legacy is a lien thereon; and, as thus amended, it will be affirmed.

Amended and affirmed.

(129 Va. 405)

COMMONWEALTH v. KERNOCHAN.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. **Taxation** ¶93(1)—Intangible property of nonresident insane person may not be taxed.

The commonwealth cannot recover alleged omitted taxes on intangible property of an insane person where the domicile of such person was in another state.

2. **Taxation** ¶93(1)—Domicile, not residence, fixes situs of intangible personal property.

Domicile, as distinguished from residence, in the more ordinary and usual sense fixes the situs for the taxation of intangible personal property.

3. **Taxation** ¶320—Burden of proving change of domicile of owner of intangible property upon the party alleging it.

In a proceeding to tax the intangible personal property of an insane person, the burden of proving the change of domicile from

another state to this is upon the plaintiff, commonwealth, alleging it.

4. **Domicile** ¶4(2)—Mental capacity requisite to change domicile.

Where an insane person's domicile was clearly in New York at the time of her commitment to a hospital in Virginia, her domicile remained in the former state, notwithstanding her presence in the other, unless changed by some competent or authorized person or tribunal, since she lacked the mental capacity to make such change.

5. **Domicile** ¶4(2)—That of insane person must be changed by committee or courts.

Any power to change the domicile of an insane person, which must be independent of such person's own will, must be found in her committee or the courts having jurisdiction of her person.

6. **Domicile** ¶5—Guardian who is not parent cannot change domicile.

A guardian or committee of an insane person other than one occupying the position of a parent has not power to change his ward's domicile from one state to another.

7. **Taxation** ¶93(1)—Whether intangible estate of nonresident insane person should be taxed depends on the rights of the forum state alone.

In a proceeding to tax the intangible property of an insane person domiciled in another state but residing in this, the question for decision is, not whether the other state has been wrongfully deprived of taxes upon the estate, but whether this state has a right to claim and collect the tax.

Error to Circuit Court of City of Williamsburg and County of James City.

Action by the Commonwealth of Virginia against J. Frederic Kernochan, committee of Marie Marshall, an insane person, for collection of taxes on intangible property. Judgment for defendant, and the Commonwealth brings error. Affirmed.

Jno. R. Saunders, Atty. Gen., S. O. Bland, of Newport News, and Frank Armistead, of Williamsburg, for the Commonwealth.

Miller & Miller and Meredith & Meredith, all of Richmond, for defendant in error.

KELLY, P. Pursuant to the provisions of the act of March 24, 1914, as amended March 21, 1916 (Acts 1916, p. 729), this action of assumpsit was brought against J. Frederic Kernochan, committee of Marie Marshall, for the recovery of alleged omitted taxes on intangible property for the years 1897 to 1914, both inclusive, and taxes assessed on such property for the year 1915, claimed to be due the state of Virginia and the city of Williamsburg, aggregating over \$800,000; the taxes on the real and personal property located in this state having been regularly paid. A jury was waived, all matters of law and fact

were submitted to the court, and a judgment rendered for the defendant.

The question in the case is whether the taxes sued for could be lawfully assessed against the intangible personal property of Marie Marshall, who is now, and has been since 1872, non compos mentis, and during all of that time either an inmate or under the control of the institution now known as the Eastern State Hospital at Williamsburg.

[1, 2] The lower court held that Miss Marshall's domicile was in the state of New York, and based its decision largely, if not wholly, upon that ground. This finding of fact being in our opinion correct, the judgment complained of must be affirmed. The further question, discussed at considerable length before us whether the domicile of the incompetent or that of the committee determines the situs for taxation, becomes immaterial, because in this case the domicile of both is in a foreign state. It is to be noted in the outset that in Virginia domicile, as distinguished from residence in the more ordinary and usual sense, fixes the situs for the taxation of intangible personal property. *Pendleton v. Commonwealth*, 110 Va. 232, 65 S. E. 536; *Hurt v. Bristol*, 104 Va. 213, 216, 51 S. E. 223, 7 Ann. Cas. 679; *Cooper's Adm'r v. Commonwealth*, 121 Va. 338, 344, 93 S. E. 680; *Talley v. Commonwealth*, 127 Va. —, 103 S. E. 612.

We quote the following as to the facts of the case from the written opinion of the learned judge who tried the case below:

"Miss Marie Marshall was born in New Orleans. When a child between eight and ten years of age, she was brought by her parents to the city of New York, which became the residence and domicile of Mr. and Mrs. Marshall and of their children. She resided in New York City during her minority with occasional visits to an aunt living at Petersburg, Va. As she approached her majority her mind became impaired. While on a visit with her mother to her aunt in Petersburg, her mental condition became such that she was taken to the Eastern Lunatic Asylum at Williamsburg, and was admitted as an insane pay patient on October 8, 1872, by the board of directors of the asylum. She remained an inmate of the asylum—hospital, as it was later named—until the year 1897, when she was moved to a house and grounds adjacent to the hospital, purchased for her by a proceeding had in the Supreme Court of New York. She has ever since occupied this abode.

"The intangible property owned by Miss Marshall was derived from her father's and mother's estates. John R. Marshall died in 1881 in New York, and his will was probated in the county of New York leaving his entire estate to be held in trust for his wife, and at her death to be divided equally among his three daughters. Mrs. Evelin Marshall, the mother, died in 1885, and her will was probated also in New York, and her residuary estate was divided among her three daughters. The share of Miss Marshall was left to the

executors of Mrs. Evelin Marshall in trust for the use of Marie Marshall.

"In 1894 proceedings were instituted in the city of New York, and as the result of said proceedings Marie Marshall was adjudicated insane and incompetent, and the defendant, J. Frederic Kernochan, was appointed committee by the Supreme Court of New York of the person and estate of Marie Marshall, and qualified as such by entering into a bond of \$1,280,000 in December, 1894. In an action brought for an accounting by the trustees under the will of John R. Marshall, it was ordered by the Supreme Court of New York that the trustees transfer to the committee all the surplus income accumulated in their hands as the property of Marie Marshall, and by an order of the said court dated October 5, 1895, the trustees under the will of Mrs. Evelin G. Marshall were directed to pay over the accumulated income arising under the trust to Mr. Kernochan, acting as committee.

"After the death of Mrs. Marshall, the trust created by John R. Marshall for the life of his wife continued for a period of 12 years for the benefit of his daughters. After the termination of such period, the trustees instituted an action for an accounting in the separate trust for the benefit of Marie Marshall under her father's will, and a judgment of the New York Supreme Court was entered April 6, 1898, which decreed that the corpus of this estate be paid over to J. Frederic Kernochan, committee. Owing to an appeal, however, being taken, this judgment did not go into effect until February, 1901, when the Court of Appeals sustained the judgment of the lower court and directed the transfer of the corpus of the estate of the incompetent to the committee of Marie Marshall.

"An accounting action was then brought by Mr. Kernochan, at that time sole committee of the person and estate of Marie Marshall. In this action an order was entered on May 8, 1901, appointing the New York Life Insurance & Trust Company to act in conjunction with Mr. Kernochan as committee of the estate of Marie Marshall, and directing Mr. Kernochan to transfer to the New York Life Insurance & Trust Company all the property in his hands as committee, and to deposit the same with the New York Life Insurance & Trust Company, and it was also ordered that upon such delivery and deposit with the New York Life Insurance & Trust Company being made, the bond given by Mr. Kernochan as sole committee should be canceled.

"Prior to the appointment of the New York Life Insurance & Trust Company as co-committee, Mr. Kernochan made application to the court of the city of Williamsburg to be appointed committee in Virginia of Miss Marshall, and in February, 1895, he was appointed by that court as committee, and entered into a bond in the penalty of \$2,000 as such committee.

"In August, 1895, Mr. Kernochan, as committee of the person of Miss Marshall, applied to the New York Supreme Court for authority to purchase a house and grounds as a residence for Miss Marshall, adjacent to the Eastern State Hospital, in Williamsburg, and to make the necessary expenditure for such purpose, and for the improvement of the house

and grounds as so purchased. The court granted the authority asked for, and such funds as were necessary to carry it into effect, and in 1897 Miss Marshall was removed to the house purchased for her. But before such removal was had, an agreement between J. Frederic Kernochan and the Eastern State Hospital was entered into, dated May 21, 1896, reciting in its preamble that the party of the first part had been duly appointed committee of the person and estate of Marie Marshall in the states of Virginia and New York, by orders and decrees of the courts of each of said states having jurisdiction of the said matter, that the party of the first part is a resident of the state of New York and his ward is and has been an inmate of the Eastern State Hospital, situated in Williamsburg, Va., and that 'it is the desire of the party of the first part in his capacity as committee of the person of the said Marie Marshall that she should continue to be and remain in and under the custody and control of the board of directors of the said Eastern State Hospital, although she is to reside in a cottage of her own outside of and adjoining the grounds of the said Eastern State Hospital,' and in the granting clause of the agreement it is provided that 'all the care and control of the person of the said Marie E. Marshall, and all questions in regard to mode of life, diet, regimen, exercise, amusement, regulations of personal attendance, and, indeed, all questions relating to Marie Marshall personally, or in any way relating to the health and happiness of her mind and body, shall be under the supreme control of the board of directors of the said Eastern State Hospital, to be exercised by its chief medical superintendent,' and in the fourth paragraph of the agreement the statement is made: 'it is expressly understood and agreed that the question of Miss Marshall's health and happiness is of the most paramount importance, and at any and all times every question in the management of said house must yield to the decision of the board of directors of the said Eastern State Hospital as expressed by its chief medical superintendent.' An addendum to this agreement was made on the 17th day of May, 1900, dealing with the installment of a water system, and it provided that 'the arrangement herein set forth shall continue for a reasonable time, in the event of the death or removal of Miss Marshall, as outlined by Mr. Kernochan, committee, in his letter of April 14, 1899, hereto attached and made a part of this agreement, and it is further understood and agreed that under no circumstances shall this contract be terminated during the lifetime of the said Marie E. Marshall without reasonable notice.'"

[3, 4] Miss Marshall's domicile was clearly in New York at the time of her commitment to the hospital. There is no room for controversy upon this point. It has remained in New York to this day, notwithstanding her continued presence in Virginia, unless it has been changed by some competent and authorized person or tribunal, and the burden of proving the change is on the party alleging it. *Cooper's Administrator v. Commonwealth*, supra; *Talley v. Commonwealth*, supra. If such change has been made, when

and by whom was it done? Miss Marshall could not have done it because she lacked the mental capacity.

[5] The question then is whether her domicile, independent of her own will, has been changed for her by some competent agency and authority. Such agency and authority, if it existed at all, must, of course, have been found in her committee and the courts having jurisdiction of her person and estate.

[6] In their learned and resourceful arguments and briefs, counsel on both sides have dealt at length with the two branches into which this question naturally divides itself, namely: (1) Did Miss Marshall's committee possess the power to change her domicile from New York to Virginia; and (2), if so, did he ever exercise that power? The commonwealth contends for an affirmative, and the defendant for a negative, answer to both of these questions. The former, to prevail in this case, must maintain such an answer to both, while a negative answer to either concludes the case in the defendant's favor.

Very much of the able and painstaking opinion of the trial court was addressed to the question of the committee's intention to make a change in the domicile of his ward, and the conclusion was there reached that no such intention had been shown. We find it unnecessary to deal with that aspect of the case, however, inasmuch as we are of opinion that regardless of any question of intention, the better reason and authority is to the effect that the committee had no power to make the change.

Mr. Raleigh Minor, in his work on *Conflict of Laws*, on page 109, states the law as follows:

"The question remains: What is the locality of the lunatic's domicile when he is himself too insane to choose one? Shall the guardian or committee have power to change it, or must it remain unalterably where it was when the disability was first incurred? This case is closely analogous to that of the guardian's power to change an infant ward's domicile, already discussed. As to the lunatic's municipal domicile, it seems that the guardian has the power, but not so with respect to his national or quasi national domicile. His latter domicile will remain unchanged regardless of the place of his actual residence. He will retain the domicile he possessed before he became insane upon the principle that a domicile once acquired is retained until another is gained."

As Mr. Minor points out, the question here "is closely analogous to that of the guardian's power to change an infant ward's domicile." With respect to the latter the better doctrine seems to be that the guardian may change the municipal domicile whenever such course is for the best interest of the ward, but that (unless he be the natural guardian or at least one occupying that relation) he may not make any national or quasi national (interstate) change of the domicile.

Minor on Conflict of Laws, p. 90; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 758. These authorities point out the important considerations justifying this limitation upon the guardian's authority. The change of the ward's domicile from one place to another in the same state "does not expose him to be subjected to any change in the law governing him and his property as does a change of his natural domicile. The courts are very jealous of a change of that character."

In Sumrall's Committee v. Commonwealth, 162 Ky. 658, 172 S. W. 1057, an insane person had been taken from Kentucky and placed in a Maryland asylum, and it was claimed that the estate was not taxable in Kentucky. The court held otherwise, and said in part:

"From the appellant's appointment as committee to the present time, the status of the ward and his estate has remained unchanged, and there is no claim, and cannot be, that the insane ward fixed his domicile in Maryland, but asserted only that appellant, before September 1, 1913, elected to fix the ward's domicile in that state. In order to enable one of sound mind to change his domicile or acquire a new one, there must be: (1) Freedom of choice; (2) bodily presence in the chosen locality; (3) an intention to remain there permanently. But an insane person is incapable of exercising either choice or intention, nor can these twin elements essential to the acquisition of a new domicile in another state be supplied by the committee of an insane person."

The Kentucky court in that case, after quoting from Minor on Conflict of Laws (page 109, supra), said:

"It will be observed that the text last quoted draws a distinction between a municipal domicile and a national or quasi national domicile. We may concede that appellant as committee has, as claimed by it, all the power that a guardian possesses with respect to the control of the person and estate of his ward, and that by virtue of such power it may change, within the bounds of the state, the municipal or county domicile of the lunatic of whose person and estate it is the committee, but we do not give our assent to the proposition that a guardian or committee has the power by the right of election to change the domicile of the ward from this state to another state. * * * The brief of appellant's counsel seems to take no account whatever of the distinction between the within-state or municipal domicile and the out-of-state, national or quasi national domicile, or to realize the fact that in this jurisdiction the right of the committee to change the domicile of the ward, by removing it to another state, has never been recognized."

In Lamar v. Micou, 112 U. S., supra, Mr. Justice Gray said:

"But it is very doubtful, to say the least, whether even a guardian appointed in the state of the domicile of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicile beyond

the limits of the state in which the guardian is appointed and to which his legal authority is confined. Douglas v. Douglas, L. R., 12 Eq. 617, 625; Daniel v. Hill, 52 Ala. 430; Storey Conflict of Laws, § 506, note; Dicey on Domicile, 100, 132. And it is quite clear that a guardian appointed in a state in which the ward is temporarily residing cannot change the ward's permanent domicile from one state to another."

In Ex parte Bartlett, 4 Bradf. Sur. (N. Y.) 221 (cited in Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751), it is said on page 225, referring to a guardian:

"There would appear to be no ground for challenging such a control over the residence of the minor as shall not withdraw him from the jurisdiction of his domicile of origin. In the present instance, the residence of the infant has been changed from one county to another, but still has been retained under the sovereignty of the same laws. This, I have no doubt, is completely within the scope of the guardian's authority. No rights are impaired or affected by the act. The jurisdiction of the state is preserved."

To the same general effect as the above authorities is Long on Domestic Relations, §§ 179, 190.

We fully realize that the authorities upon this question are not in harmony. An extended review of them would prolong this opinion without affecting the result or accomplishing any good purpose. It will be found, however, that most of them which appear to support the power of a guardian or committee to make a change of the ward's domicile, either relate to the municipal as distinguished from the national or quasi national domicile, or relate to cases of change by a parent or one standing in the relation of a natural guardian. The case in hand is not within either of these lines of authority. In so far as there is any necessary conflict in the decisions as to the case here presented, we feel constrained to follow those holding that a guardian or committee, other than one occupying the position of a parent, has no power to change his ward's domicile from one state to another. Such a change, as the authorities point out, might materially impair or affect some of the substantial personal or property rights of the insane person, as well as the right of succession at his death.

In this case it is perfectly clear that Miss Marshall became insane while her domicile was in New York; that her parents, who were then living, never attempted or intended, and in all probability would not have been willing, to make any change in her domicile; that her parents made no provision for the appointment of a guardian or committee who would stand in loco parentis; and that therefore there has been no competent mind or authority which could have changed her domicile from New York to Virginia. Having reached this conclusion, it follows that the judgment of the lower court must be affirmed.

[7] It appears that Miss Marshall's estate has in a large measure escaped taxation in New York. Counsel for the committee contend that this result was lawfully accomplished, and was due to the alleged fact that according to the law in New York the actual physical residence and not the domicile of the taxpayer fixed the situs for taxation. On behalf of the commonwealth it is contended that the committee, in proceedings by which the exoneration in New York was accomplished, affirmatively recognized by affidavits and otherwise that Miss Marshall had become domiciled in Virginia. The lower court sustained the committee's contention, holding that nothing done by the committee amounted to an admission that she was domiciled in Virginia, or showed any intent to change her domicile from New York to the latter state. Whether the decision be rested upon that ground or upon the ground upon which we have placed it, the result is the same; and the question for us to decide is, not whether the state of New York has been wrongfully deprived of taxes upon the estate, but whether Virginia has the right to claim and collect the tax. *Buck v. Beach*, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, 1112, 11 Ann. Cas. 732.

For the reasons stated, we are of opinion that there is no error in the judgment complained of, and the same is affirmed.

(129 Va. 453)

MANN v. CITY OF LYNCHBURG.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Master and servant §364—City and not state employer of policeman.

If a policeman is an employee within the Workmen's Compensation Act, the city, as the party using his services for pay, and not the state, is liable for benefits.

2. Master and servant §417(2)—Compensation case fully determined in public interest, though submitted on limited certification.

The question whether a policeman is an employee within the protection of the Workmen's Compensation Act will be determined as one of a public nature, though the case is submitted to the Supreme Court of Appeals on a limited certification, presenting merely the question whether the city or the state is the employer.

3. Municipal corporations §186(1)—Policeman is a "public officer."

A policeman is a "public officer," and the compensation he receives is an incident to the office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

4. Master and servant §364—Policeman not within Compensation Act defining "employers" and "employees."

Under Workmen's Compensation Act, § 2, declaring in subdivision (a) that "employers" shall include the state or any municipal corporation, and in subdivision (b) that the term "employees" shall include every person in the service of another under any contract of hire, the relation of employer and employee does not exist between a municipality and a policeman, so as to create a liability for benefits, for a policeman is a public officer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Employer.]

Questions Certified from the Industrial Commission.

Claim by Willie H. Mann against the City of Lynchburg or the Commonwealth of Virginia for compensation under the Workmen's Compensation Act for the death of Lee Arthur Mann. On questions certified by the Industrial Commission. Questions answered, and claimant denied compensation.

N. C. Manson, of Lynchburg, John R. Saunders, Atty. Gen., and J. D. Hank, Jr., Asst. Atty. Gen., for city of Lynchburg and the Commonwealth.

PER CURIAM. The Industrial Commission of Virginia, pursuant to the provision of section 61 of the Workmen's Compensation Act (Acts 1918, p. 637), has certified to this court for its decision certain questions of law arising in the above entitled proceeding.

We quote as follows from the certificate of the commission:

"The claimant, Willie H. Mann, in her own right and in behalf of her two infant children, Bernard Mann, of the age of 13 years, and Arthur Mann, of the age of 10 years, has filed her application for hearing before the Industrial Commission of Virginia, setting up the claim of herself and infant children as dependents of her husband, Lee Arthur Mann, a policeman of the city of Lynchburg, who was killed in the line of duty on the 25th day of March, 1920.

"In said application claimant asks that the compensation be paid as provided by the statute, either by the city of Lynchburg or the commonwealth of Virginia, as liability under the statute may be determined.

"The facts of the case may best be stated in the agreed statement of facts, which is in the words and figures following to wit:

"Agreed Statement of Facts.

"I. The claimant, Willie H. Mann, was the lawful wife of Lee Arthur Mann, who died in the city of Lynchburg, Va., on the 26th day of March, 1920, from the effects of a pistol shot wound in the head inflicted by John H. Williams (colored) on the night of the 25th of March, 1920.

"II. The deceased, Lee Arthur Mann, left surviving him, as his only heirs at law and distributees, his widow, the aforesaid Willie

H. Mann, and their two children, to wit, Bernard Mann, who was born on the 9th day of December, 1907, and is therefore aged 12 years, and Arthur Mann, who was born on the 12th day of November, 1910, and who is therefore aged 9 years. The said widow and children of the deceased were entirely dependent upon him for support.

"III. The deceased was in every respect a duly and lawfully appointed, qualified and constituted policeman for the city of Lynchburg, Va.

"IV. The deceased in the performance of his duty as a policeman of the city of Lynchburg, along with a fellow policeman of the said city, sought on the night of the 25th of March, 1920, to place the aforesaid John H. Williams under arrest, upon a charge of carrying a concealed weapon and upon a suspicion, which has since been confirmed by his own confession, that he was wanted in the state of South Carolina for the crime of murder. The said John H. Williams in resisting the said arrest inflicted a pistol shot wound upon the deceased, from the effects of which the latter died on the following day.

"V. The arrest of the said John H. Williams sought to be made by the deceased and his fellow officer was in every respect a lawful arrest, made in a lawful and proper manner by proper officers.

"VI. The average weekly wage was \$26.25, and he was paid monthly by the city of Lynchburg.

"VII. The method of appointing policemen for the city of Lynchburg, and which was followed in the appointment of the deceased, is set forth in the charter of the city of Lynchburg. (See Acts of the General Assembly of 1918, page 238, and special section 10 of chapter VI of the charter, on pages 251 and 252 of said Acts.)

"VIII. The duties of the members of the police force of the city of Lynchburg, including those of the deceased, are prescribed by law, and include the enforcement within the said city of the laws of the commonwealth of Virginia and the ordinances of the city of Lynchburg, and the detention and arrest of offenders thereof. (See section 2901, Code of Virginia for 1919; section 10 of chapter VI of the charter of Lynchburg, supra.) The members of the Lynchburg police force were also made conservators of the peace under the charter of the city of Lynchburg. (See section 4798 of Code of Virginia, 1919.)"

"The city of Lynchburg contends that the killed policeman was not 'the agent, employee or servant' of the city of Lynchburg, but was 'the agent, employee or servant' of the state of Virginia, and that under the terms of the Workmen's Compensation Act the state is the true employer and is alone liable to pay the compensation stipulated to be paid under the terms of the act to the claimants as dependents of the said Lee Arthur Mann.

"The contention of the state is that the city of Lynchburg is by the clear intentment of the Workmen's Compensation Act alone liable, as the employer of the killed policeman, to pay the compensation therein provided to the said dependents.

"The questions of law which are here respectfully certified to this honorable court for its decision and determination are:

"I. Was the city of Lynchburg the employer of the policeman, Lee Arthur Mann, at the time of his death, and is it, as such, liable to pay the compensation to the claimants in the act provided? or

"II. Was the commonwealth of Virginia the employer at said time, and as such liable to pay said compensation?"

[1] From the briefs of counsel for the city of Lynchburg and the commonwealth of Virginia it appears to be agreed that no question is to be raised by either of the defendants as to the right of the claimant, Willie H. Mann, to recover from one or the other. The necessary result is that for the purposes of this case both defendants concede that Policeman Mann was an employee either of the city or the state, within the meaning of the statute. Upon such concession, eliminating any consideration of the statutory definition of an employee, we answer that in our opinion, as between the two defendants, the city of Lynchburg, as the party "using the services for pay," would be liable for the compensation conceded to be due from one or the other of the parties.

[2] If this were a question between private persons or corporations, we might well stop where the briefs of counsel stop, and refrain from passing upon the question as to whether either of the defendants are liable for the compensation claimed. The question, however, is one of a public nature, and we feel that we should answer it as fully as if it had been submitted to us without the limitation above indicated.

[3, 4] Section 2 of the act, so far as pertinent, is as follows:

"(a) 'Employers' shall include the state and any municipal corporation within the state or any political division thereof, and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay. If the employer is insured it shall include his insurer so far as applicable.

"(b) 'Employee' shall include every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade, business occupation or profession of the employer. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representatives, dependents and other persons to whom compensation may be payable."

While it is plainly provided in the act that the term "'employers' shall include the state and any municipal corporation within the state," it by no means follows that all persons in the service of the state, or of the municipal corporations therein, are entitled to the

benefit of the act; for example, the Governor, Attorney General, members of the State Corporation Commission, judges, mayors, and city managers are all in a sense servants of the state or city, but the act plainly does not extend to any of these persons, and they do not fall within the definition of the statute, which provides that—

“‘Employee’ shall include every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied.”

The statute is to be liberally construed to the end that its wise and humane purpose may be advanced; but we cannot extend its provisions by construction, so as to cover persons or occupations not within its scope and intent.

The act, as its title shows, relates to industrial accidents, and its well-known purpose was to substitute for the unsatisfactory common-law remedies a speedier and simpler and more equitable form of relief for personal injuries sustained by persons engaged in hazardous occupations. It would seem clear from the history and purposes and general provisions of the act that the Legislature did not have in mind as beneficiaries any other persons than such as are commonly understood as falling within a contractual relationship of master and servant. It often happens that cities and towns employ large forces of men in connection with municipal undertakings, such as the construction of sewers, the building of streets, the operation of rock quarries, and other similar and more or less hazardous occupations akin to those undertaken by individuals and industrial corporations. The Legislature undertook to make an improvement upon the remedies hitherto existing in cases of employees receiving personal injuries, and who might or might not, according to the particular facts of the case, have a cause of action against the employer on the ground of negligence or breach of duty, and manifestly the idea was that this remedy should be provided for those who theretofore stood in such a relationship as that there might be in cases of negligence a liability on the employer. *Griswold v. Wichita*, 99 Kan. 502, 162 Pac. 276, L. R. A. 1918F, 187, 189, Ann. Cas. 1917D, 31. The case of a city policeman does not, as we think, fall within the reason and purpose of the act, and this conclusion is greatly strengthened by the language which the Legislature used in its enactment.

It is no longer open to question in this state that a policeman is a public officer. See *Burch v. Hardwicke*, 30 Grat. (71 Va.) 24, 32 Am. Rep. 640; *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652; *Sherry v. Lumpkin*, 127 Va. —, 102 S. E. 658. And this is the holding generally in other states. See *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681, 683; *Griswold v. Wichita*, supra. The act in

question, as we have seen, is limited to persons in service of the state or city under a contract of hire. A public officer does not perform his duties under contract, express or implied, but by virtue of the law creating the office. His compensation is a matter of statute or ordinance, and does not depend upon the amount or value of the services performed, but is incident to the office. Unlike an employee working under contract, an officer acquires no vested right to have the office continued during the time for which he is elected or appointed, since the authority creating the office may abolish the same during the term of the incumbent, or change the compensation and the duties to be performed. The following authorities may be cited as sufficient in support of the foregoing propositions: *Booker v. Donohoe*, 95 Va. 359, 363, 28 S. E. 584; *Nichols v. MacLean*, 101 N. Y. 526, 533, 5 N. E. 347, 54 Am. Rep. 730; *Mechem on Public Officers*, §§ 463, 855; *U. S. v. Hartwell*, 6 Wall. 385, 393, 18 L. Ed. 830; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302.

While it is true, with respect to the decided cases in other states which have dealt with a similar question, that most of them have turned upon the peculiar language of the local statute, and therefore cannot be said to be of any very great assistance in the construction of the Virginia Compensation Act, the case of *Sibley v. State*, 89 Conn. 682, 96 Atl. 161, L. R. A. 1916C, 1087, is so pertinent in its reasoning that we feel justified in quoting from it at length. That was a case in which the Supreme Court of the state of Connecticut held that a sheriff was not an employee of the state within the operation of the Workmen's Compensation Act, which rendered the state liable for injuries to its employees, but defined an employee as any person who has entered into or works under contract of service with an employer. The commissioner held otherwise, and the Connecticut court, in reversing that finding, said in part:

“That the injury which caused Sheriff Sibley's death arose out of and in the course of his employment, so as to entitle him to compensation, provided he was an employee of the state within the meaning of the act, has not been questioned before us. The respondent's claim is that, according to the definition of the word ‘employee’ given in section 43 of part B of the act, Sibley was not an employee of the state.

“Part B, § 43, gives the following definition of ‘employee’ and ‘employer’: “‘Employee’ shall mean any person who has entered into or works under any contract of service or apprenticeship with an employer. “‘Employer’ shall mean any natural person, corporation, firm, partnership, or joint-stock association, the state, and any public corporation within the state using the services of another for pay; it includes also the legal representative of any such employer.”

“The commissioner held that the sheriff, while in the performance of his duties as such, was

an employee of the state within the meaning of the statute. As the statute, by defining 'employee,' leaves no question as to its meaning, the commissioner must have held, and his memorandum of decision shows that he did hold, that the sheriff was working under a contract with the state while performing the duties of his office. In this he was in error.

"* * * The office of sheriff is thus a public office as defined by us in *State ex rel. Stage v. Mackie*, 82 Conn. 398, 401, 26 L. R. A. (N. S.) 660, 74 Atl. 759, and numerous other cases, and by, so far as we know, all courts and text-writers. The incumbent of such an office holds it as a trust from the state not resting upon contract. *State ex rel. Rylands v. Pinkerman*, 63 Conn. 176, 182, 22 L. R. A. 653, 28 Atl. 110. He is a preserver of the public peace; he is not the hired servant of a master; no contract relation exists between him and the community or state. *Farrell v. Bridgeport*, 45 Conn. 191, 195. In *Seymour v. Over-River School Dist.*, 53 Conn. 502, 509, 3 Atl. 552, as showing that a teacher in a school district is not a public officer, it was said: 'He is not usually elected or appointed, but is employed—contracted with.'

"*Mechem, Public Officers*, §§ 855, 856, says: 'The relation between an officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of the law, and when it so exists it belongs to him "not by force of any contract, but because the law attaches it to the office." * * * Unless * * * compensation is by law attached to the office none can be recovered.'

"Compensation to a public officer is a matter of statute, and not of contract, and it does not depend upon the amount or value of the services performed, but is incidental to the office. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 149 S. W. 638, 641; *Leonard v. Terre Haute*, 48 Ind. App. 104, 98 N. E. 872. A salary is attached to the office to enable the incumbent the better to perform the duties of his office. *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 110, 5 N. E. 228. It is the substantially universal rule that a person who is elected or appointed to a public office to which no salary or compensation is attached by law can recover no compensation for his services, although he qualifies and performs its duties, and for the reason that no contractual relation exists between him and the governmental agency by whom he is elected or appointed.

"But it is urged in behalf of the claimant that the statute attaching a salary to the office of sheriff raises an obligation or duty on the part of the state to pay it, and that, if it refuses to pay, the law will give the sheriff an action quasi ex contractu upon the obligation, and that the officer was thus under a quasi contract of service with the state. If, for the argument's sake this were to be conceded, it would not advance the claimant's cause. A quasi contract is no contract. *Maine, Ancient Law* (3d Am. Ed.) 332, quoted with approval in *Keener's Law of Quasi Contracts*, p. 6. The term 'quasi contract' describes a situation where there is an obligation or duty arising by law upon which the same remedy is given as would be given if the obligation or duty arose out of contract.

The term itself implies that the obligation or duty is not a contractual one. As we said in *Powers v. Hotel Bond Co.*, 89 Conn. 143, 145, 93 Atl. 245, the Workmen's Compensation Act is founded upon the theory of a contract existing between workman and employer. The contract may be established by evidence showing that an express contract was entered into by the parties or by evidence of facts and circumstances from which as an inference of fact it can legally be found that a contract of employment existed between them. There must be a real contract of employment either expressed or implied, or there is no employee within the definition and meaning of the statute.

"It is said in behalf of the claimant that the compensation act must be construed so as to be consistent with itself, and that as the definition of 'employer' specifically says that it shall mean the state when using the services of another for pay, the definition of 'employee' should be so construed as to be harmonious, and not contrary to the definition of 'employer.' And it is said that as an employer presupposes an employee and vice versa, and as the state was using the services of Sheriff Sibley for pay, it was his employer and the sheriff its employee. *The argument is more ingenious than convincing. If, as it assumes, the state used the services of the sheriff for pay when he was exercising for the public good a portion of the sovereign power of the state as a public officer and received the salary attached to the office, and if this made him an employee of the state, he was not, as we have shown, an employee under a contract.* But we think he was not an employee, and that the state was not using his services for pay. He was performing a duty which he owed to the state, and the salary which was attached to the office was not given in payment for his services, but, as is said concerning public officers in *State ex rel. Atty. Gen. v. Hawkins*, supra, to enable him to perform his statutory duty as one of the public functionaries of the state exercising a portion of its sovereign powers. *The state, like public municipal corporations and private firms and individuals, may be and is a large employer of persons by contract.* The state and the person or persons whom it employs to care for the lawns surrounding the Capitol are as much employer and employee as are the householder and the person who is employed by him to mow his lawns; but no one would say that the Governor and others public officers who exercise the sovereign powers of the state and receive as such officers the salary attached by law to their offices are mere employees of the state. While exercising those powers they represent the state. The office is a trust and not an employment; the salary attached is for the maintenance of the office, and not a payment for the incumbent's services." (Italics added.)

The case of *McCarl v. Borough of Houghton*, 263 Pa. 1, 106 Atl. 104, deals with the case of a policeman under a statute which is somewhat similar in its provisions to the Virginia statute, and reaches a conclusion different from that reached in the *Sibley* Case and approved by us in the instant case. In the *McCarl* Case, however, the statute, involved did not use the expression, "contract

of hire," nor, as we think, any exactly equivalent language in the definition of the term "employee," but declared that the term should be treated as "synonymous with servant," and includes all natural persons who perform services for another for a valuable consideration."

The decision in the McCarl Case seems to us to write into the statute terms which are not there, and to bring into the operation of the act a class of persons for whose benefit it was not intended. Of course, as already pointed out above, there is a sense in which every officer is a servant, and in which every officer performs services for pay, but this is no more true of policemen than of any of the other officers of the state or municipality. If any such officers are to be included within the provisions of the statute, the amendment should be made by the Legislature, and not by the tribunals called upon to construe and enforce the law.

It follows that we are of opinion that neither the city of Lynchburg nor the state of Virginia can lawfully be required to pay the compensation claimed in this proceeding.

(129 Va. 466)

REALTY CO. OF VIRGINIA, Inc., v. BURCUM.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Trial ⇐252(2)—Instructions must be supported by testimony.

A trial court is not required to give instructions presenting a plaintiff's or a defendant's theory of a case, unless these instructions are supported by the testimony, and it must be supported by appreciable evidence.

2. Contracts ⇐176(1)—Duty of court to construe deed or contract.

It is the duty of the court to construe a deed or contract, and the rule against peremptory instructions is not to be construed as applying to cases in which the verdict of the jury depends necessarily and exclusively upon a question of law, such, for example, as the legal effect of a deed or contract.

3. Brokers ⇐56(2)—Representation of purchaser that he was not under obligations to broker did not relieve owner of liability for commission.

A negative answer by purchaser to inquiry of owner of property whether purchaser was under any obligations to a real estate agent who had the land listed would not relieve the owner from liability, if as a matter of fact the real estate agent was the procuring cause of the sale.

4. Brokers ⇐53—Activities of realty company's agent held not procuring cause of sale.

Under a contract providing, "Should said property be sold to any one with whom the realty company has negotiated for the sale thereof or to whose attention it has directly

brought the property, I agree to pay said realty company the said commission above mentioned," landowner reserving right to sell without compensation to the realty company, the realty company was not entitled to commissions, where its agent, while driving past the land with subsequent purchasers, called their attention to it and described it, and offered to drive in if they wanted to see it, but the purchasers declined, as it was late, and they had not the time; their interest in the property being subsequently aroused by other persons.

Sims, J., dissenting.

Error to Circuit Court, Nottoway County.

Action by the Realty Company of Virginia, Incorporated, against J. W. Burcum. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry E. Lee, of Crewe, and W. Moncure Gravatt, of Blackstone, for plaintiff in error.

H. H. Watson, of Crewe, for defendant in error.

SAUNDERS, J. This case is brought before us by a writ of error to the judgment of the circuit court of Nottoway county. The controversy relates to certain commissions alleged to be due by J. W. Burcum to the Realty Company of Virginia, plaintiff in error.

J. W. Burcum, the defendant in error, owned a farm near Nottoway Courthouse, Va. In December, 1915, he placed this farm, Blendon, containing about 120 acres, in the hands of the Realty Company of Virginia for sale. At the same time he signed a written contract of agency containing various agreements with the Realty Company. The Realty Company thereupon included this farm in its advertising matter which they distributed through the mails. In the year 1917, W. C. Dick and wife, of Ohio, having seen various advertisements of Southside Virginia, including the catalogue of the Realty Company, which attracted their attention, came to this state. Stopping at Blackstone, they called at the office of the company, stating that they wished to see a farm listed in its catalogue. Mr. E. L. Denton, manager of the company, thereupon showed them a number of farms. Returning in his automobile from one of these trips, Denton, while passing the Burcum farm, late in the afternoon, pointed out to the Dicks the lines of the property, described the house and other buildings, and, stating that it was listed with him for sale, asked if they wanted to see the property. Mrs. Dick said that they did not care to go in, that it was late, and they preferred to see the Dillemath place. Accordingly the party proceeded to the Dillemath place, and stopping, looked it over, securing Mrs. Dillemath's price on her property. After this trip Mr. Dick did not return to see Mr. Denton about the Dillemath or any other property, and

later the Realty Company ascertained that Mr. Burcum had sold the Blendon farm to Mr. Dick. Thereupon the Realty Company brought an action of assumpsit against Burcum to recover a commission of \$900 on the above sale.

The case was tried several times, resulting in hung juries. On the last trial the jury found for the defendant. The plaintiff moved to set aside this verdict, on the ground that it was contrary to the evidence, and for misdirection of the jury. This motion the court overruled. Thereupon the plaintiff applied for and obtained a writ of error from one of the judges of this court.

The plaintiff in error makes five assignments of error, as follows:

(1) The court erred in giving the instruction which was given because the same was mandatory, and required the jury to find a verdict for defendant.

(2) Because the court refused to give the nine instructions, or any of them, asked for by petitioner.

(3) Because the court failed to give any instructions presenting petitioner's theory of the case.

(4) Because the court overruled petitioner's motion to set aside the verdict of the jury as being contrary to the law and the evidence.

(5) Because of misdirection of the jury.

[1] A trial court is not required to give instructions presenting plaintiff's or a defendant's theory of a case, unless these instructions are supported by the testimony. The scintilla doctrine has not been revived in this state. It is true that this court said in *Small v. Virginia Ry. & P. Co.*, 125 Va. 421, 99 S. E. 525:

"We are of opinion that the plaintiff was entitled to an instruction upon his theory of the case."

But the court did not mean to say by this language, that merely because a plaintiff, or, for that matter, a defendant, has a theory of the case, he is thereby entitled to an instruction upon that theory. A sine qua non of his right to an instruction is that it is supported by some appreciable evidence.

In that very case the court said:

"The statute against peremptory instructions is not to be construed * * * as reinstating the scintilla doctrine, formerly prevailing in this state. * * *

"The duty and power of deciding finally whether there is evidence sufficient to take a case to the jury must reside somewhere, and, under the law as it now prevails, this duty and power rests upon this court."

125 Va. p. 427, 99 S. E. 527, 528.

It is error to give an instruction where there is no sufficient evidence upon which to base it, as it tends to mislead the jury. *Va. Coal, etc., Co. v. Ison*, 114 Va. 144, 75 S. E. 782. It is not error to refuse an instruction where there is no evidence upon which it

could be properly based—some material fact, which is either admitted or supported by some appreciable evidence. *Morton v. Southern Ry. Co.*, 112 Va. 398, 71 S. E. 561; *Richmond v. McCormack*, 120 Va. 553, 554, 91 S. E. 767.

Hence, after a trial court has given appropriate instructions, it is not necessarily error on its part to refuse to give further instructions in support of a view, or theory of a case which a defendant wishes to present to the jury.

In the case in judgment the court gave one instruction, which in effect was an interpretation of the contract, and refused, as appears from the record, to give any other or further instructions. Plaintiff in error complains that this instruction was peremptory, or mandatory, and therefore erroneous.

[2] It is the duty of the court to construe a deed, or contract, and, as stated in *Small's Case*, cited supra, 125 Va. 426, 99 S. E. 527:

"The statute against peremptory instructions is not to be construed as applying to cases in which the verdict of the jury depends necessarily and exclusively upon a question of law, such, for example, as the legal effect of a deed or contract."

This brings us to the consideration of the instruction complained of, the provision of the contract relied upon, and the evidence supposed to entitle the plaintiff to recover.

The clause of the contract upon which the plaintiff in error (plaintiff below) relies is clause 8, as follows:

"Should said property be sold to any one with whom the Realty Company of Virginia, Incorporated, has negotiated for the sale thereof, or to whose attention it has directly brought the property, I agree to pay to said Realty Company of Virginia, Incorporated, the said commission above mentioned."

The instruction given by the court is in the following terms:

"The court instructs the jury that, although they believe from the evidence that E. L. Denton, agent for the Realty Company of Virginia, did have a written contract as shown to the jury, and did take Mr. and Mrs. W. C. Dick by the Burcum farm, in showing him farms in the county of Nottoway that he had listed for sale, and did state in driving past said farm, that there was a farm with about 120 acres that he had for sale, that the boundary began at a hedge, which was pointed out, and that it had an old colonial house, which had no two floors on the same level, and a barn with a slate roof, that he asked Mrs. Dick if she wanted to see the place, and she replied she did not, that he did not remember stating the price or the terms upon which the property could be bought, and if they believe from the evidence of Mr. Keller and Mr. Graham, that Denton did state on passing by said farm as above stated, that the price for which said farm could be bought was \$9,000, and that the said farm was subsequently sold to W. C. Dick by J. W. Burcum, and that the Realty

Company of Virginia nor its agent, E. L. Denton, did nothing more to cause or bring about the sale of said farm, they must find for the defendant."

[3] This instruction, in substance, gives the evidence upon which the plaintiff bases his claim to recovery, and advises the jury that, if there is no further evidence of activity on Denton's part, the evidence recited does not entitle the plaintiff to a verdict under the contract, and they must find for the defendant. The instruction does not limit the jury to the consideration of the evidence recited, or advise them that they cannot find a verdict for the plaintiff, if, in their judgment, there was other evidence before them which, added to the evidence recited, would support a verdict. Nor was counsel for the plaintiff restrained, or hindered, by this instruction from pointing out to the jury that there was such additional evidence before them, and upon the basis of such evidence, plus that recited by the court, that his client was entitled to its commissions. Apparently the jury could not discover in the testimony, of their own initiative or with the aid of counsel for the plaintiff, the necessary "something more," on Denton's part, to "cause or bring about the sale of the Burcum farm, and support a recovery," since their verdict was for the defendant.

It remains for us to determine whether the trial court properly construed section eight of the contract, when it announced that the acts and words of Denton as revealed in the evidence—that is to say, the activities of Denton—did not afford the plaintiff company the right to recover commissions on the sale to Dick ultimately effected by the defendant, Burcum.

The words to be construed are the following:

"Should said property be sold to any one with whom the Realty Company of Virginia, Incorporated, has negotiated for the sale thereof, or to whose attention it has directly brought the property, I agree to pay to said Realty Company of Virginia, Incorporated, the said commission above mentioned."

Section 9 should also be considered in this connection. This section retains a right of sale in Burcum as follows:

"I reserve the right to sell, or employ others to sell, said property without any compensation to said Realty Company of Virginia."

[4] The plain meaning of the two sections is that the defendant was free to sell his property without liability to the Realty Company, unless with respect to the sale subsequently effected the latter's initial activities had proceeded to such an extent that they were really the "procuring cause" of that sale. Hence Burcum's inquiry of the Dicks whether they were under any obligations to the Realty Company. But their answer in the negative would not relieve Burcum from lia-

bility, if as a matter of fact, as alleged in plaintiff in error's petition, the Realty Company was the "procuring cause" of the sale to Dick.

It appears from the evidence of Denton that on the day on which Denton took the Dicks to see the Lewis farm near Jennings's Ordinary—

"he called their attention on the return trip to the Burcum place, and as they were coming into the village of Nottaway Courthouse, and just about to pass the Burcum place, he slowed down his car, pointed out the lines, as to where the land began along the highway, stated that they extended along said highway over to the Norfolk & Western Railroad at the overhead bridge, that there were about 120 acres in the farm; that he had it listed for sale; that it contained an old colonial house of 12 or 14 rooms, no two of which were on the same floor, the roof being covered with slate, a fishpond and certain other buildings thereon, a large stable covered with slate; that he did not recollect whether he stated the price or not, but told them that it was listed with him for sale, and asked them if they wanted to see it, and while they were passing the property he slowed down his car to intermediate gear and offered to drive in."

"While they were passing, Mr. Dick stated that, if he owned the place, he would cut the hedge from around it. Upon asking whether they wanted to see the property, Mrs. Dick said, 'No;' that they preferred to see the Dille-muth place formerly owned by Gov. Mann, and as it was late in the afternoon, and they had only time enough to see one place, they would look at that."

The party thereupon proceeded to the Dille-muth place, looked it over, secured Mrs. Dille-muth's price on same, and "agreed to return next morning and look at it further."

The witnesses Graham and Keller confirm the above statements of the witness Denton. In addition, one of them states that Denton said the price on the property was \$9,000, and the other adds that he was absolutely certain that Mr. and Mrs. Dick heard what Mr. Denton said to them.

The above was the sole interview between the Dicks and Denton relating to the Blendon property. Indeed, he did not see them again in reference to any other property, for they did not return next morning to look at the Dille-muth place. If the above recited occurrences do not support the Realty Company's claim for commissions, then there is nothing further in the case upon which it can be based. Mr. and Mrs. Dick, after looking at the Dille-muth place with Mr. Denton, went to Blackstone to spend the night, stopping with a Mrs. Chalkley. Next morning their landlady called their attention to the Burcum farm, described it as a beautiful place, and asked Mr. Primm, a son-in-law of Mr. Burcum, who was at the breakfast table, if it was for sale, and if he could take the visitors to see it. Mr. Primm replied that he could, if he was able to secure some one to

take his place at the post office. He did effect this arrangement, and took Mr. and Mrs. Dick to Nottoway Courthouse to look at Blendon. The parties also saw Mr. Burcum on this trip with Primm. No sale was effected at this time, but in February, 1918, Mr. Dick returned, and on February 19 matters were closed, and a deed to the property was made on March 18, 1918. The price paid by Dick was \$9,000.

Upon the above state of facts, was the Realty Company the "procuring cause" of the sale finally effected by Burcum? Did Denton's remarks and acts so interest the Dicks that they were moved thereby to prosecute further inquiries into the merits and desirability of Blendon as a home? Was their interest in that specific property so quickened by Denton's acts and Denton's words that, fairly speaking, those acts and words caused Dick's return to look over the same, thereby setting in motion the negotiations which culminated in a purchase? Looking to Mr. Denton's testimony, it does not appear that either what he said or did in relation to Blendon aroused the slightest interest in Mr. Dick or his wife. Mr. Dick's sole comment on passing was to say that, if he owned the Blendon property, he would cut down the hedge, while Mrs. Dick's response to Mr. Denton's inquiry as to whether they wanted to see the property was that they did not care to do so, and preferred to look over the Dillemath place. It is difficult to find in these responses to the brief comments of Denton on the Blendon property, the evidence of an interest which was to culminate in a later purchase. If the parties were not aroused to an interest in Blendon by the activities of Denton, but by the independent activities of others, then Burcum had a right to negotiate a sale of his property without liability for commissions to the Realty Company. We do not find in the evidence that the Realty Company negotiated with the Dicks for the sale of Blendon, or that what was said by Denton brought their attention directly to the property in the sense contemplated by the contract and necessary to fix responsibility for commissions upon the owner, Burcum. The quickened interest of the Dicks in Blendon was evidently aroused by the glowing comments on its beauty by Mrs. Chalkley, who enlisted the aid of Mr. Primm to show the place in detail to the visitors from Ohio. It was the interest that her comments aroused, followed by the trip to Blendon with Primm, that led to the negotiations with Burcum, and the ultimate purchase. Unless Denton's acts were the "procuring cause" of the ultimate sale, and we do not consider that they were, then Burcum had the right to sell to Mr. Dick "without any compensation to the Realty Company."

We do not find any error in the instruction given by the court, or in its refusal to give further instructions. The verdict of the jury

was proper and should not have been set aside.

We affirm the judgment of the trial court. Affirmed.

SIMS, J. (dissenting). I concur in what is said in the majority opinion in regard to the duty of the court to construe the contract, and also in the holding that the instruction given by the court is not per se erroneous, for the reason that it is such a peremptory instruction as is forbidden by statute. There would be no error in the instruction if it was not upon a partial view of the material evidence—I. e., if the evidence therein stated, together with the other evidence thereby left to the consideration of the jury, embraced all of the material evidence in the case bearing on the issue. But did the instruction do this? I think it did not.

It is true that under the instruction the jury were left free to consider any other evidence there may have been in the case of other action of the Realty Company or its agent, Denton, tending to cause or bring about the sale to Dick, besides that set forth in the instruction. But that is immaterial, as there was in fact no such other action, and no evidence was introduced by the Realty Company tending to show any such further action, and it was not claimed in the court below, nor is it claimed before us by the Realty Company, that there was any such further action. There was no such issue made in the case. The instruction was therefore, as I think, misleading for the very reason that it did instruct the jury, in substance, that they were free to consider such other evidence. It erroneously diverted the attention of the jury to an issue not in the case, and as to which there was no evidence before them. This was in itself error.

The issue in the case was whether what the Realty Company did prior to the occasion when Denton took the parties to the farm, and on that occasion, "directly brought the [Burcum] property * * * to [the] attention" of Dick.

The instruction in question in effect stated to the jury that they could not, upon that issue, consider any other evidence than that set forth and alluded to in the instruction, and in so doing the instruction excluded from the consideration of the jury the following evidence for the Realty Company, viz.:

1. The evidence in the case tending to show that it was a fact, and that Dick at least realized it to be a fact, that prior to the time the sale from Burcum directly to the latter was negotiated the Realty Company had directly brought the Burcum property to the attention of Dick, and that Dick then knew (and, if he told Burcum the truth at the time of the negotiation of the sale, that Burcum also then knew) that the Realty Company was entitled, under the contract of Burcum with it, to the commissions in question in this case.

There is of such evidence the following in the record, viz.:

(a) The testimony of Keller—

"that he was absolutely certain that Mr. and Mrs. Dick heard what Mr. Denton said to them." Record, p. 31.

(b) The direct testimony of Denton to the effect that his action, which is set forth in the instruction, in fact called the attention of Dick and wife to the Burcum place. Record p. 22.

(c) The further testimony of Denton as follows:

"The next morning * * * Mr. Dick came by to see him and said he was going to Nottoway to look at a farm containing about 120 acres; that witness told him 'that must be the Burcum place with the hedge around it,' and Mr. Dick agreed it must be." Record, p. 22.

(d) The testimony of Denton that when Dick's attention was called to the hedge the evening before—

"Mr. Dick stated that if he owned the place he would cut the hedge down from around it." Record, p. 22.

(e) The letter of Mr. and Mrs. Dick, of date October 16, 1917, to Denton, in which they say that before leaving Virginia "we did not see what we wanted." Record, p. 28.

(f) The other testimony of defendant Burcum, introduced in the attempt to show that the sale to Dick was not made until February, 1918; whereas it appears from the admissions of both Mr. and Mrs. Dick, witnesses for the defendant, made on cross-examination, that the sale was in truth practically agreed upon at the time of the negotiation aforesaid, on their visit to the Burcum farm, when taken there by the son-in-law of Burcum, which was prior to October 16, 1917.

(g) The admission of Dick, on cross-examination, that on the day last named—

"Mr. Burcum told him that the farm was listed at \$10,000, but that he (Burcum) had saved the witness \$1,000; that Burcum asked him if Denton had not shown him properties in the county, and he told him he had, and that Burcum told him to keep it from Denton; that it would cost him \$1,000 if Denton found it out, and not to let Denton know anything about it; that he did keep it away from Mr. Denton, and tried not to let him know anything about it, but that Denton found it out anyway." Record, p. 35.

(h) The admission of Mrs. Dick, on cross-examination—

"that when they were talking to Mr. Burcum about buying the property, he told them it was listed with real estate agents for \$10,000; that if they bought direct from him it would save them \$1,000, and told Mr. Dick not to let Mr. Denton know anything about their transaction; that if he did it would cost \$1,000."

(i) The statement of Burcum in his testimony in his own behalf, on examination in chief, that—

"he did not recollect telling Mr. and Mrs. Dick not to tell Mr. Denton about his negotiations with them * * * Mr. Dick * * * entered into no negotiations while here" (in 1917); "that they had not sold their farm in Ohio; in February Mr. Dick came back; * * * that he wanted an abstract, etc.; that everything was closed up on the 19th of February"; that on cross-examination this witness "denied telling Mr. and Mrs. Dick to keep the matter secret from Mr. Denton."

(j) Other conflicts between the testimony of Denton and that of Dick and Burcum. Record, pp. 24, 34, 35, 36.

The evidence thus excluded from the consideration of the jury raised the question of veracity, certainly between Denton, witness for plaintiff, and Mr. and Mrs. Dick witnesses for the defendant, Burcum, if not between Denton and Burcum also, and raises such question upon the very issue in the case aforesaid. In the light of such evidence, the decision upon such issue depended upon the credibility to be given to the testimony of Mr. and Mrs. Dick and of Burcum. Thus was presented a question which was for the jury, and not for the court, and a vitally material question. The court by the instruction under consideration took that question wholly away from the jury and itself decided it. This was a further error, and, as I think, plainly reversible error.

(129 Va. 437)

FORD v. STREET et al.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Specific performance \Leftrightarrow 30—Contract held not unenforceable for uncertainty as to amount payable.

Where building on land was destroyed by fire after option to sell land for \$10,000 had been given, a contract entered into between the parties after they thought they had ascertained that insurance to the amount of \$8,000 was due, providing for sale of the land for the sum of \$10,000, payable "\$100 cash, * * * \$8,000 payable by and when the insurance is collected for the fire which destroyed the residence, * * * the remainder of the \$10,000 not paid by the insurance company," on delivery of deed on specified date, held specifically enforceable as against the objection of uncertainty as to the amount payable, though there was \$9,000 instead of \$8,000 of insurance due, the contract not requiring purchaser to pay merely the difference between \$10,000 and the amount of insurance paid, regardless of the amount thereof, but to pay approximately \$2,000 for the vacant lot which was the subject of the contract.

2. Dower §10—No right of dower in proceeds of insurance policy on buildings on husband's land.

Wife has no contingent right of dower in the proceeds of insurance policy on buildings on husband's land.

3. Insurance §2—"Fire insurance policy" defined.

A "fire insurance policy" is a contract of indemnity whereby the assurer indemnifies the assured against certain loss on account of his interest in the property if destroyed by fire.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fire Insurance.]

4. Specific performance §10(2)—When husband's contract to sell land without joinder of wife will be specifically enforced.

Husband's contract to sell his land will be specifically enforced, notwithstanding failure of wife to join therein, where purchaser is willing to accept deed without the wife's relinquishment of her contingent right of dower, and asks no abatement in the purchase price.

5. Vendor and purchaser §153—Agreement to deliver "good and sufficient deed of conveyance" requires execution of general warranty deed.

Contract requiring vendor to execute and deliver a "good and sufficient deed of conveyance" held to require execution of a general warranty deed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good and Sufficient Deed.]

6. Vendor and purchaser §153—Vendor considered as contracting for general warranty deed, unless contrary is shown.

On agreement for sale of land the vendor must be considered as contracting for a general warranty deed, unless the contrary is clearly shown.

Appeal from Circuit Court, Nottoway County.

Suit by J. A. Street against Culvin Ford and others. Decree for plaintiff, and named defendant appeals. Affirmed as amended.

W. Moncure Gravatt and L. S. Epes, both of Blackstone, for appellant.

H. H. Watson, of Creive, and T. F. Epes, of Blackstone, for appellees.

PRENTIS, J. This is an appeal from a decree requiring the appellant specifically to perform a contract for the sale of real estate. The pertinent facts are these: On September 6, 1919, the appellant gave an option in writing to J. A. Street, the appellee, which reads thus:

"Agreement made this 6th day of September, 1919, by C. Ford, of the town of Burkeville, party of the first part, and J. A. Street, of the town of Burkeville, party of the second part.

"Witness: That the said party of the first part has agreed to sell the said party of the

second part, J. A. Street, his tract of land in the town of Burkeville, containing about seven acres, more or less, at the corner of Namoxine avenue and Harris Spring road, for the sum of \$10,000, terms to be arranged on or before the 17th day of September. In consideration of \$1 as an option, cash in hand, paid to the party of the first part, receipt of which is hereby acknowledged, said C. Ford agrees to deliver the said premises to the said Street on or before the 17th day of September, 1919."

Eight days later, September 14th, the dwelling house and its contents were totally destroyed by fire. The appellee had not exercised his right to close the option at that time, and on September 16th the vendor wrote at the bottom of this agreement: "This option is extended for 60 days." On the same date the parties concluded an agreement for the sale of the property, then consisting of a vacant lot upon which the improvements had been destroyed, and this agreement reads thus:

"This agreement made this 16th day of September, 1919, by C. Ford, of Burkeville, Va., party of the first part, and J. A. Street, of Burkeville, Va., party of the second part.

"Witnesseth: That the said party of the first part agrees to sell and the said J. A. Street agrees to buy, a certain tract of land lying and being in the town of Burkeville at the corner of Namoxine avenue and Harris Spring road, containing seven acres, more or less, for the sum of \$10,000, payable as follows:

"\$100 cash in hand paid to the said party of the first part by the said J. A. Street, the receipt of which is hereby acknowledged, and the sum of \$8,000 payable by and when the insurance is collected for the fire which destroyed the residence on the 14th day of September, 1919, and on the 1st day of October, 1919, upon the delivery of a good and sufficient deed of conveyance and abstract of title to the said property, said Street agrees to pay the remainder of the \$10,000 not paid by the insurance company, making the total sum of \$10,000 to the said party of the first part when the property is fully paid for."

Before this contract of sale was executed, each of the parties had separately inquired of the insurance agent with whom the policies of insurance had been placed as to the precise amount of the insurance upon the buildings, and each was explicitly informed that it was \$8,000. The appellant testified that he had directed \$8,000 to be written upon the buildings and \$4,000 upon the furniture. Shortly afterwards it was discovered that instead of the \$12,000 insurance being thus apportioned there was \$9,000 upon the buildings and \$3,000 upon the furniture. It also developed that the wife of the vendor refused to unite in the deed which her husband had contracted to execute to the vendee, and thereupon the vendor repudiated the contract.

[1] The vendee filed his bill, agreeing to accept a deed for the property without the

wife's signature and without demanding any abatement of the purchase price. It is claimed for the vendor that he is not bound to perform the contract of sale because of its uncertainty. We think, however, that a careful consideration of the pertinent facts shows that the only uncertainty which exists is the mistake or uncertainty as to the amount of insurance. We find no such uncertainty in the terms and conditions of the sale. When the contract was entered into, the buildings had been destroyed. The vendee was not undertaking to buy an assignment of the insurance policies. The contract related to the vacant lot, and, as we construe the testimony, it is sufficiently clear and definite to justify the decree of the trial court requiring the vendor to convey the property.

In order properly to construe every agreement, it is the duty of the court, as nearly as may be, to place itself in the position of the parties, and from this point of view no fair doubt arises out of the language used in this contract. Each of the parties clearly understood that of the \$10,000 which the vendor was to receive thereunder, \$8,000 was to come from the proceeds of the insurance policies and \$2,000 was to be paid by the vendee.

One clause of the contract appears to us conclusive on this point. After acknowledging the payment of \$100 in cash it recites that the sum of \$8,000 is "payable by and when the insurance is collected for the fire which destroyed the residence on the 14th day of September, 1919."

The clause which is relied on for the contrary view immediately follows, and reads thus:

"And on the 1st day of October, 1919, upon the delivery of a good and sufficient deed of conveyance and abstract of title to the said property, said Street agrees to pay the remainder of the \$10,000 not paid by the insurance company, making the total sum of \$10,000, to the said party of the first part when the property is fully paid for."

This clause, if the attendant circumstances and the context are both disregarded, supports the contention that the purchaser was to receive the benefit of the entire amount of the fire insurance policies, and only to pay such part of the \$10,000 as might not be thus provided for. It must be remembered, however, that the parties were not entering into a contract of hazard; that before agreeing upon the terms of sale they both inquired as to the precise amount of insurance upon the buildings and both entered into the agreement with the distinct mutual understanding that \$8,000 was the amount of the purchase price which was to be paid out of the proceeds of the insurance policies.

There is little profit in considering what construction might have been put upon the contract if some other than the true state of affairs had developed, and yet it may assist us in construing the language used to con-

sider what would have been the rights of the parties if the whole insurance of \$12,000 had been placed upon the buildings and collected. Would it then be held that any court of equity would release the vendee from the payment of any part of the agreed purchase price for the vacant lot, and thus to make him a present of it? Or, taking another view, suppose it had developed that there was only \$1,000 of collectable insurance upon the improvements. Would any court have required the vendee to pay \$9,000 for the vacant lot, for which, by clear understanding with the vendor at the time the contract was signed, he was to pay \$2,000?

In our view there can be but one answer to the questions presented by this record, and that is that the contract is clear, definite, and certain to the effect that the vendee was to pay approximately \$2,000 for the vacant lot which was the subject of the contract, which, of course, justifies its specific enforcement.

It follows from what we have said that we think the court erred in decreeing that the vendee was entitled to credit for \$9,000 upon the purchase price because there happened to be \$9,000 of insurance upon the improvements. As he would not have been made to assume the loss if the property had been entirely uninsured, so he cannot be allowed to profit by the mutual mistake of the parties as to the true amount of insurance. At the time the sale was made the entire proceeds of these insurance policies, subject to the liens upon the property, belonged to the vendor, and he should not be held to have assigned \$1,000 to the vendee when he had no intention of so doing, and the vendee had no idea that he was to receive such a gratuity.

[2, 3] It is suggested by the vendor that an uncertainty grows out of the fact that the wife of the vendee has a contingent right of dower in the proceeds of the insurance policy on the buildings which were burned. We hardly think this suggestion needs any extended treatment. A fire insurance policy is a contract of indemnity, whereby the assurer indemnifies the assured against certain loss on account of his interest in the property if destroyed by fire. When the loss accrues there arises under the contract a debt due by the assurer to the assured, and we know of no principle of law or reason for holding that the wife of the creditor has any interest in such a debt. Not being a party to the contract, she has no more claim thereto or interest therein than she has in any other debt due to her husband.

[4] It is claimed that the contract cannot be enforced against the husband leaving the wife's inchoate and contingent right of dower in the real estate unaffected. This question must be regarded as settled in Virginia, for it is expressly held in *Steadman v. Handy*, 102 Va. 383, 46 S. E. 380, that where the vendee is willing to accept such a deed with-

out the wife's relinquishment of her contingent right of dower, and asks no abatement in the purchase price, the vendee is entitled to have the contract specifically enforced. The subject is also thoroughly discussed in the case of *Haden v. Falls*, 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1084, where the converse of the proposition is held—that, in the absence of any allegation of fraud, a court of equity will not, at the instance of the vendee, decree specific performance of a husband's contract to sell his land, in which his wife has a contingent right of dower which she refuses to release, where the purchaser demands an abatement of the purchase price, or an indemnity by reason of such refusal. It must be regarded as settled in Virginia that where, as in the case in judgment, the vendee is willing to pay the agreed price and to accept the deed without the wife's signature, the husband may be compelled to perform his contract and to convey what he has agreed to convey.

It is urged, however, that this case comes within the doctrine of *Clinchfield Coal Co. v. Sutherland*, 114 Va. 20, 75 S. E. 765, in which it was held that the wife could not be compelled by the court, when not a party to the contract, to convey her contingent right of dower; and it is claimed that to require the appellant in this case to convey the property operates as an indirect coercion upon the wife, and that the court should not indirectly do what it cannot directly do. But that case has little value here, because there is neither direct nor indirect attempt to coerce the wife. Her rights at the end of this litigation will be unimpaired and unaffected thereby. The mere fact that an obligation rests upon her husband because of his warranty can no more be said to coerce her than the existence of any of his other debts or pecuniary obligations may thus affect her. She has no present vested interest in his personal property, and can have none after his death, except in that portion of it which remains after the payment of his just debts.

[5, 6] It is also urged that the court erred in requiring the vendor to convey the property with general warranty. It is only necessary to say as to this that the cases of *Rucker v. Lowther*, 6 Leigh (33 Va.) 269, and *Goddin v. Vaughn*, 14 Grat. (55 Va.) 117, must be regarded as a conclusive refutation of this contention; for the accepted rule is that upon an agreement for the sale of land the vendor must be considered as contracting for a general warranty deed, unless the contrary is clearly shown. In this case the contract requires the vendor to execute and deliver a good and sufficient deed of conveyance, and the trial court did not err in construing this to require the vendor to convey by deed with general warranty.

Our conclusion, then, is to amend the decree appealed from by requiring the vendee,

J. A. Street, to pay \$2,000 instead of \$1,000, as purchase money for the property to be conveyed, and only upon such payment or deposit to the credit of this cause in the circuit court of Nottoway county will he be entitled to have the decree complained of enforced. As thus amended the decree will be affirmed.

Amended and affirmed.

SAUNDERS, J., absent.

(159 Va. 536)

SURRY LUMBER CO. v. WELLONS et al.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Equity §51(1)—Possible future litigation not ground for jurisdiction to construe deed.

A grantee under a timber deed cannot confer jurisdiction in equity to construe the deed by allegations as to future litigation, which may flow from complainant's exercise of his rights thereunder.

2. Equity §17—Equity will not construe a deed merely to determine legal rights of parties.

A court of equity will not undertake to construe a will merely for the purpose of determining the legal rights of the parties.

Appeal from Circuit Court, Southampton County.

Suit by the Surry Lumber Company against J. F. Wellons and others. From a decree of dismissal on demurrer, complainant appeals. Affirmed.

Williams & Tunstall and J. N. Sebrell, Jr., all of Norfolk, for appellant.

Lewis & Harris and J. G. Martin, of Norfolk, for appellees.

KELLEY, P. This is an appeal from a decree dismissing on demurrer a bill in equity brought by the Surry Lumber Company v. J. F. Wellons and others.

The bill alleges that on the 5th day of April, 1902, the appellant purchased from the appellees certain timber and timber rights as set forth in a deed of that date filed with and made a part of the bill. The deed contained the following clause:

"And it is further covenanted and agreed by and between the parties hereto that the said Surry Lumber Company shall have five years in which to cut and remove said timber, from the time they commence to manufacture said timber into wood or lumber, but that they shall not be limited as to the time in which they shall commence to cut or remove the same."

After referring to and exhibiting the deed, the bill proceeds with the following allegations, and no others, to wit:

"Your orator since the execution and delivery of said deed has been in possession of the said

timber thereby conveyed, and is now in possession of the same; that about six months ago your orator commenced to prepare to cut and remove said timber, as it had a right to do under the terms of said deed, and thereupon your orator was notified and warned by the said defendants not to cut or remove said timber, as said defendants claimed the right to the said timber under the provisions and limitations contained in the deed aforesaid, and objected to your orator's going upon the fee which they own, and not only objected to the cutting of the said timber by your orator, but are intending to cut the timber themselves, and thereby destroy the entire estate of your orator therein, and threatening that if your orator cut or remove said timber they would sue your orator for the trespass.

"Your orator is now ready and anxious to cut and remove said timber, but it cannot do so peaceably on account of the attitude of said defendants.

"That the said defendants' claim of the right to cut and remove said timber under the terms of said deed as construed by them is a cloud upon the title of your orator to said timber, and that your orator is entitled to have the same removed and quieted in order that it may enjoy its right to said real estate, and to have the said defendants enjoined from cutting the said timber and from interfering with your orator in the exercise of its rights."

As appears inferentially from the foregoing allegations, and as actually disclosed by the brief and arguments of counsel, the sole question which the complainant seeks to have determined is as to the meaning of the clause in the deed above quoted. The difference between the parties is stated thus in the appellant's petition and brief:

"The contention on the part of your petitioner is that human language could not be more explicit, and that the deed means what it says, namely, that your petitioner should not be limited as to the time in which it should commence to cut or remove the timber. The defendants claim that the deed does not mean this, and that it means something else, namely, that the timber must be cut within such time as some person, either court or jury, shall determine."

The prayer of the bill is that—

The court "will enter a decree deciding and adjudging that your orator has the right to cut and remove the said timber, and that the said defendants and neither of them have any right, title, or interest in the said timber, and that they be enjoined and restrained from cutting or removing any of said timber or claiming any rights therein, or in any wise interfering with your orator in its rights to cut and remove the same, and for such other, further, and general relief as to the court may seem meet."

The defendants demurred on the ground that—

"The bill does not show any jurisdiction in equity; it merely shows that defendants have threatened to sue plaintiff if plaintiff cuts the timber; it does not show that defendants will make any forcible resistance."

The court sustained the demurrer, and dismissed the bill.

[1] It is obvious that this is merely a suit for the construction of a deed under which the complainant itself claims title. The allegations as to future litigation which may flow from an exercise of appellant's rights under the deed as construed by it are not sufficient to bring the controversy within any of the recognized grounds of jurisdiction in equity. No authority whatever is cited in support of the jurisdiction. The bill does not charge that there will be any physical or forcible resistance to the cutting and removal of timber if undertaken by appellant, but merely that the appellees threaten in that event to sue for trespass. Nor is there any allegation that the appellees have in any way invaded the appellant's alleged possession of the timber, but merely a general charge that the appellees intend to cut the timber themselves, and thus destroy the estate as a whole. Under these naked facts a court of equity will not undertake to give relief.

[2] The argument principally relied upon for a reversal of the decree is that the construction placed upon the deed by the appellees results in a cloud upon the appellant's title. We will not say that this argument is unworthy of consideration or without inherent strength, but it involves a novel proposition, and one which cannot be maintained unless we are to extend the jurisdiction of equity for the removal of clouds from title to a class of cases which it has not heretofore been held to embrace. A court of equity will not undertake to construe even a will merely for the purpose of determining the legal rights of the parties. *Hart v. Darter*, 107 Va. 310, 58 S. E. 590, 15 L. R. A. (N. S.) 599, 13 Ann. Cas. 1. If the relief prayed for in this case can properly be allowed, then it would seem to follow that whenever a muniment of title is of doubtful interpretation the parties claiming, not against it but directly under it, would be entitled to have possible future controversies under it adjudicated and settled by appealing to equity for advice and guidance. Whether such extension of jurisdiction would be wise is a debated and debatable question; but whether wise or not, the courts would hardly undertake to make the extension without statutory aid.

The case, as it seems to us, is completely controlled by the decision of this court in *Sulphur Mines Co. v. Boswell*, 94 Va. 481, 27 S. E. 24, wherein it was held, in a forceful opinion by Judge Riely, that the jurisdiction to remove clouds from title is founded upon the necessity for cancellation or removal of some instrument or proceeding in writing constituting a cloud, and that in the exercise of that jurisdiction a court of equity will not construe a deed under which the complainant claims, merely to forestall future litigation.

The decree appealed from dismissed the bill in general terms, and it is contended that, even if the decree was otherwise proper, it should have stated that the dismissal was without prejudice to any future action which the plaintiff might be advised to take. Inasmuch as the record shows upon its face that the sole ground of the demurrer was the want of jurisdiction in equity, the legal effect of the decree would doubtless be the same as if the qualification suggested had been inserted therein; but the order of this court will contain an amendment in that respect, and as thus amended the decree will be affirmed, with costs to the appellee as the party substantially prevailing.

Affirmed.

(129 Va. 672)

SUSSEX COUNTY v. JARRATT et al.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Taxation ⚡498—Equity may restrain unauthorized assessment for preceding years.

Equity had jurisdiction to restrain county from assessing taxes for preceding years after expiration of period during which levy thereon could be made had expired, notwithstanding Code 1919, § 2389, giving taxpayer the right to apply to the circuit court for relief where aggrieved by assessment, since the remedy under such statute exists only if an assessment has been made.

2. Taxation ⚡418—Bank stock held not assessed where assessment did not specify stockholders.

Assessment specifying name and place of bank, amount assessed, amount levied, and total levy for county and district, without specifying the names of the stockholders, the number of shares of stock held by each stockholder, the value of such stock, and the amount of taxes due, as required by Code 1904, § 1040a, for assessment of bank stock, held not an assessment of such stock but the assessment of the bank's capital stock.

3. Taxation ⚡128—Shares of stock taxable though capital is invested in nontaxable securities.

The shares of stock of a bank are distinct and different from its capital and may be taxed though the capital itself be invested in nontaxable securities.

4. Taxation ⚡319(1)—Assessments must be made in manner prescribed by law.

Officers must make their assessments in the manner prescribed by law.

5. Taxation ⚡301(1)—Assessment must rest upon proper levy.

Every assessment must rest upon a proper levy of a tax, and if there is no levy there can be no assessment.

6. Taxation ⚡295, 309—Difference between "levy" and "assessment" stated.

The "levy" of taxes is a legislative function and declares the subject and rate of tax-

ation, while "assessment" is quasi judicial and consists in making a list of the taxpayer's property and fixing its valuation for appraisal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assessment; Levy.]

7. Taxation ⚡406—Assessment for omitted years unauthorized where there was no levy during such years.

Commissioner of revenue could not assess shares of bank stock for taxes for previous years under Code 1904, § 508, where there had been no levy on such shares of stock during such previous years.

8. Taxation ⚡300—Levy of tax against "real and personal property" held not a levy against shares of bank stock.

Board of supervisors' order that a tax be levied against "real, personal property of the county" held not a levy on shares of bank stock under Code 1904, § 1040a, providing for taxation of bank stock.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property; Real Property.]

9. Statutes ⚡245—Statute construed in favor of taxpayer against government.

Statutes imposing taxes are to be construed most strongly against the government and in favor of the citizen, and are not to be extended by implication beyond the clear import of the language used.

10. Taxation ⚡498—Court not empowered to make levy omitted in previous years.

The court has no power to make a levy for taxes omitted in previous years, since neither the commissioner of revenue, nor the board of supervisors, having failed to order levy, had power to make levy for such back taxes.

11. Taxation ⚡301(3)—Board of supervisors not empowered to make levy omitted during previous years.

Board of supervisors, having failed to order a levy on bank stock for certain years, had no authority to order a levy for taxes for such years in succeeding years.

Appeal from Circuit Court, Sussex County.

Consolidated suits by B. F. Jarratt and by S. B. Grant against the County of Sussex. Decree for complainants, and defendant appeals. **Affirmed.**

Thos. H. Howerton, of Waverly, and Buford & Peterson, of Lawrenceville, for appellant.

Geo. Bryan, of Richmond, and Wm. B. Cocke, of Stony Creek, for appellees.

SAUNDERS, J. These are two suits in equity, brought, respectively, by S. B. Grant, for himself and other stockholders similarly situated, and B. F. Jarratt, suing in like fashion, against the county of Sussex. The complainant Grant is the owner of one share of the capital stock of the Bank of Waverly.

and the complainant Jarratt, of 33 shares of the capital stock of the Bank of Stony Creek, both banks situate in the county of Sussex. The object of these suits was to enjoin the treasurer of said county from levying certain taxes alleged to be due by the said complainants to the said county for the years 1912, 1913, and 1914. This alleged claim of the county arose in the following fashion:

The board of supervisors of the county of Sussex did not make a levy for the years 1912, 1913, and 1914 on the shares of the stock of banks in that county. Some years later the board essayed to collect these taxes. Its first order to this end was made on December 20, 1917, and is as follows:

"Walter Harrison, commissioner of revenue for district No. 1, is directed to assess back taxes on bank stock in district No. 1 for the years 1912, 1913 and 1914, and report at next meeting of this board."

The second order was made at a meeting of the board on January 7, 1918:

"Ordered that G. O. Wrenn, commissioner of the revenue for district No. 2, be and he is hereby instructed to make a levy, assessing the banks in district No. 2 with levy for the county and district purposes for the years 1912, 1913, and 1914, in accordance with an order heretofore entered in this matter, and the clerk is instructed hereby to certify a copy of same to said G. O. Wrenn, commissioner of the revenue."

This order is not very clear, inasmuch as it directs the commissioner in district No. 2

In January, 1918, the commissioner of the revenue for district No. 1 made an assessment for the years referred to in the order of December 20, 1917. This assessment, as will be noted from a copy of the same, was upon the banks in the commissioner's district, and on the aggregate amount of their capital. It contained neither the names of the stockholders of the banks, nor the number of shares held by them respectively. This assessment is as follows:

BANK STOCK OF THE BANKS OF STONY CREEK AND JARRATT.

Name of Person Bank of Stony Creek	Residence Stony Creek Va.	Aggregate Amt. Assessed	Total Amt. Levied	Total Levy for County and District
1912	"	18,020.00	1.30	216.24
1913	"	18,300.00	1.15	210.45
1914	"	20,900.00	1.30	271.90

The assessment of the Bank of Jarratt is to the like effect as the above, and need not be given.

About this same time the commissioner of the revenue for district No. 2 reported under the order of January 17, 1918. He testifies that he was instructed by the board to assess the bank stocks in his district for county and district purposes for the years 1912, 1913, and 1914. He filed his record book showing his official action under this instruction. All the banks in his district were assessed in the same fashion, so that an extract as to one bank only will be sufficient in this connection.

	Ag. Capital	Gen. Co.	Co. Sch.	Dist. Rd.	Dist. Sch.	Total.
Bank of Waverly, 1912,		40	20	25	30	1.05
Waverly, Va.	95372.79	381.49	190.74	238.43	190.75	1,001.41
" " " 1913,		40	20	20	30	1.00
	103500.	414.00	207.00	207.00	207.00	1,035.00
" " " 1914,		40	30	20	30	1.00
	112000.	450.32	225.16	225.16	225.16	1,125.80
		1,245.81	622.90	670.59	622.91	\$,162.21

to "make a levy assessing the banks in his district with the levy for the county and district purposes, for the years 1912, 1913, and 1914 in accordance with an order heretofore entered in this matter." The order theretofore entered was an order directing Walter Harrison to assess back taxes on bank stock in his district (No. 1). Of course, strictly speaking, the board could not direct a commissioner to make a levy, nor could the commissioner in district No. 2 make a levy assessing the banks in his district in accordance with an order directing the commissioner in another district to assess back taxes on bank stock in that district. However, petitioner in error construes the second order to constitute a direction to the commissioner in the second district to assess the "bank stock" in his district for the years 1912, 1913, and 1914, and this construction will be adopted for the purposes of a decision of this controversy.

Commissioner Wrenn testifies that his record is entitled, "Assessment of Bank Stocks for County, District and Road Levies, for the Year 1917," and under the title, "Name of Person," are listed for the years 1912, 1913, and 1914 the Bank of Waverly, Waverly, Va., the Bank of Sussex and Surry, Wakefield, Va., and the Farmers' Bank of Wakefield, Wakefield, Va. Further that this was the only assessment made for the years 1912, 1913, and 1914 for county and district purposes. The assessments as made supra for the years 1912, 1913, and 1914 were furnished to the treasurer of Sussex in December, 1917, and January, 1918. No other assessments for these years were furnished him until some time in December, 1918, when Commissioner Wrenn furnished him with an itemized list of the stockholders of the banks in his district.

Upon receipt of these alleged assessments, the treasurer applied to the banks for pay-

ment of the taxes, and posted one notice. The banks asked for a little time for consideration. This was given. At its expiration, on advice of counsel, they refused to pay said taxes. The treasurer prepared to collect said taxes. Thereupon, in September, 1918, B. F. Jarratt, for himself and other stockholders of the Bank of Stony Creek, and S. B. Grant, for himself and other stockholders of the Bank of Waverly, filed their respective bills in equity against the county of Sussex for the purposes stated, *supra*.

These causes, by consent of counsel, were consolidated. Demurrers and answers were respectively filed, and depositions taken.

On the hearing, the court overruled the demurrers, entertained the bills, and enjoined the treasurer of Sussex county from taking any steps to collect the taxes alleged to be due to Sussex county upon complainants' shares of stock in their respective banks, for the years 1912, 1913, and 1914. An appeal from this decree was allowed by one of the judges of this court.

By a stipulation of counsel, it was agreed that the cases, *supra*, should be considered as test cases, in the matter of the several liabilities of the several banks of Sussex county and their respective stockholders, for county taxes alleged to be due to the county of Sussex for the years 1912, 1913, and 1914.

The same parties who are complainants above endeavored to secure, by motion, the same relief sought in their bills in equity. These motions were dismissed in the circuit court of Sussex county, and writs of error were secured to the rulings of the court by the county of Sussex.

The same stipulations were made between counsel in respect of these motions as were made in regard to the bills in equity. Should the proceedings in equity be sustained, there will be no occasion to make further reference to these motions.

Appellant, the county of Sussex, assigns the following errors in the consolidated proceedings in equity:

First. The court, sitting as a court of equity, was without jurisdiction, and erred in refusing to dismiss the bills, and require the plaintiffs to proceed by motion under section 571 of the Code 1887.

Second. The court, on the merits, erred in affording the relief prayed by the plaintiffs, instead of requiring them to pay the levies with which they were properly chargeable, and, to that end, exercising its power to correct defects and irregularities, if any, in the assessments.

The act of February 24, 1916, provides that—

"No suit for the purpose of restraining the collection or assessment of any tax, state or local, shall be maintained in any court of this commonwealth, except when the party has no adequate remedy at law." Laws 1916, c. 64.

A person assessed with county levies, and aggrieved by such assessment, can apply for relief to the circuit court of the county wherein such assessment was made, under section 2389, Code 1919 (sec. 571, Code 1887); but by the very terms of this section the remedy is afforded only to parties who have been assessed and who are aggrieved thereby. An assessment is a *sine qua non* of relief under this section.

[1] Appellant urges that the trial court was without jurisdiction in equity in the case in judgment, and cites *Commonwealth v. Tredegar Co.*, 122 Va. 506, 95 S. E. 279, and *Barrow v. Prince Edward Co.*, 121 Va. 1, 92 S. E. 910. In both of these cases the court held that the remedy at law was full and complete—in a word, adequate to afford the relief sought in equity. Hence the jurisdiction of equity was excluded by the very terms of the statute. It may be conceded that if there was an assessment of taxes against the complainants in the case under consideration, however erroneous such assessment may have been, the authorities, *supra*, would be in point, and the decree of the circuit court must be reversed. But the circuit court held, upon the facts, that there had been no such assessment, and that the remedy by motion did not apply. The following is taken from the opinion of the circuit court:

"The court is also of the opinion that the complainants' remedy is in equity, and not under the statute for the correction of erroneous assessments. To give jurisdiction under the statute, there must be an assessment, and a person aggrieved by such assessment (sections 567 and 571). In *Main Street Bank v. City of Richmond*, 122 Va. 574, 95 S. E. 386, decided March 21, 1918, the court says:

"It is unnecessary for us to consider in this case, whether or not the error on the part of the officials of the bank can be corrected upon the motion of any stockholder who may be entitled to relief; it is clear that it cannot be corrected upon the motion of the bank, under sections 567 and 571, for its property has not been assessed and its funds are in no way involved."

See, also, *Commonwealth v. Carter's Ex'x*, 126 Va. 469, 102 S. E. 58, *Withers v. Jones*, 126 Va. 524, 102 S. E. 68, in which the court held that as the appellants were without remedy at law, the statute had no application to the cause before them. It is very evident from the citations made that we must determine primarily whether the complainants, *supra*, were aggrieved by an assessment of their property. Once this determination is made, a conclusion on the question of jurisdiction will be easily derived.

The statutes prescribe how bank stocks shall be taxed for state and county purposes. The law applicable to taxation of bank stock for the years 1912, 1913, and 1914, so far as the state tax was concerned, was contained in Acts 1912, p. 19. This law provided that

no tax should be assessed upon the capital of any bank, but that the stockholders in such bank should be assessed and taxed on their shares of stock therein. The banks are required to report lists of all the shares of stock, and of their stockholders, and the actual value of the shares of stock held by each stockholder.

The commissioner of the revenue, upon the receipt of these reports, is required to assess each stockholder upon the value of the shares of stock owned by him as reported, less certain deductions. Three assessment lists are to be made out, one for the bank, one for the auditor, and the other for the commissioner.

The law applicable to the taxation of bank stocks for county purposes during the years 1912, 1913, and 1914 was section 1040a of the Code of 1904, as follows:

"(1) Hereafter each county or city in which any bank, either national or state, is so located may, subject to the conditions mentioned below, tax all the shares of stock issued by any such bank so located within its limits at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in such county or city.

"(2) That in so taxing said shares the said county or city authorities, respectively, shall follow the mode of assessment and manner of collection prescribed by statute for the collection of state taxes upon said shares." Acts 1889-90, p. 111; Acts 1902-03-04, p. 412.

This statute very explicitly provides that in respect of taxing bank shares by a county, the proper authorities must follow the mode of assessment and manner of collection prescribed in respect of state taxes upon such shares.

[2] Looking to the reports of the commissioners, cited supra, it will be seen that these officers, in the alleged assessments of 1917 and 1918, did not comply in a single respect with the requirements of the statute prescribing the mode in which bank stock shall be assessed for county purposes: The names of the stockholders, the number of shares of stock held by each, and the value of the same, and the amount of taxes respectively due, are not afforded. The several banks are named as the parties assessed for the years 1912, 1913, and 1914, the property taxed in each case is the capital of the bank, and the total tax is the aggregate produced by the several rates on this capital. It appears, therefore, from the record, that whatever the commissioners may have had in mind, they actually assessed the capital stock of the banks. Of course, it is true that the aggregate of the stock held by the individual stockholders is the capital of a bank, but the shares are different from the capital, and an assessment of the capital is not an assessment of the shares in the names of the several stockholders.

[3] "The shares of stock of a bank are distinct and different from its capital and may be taxed though the capital itself be invested in nontaxable securities." *Union Bank v. City of Richmond*, 94 Va. 316, 26 S. E. 821.

[4] Officers must make their assessments in the manner prescribed by law. "The officers of the state, in the collection of revenue, are as much bound to observe the law and proceed in the mode pointed out by the statute as an individual is required to observe the law in the enforcement of any right." *People v. Biggins*, 96 Ill. 481.

Assessment being an indispensable element of jurisdiction in the statutory remedy, and assessment of the banks' capital not being an assessment of the shares of stock owned by the stockholders, the complainants in the case in judgment had no adequate remedy at law with which to meet the threatened attack upon their property. The statute excludes the jurisdiction of equity in those cases only in which the remedy at law is complete and effective. The trial court did not err in holding that the complainants' remedy was in equity.

Appellant contends that if the jurisdiction of equity is sustained, the court can proceed to make a proper assessment for the years in controversy—in a word, that the court can now do what the commissioners should have done when they assessed the capital of the banks for the omitted years. Conceding this contention to be sound, it becomes necessary to ascertain what the commissioners might have done under the orders of the board cited heretofore.

These orders conferred no authority upon the commissioners of the revenue to make *nunc pro tunc* assessments for the omitted years. That authority, however, is afforded by section 508 of the Code.

"Under section 508 of the Code [of 1904], it is the duty of the commissioner of the revenue to assess for taxation any property which he finds has not been assessed for taxation for any previous years within the limits prescribed by that section." *Commonwealth v. Tredegar Co.*, supra.

[5-7] Hence it was the duty of the Commissioners, apart from the suggestions of the board, to assess for taxation within the prescribed limits any property which upon ascertainment appeared to have been omitted. But "the subsequent assessment must be made in the manner and within the time prescribed by law." *Commonwealth v. United Cigarette Machine Co.*, 120 Va. 835, 92 S. E. 901. Every assessment rests upon a proper levy of a tax. In fact, it may be said, no levy, no assessment. "Levy and assessment have very different meanings. The levy of taxes is a legislative function, and declares the subject and rate of taxation." *Hilliard on Taxation*, p. 290. "Assessment is quasi judicial, and consists in making a list

of the taxpayer's property, and fixing its valuation, or appraisalment." *Id.*, 291.

"The first step in taxation, whether by the state or inferior political subdivisions of the state, is the levy by the proper legislative body. Until this is done, there can be no assessment, or collection." 27 *Am. & Eng. Ency. L.* (2d Ed.) p. 730.

"It is elementary that property, however taxable, that is, however liable to taxation, cannot be assessed and subjected to consequent taxes unless the authority which had the right to speak has been heard thus to command. In other words, property in itself taxable cannot be assessed and be made to contribute, by taxation, to government expenses, where the proper authority has not directed its assessment."

"Since it is a settled principle that, however clear the power may be, or even the duty, of the legislative body to levy a tax on any particular species of property, until that power has been exerted the burden cannot be imposed and the legislative intent to impose a tax must be explicitly and distinctly shown. It cannot be extended by implication beyond the clear import of the language used. Hence, where there was no legislative enactment directing the assessment on a man's income, such income could not be assessed and payment of the tax enforced."

"The levy, that is, the governmental act which determines that a tax shall be laid, as distinguished from the levy on property incident to the enforcement of the collection of the tax, has been embodied in constitutional provisions in some of the states without the assistance of the Legislature; but, as a general rule, a levy can be made only by legislative enactment or authority, within the limits and in the form prescribed by the organic law, and by a duly authorized and properly constituted body. Thus, where a law required a county levy to be laid by a majority at least of the justices of the county, it was held that any less number, although they might constitute a court for a different purpose, had no jurisdiction in the case of a levy." *Id.*

It becomes, therefore, necessary to inquire whether, if the court should now undertake to make an assessment of the bank stock for the years, 1912, 1913, and 1914, upon the theory that the court can do what the commissioners should have done, that assessment would rest upon any levy of local taxes for such years.

It is contended by appellant that the word "may," in section 1040a, providing for taxation of bank stock by counties, means "must." If it means "must," the query would still recur: Did the supervisors of Sussex county, by appropriate orders, levy a tax on bank stock within said county during the said years?

The orders of the board of supervisors of Sussex county ordering levies for the several years 1912, 1913, and 1914 are the same. Hence we need cite only the orders for one year, the year 1912. These orders are as follows:

"At a meeting of the board of supervisors for the county of Sussex, held at the courthouse thereof, Thursday, May the 16, 1912:

"Ordered that a levy of forty cents on the one hundred dollars assessed value of the real and personal property of the county be laid for general county purposes.

"Ordered that a levy of twenty cents on the one hundred dollars assessed value of the real and personal property of the county be laid for the county free schools," etc.

"Ordered that a tax be levied on the capital invested, used or employed by the merchants in the conduct of their business in accordance with an act," etc.

[8] It is insisted, in substance, that as bank stocks are personal property the words "assessed value of the real and personal property of the county of Sussex," included bank stocks in the county, and were efficient to levy a tax on same without regard to the intent of the board at the time these words were used. With that contention we cannot agree. A board need not consciously have in mind every species of personal property when a levy is ordered, to affect it with the levy, but property that they specifically do not intend to tax will not be taxed merely because general words are used. Further, it is doubtful whether, standing alone, the words used would levy a tax on bank stock.

Section 1040a prescribes that—

"A county may tax all shares of stock issued by a bank," etc., "at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in such county."

The language used in this section suggests that a county intending to tax bank stock should use language more specific than the general terms used by the board in the orders cited. Moneyed capital is a form of personal property, but it is taxed by a special order in the orders, *supra*, to wit:

"Ordered that a tax be levied on the capital invested, used, or employed by the merchants of the county," etc.

Moreover, the board that used the words "real and personal property of the county" did not construe them to include bank shares. No effort was made during the years 1912, 1913, and 1914 to have the bank stocks assessed under these orders. Further, the members of the board testify that they did not intend to tax bank shares during these years. The president of the board testifies that they designedly omitted this taxation lest, if laid, the banks would increase the rate of interest to borrowers in the county. Other members of the board do not agree with the president that they did not tax bank shares as a matter of county policy, but that they omitted to do so because they were not aware that they possessed the necessary power of taxation. All the witnesses agree that as a matter of fact bank stock was not taxed during the years in question. Further, when

the board was apprised in 1915 that they possessed the right to tax bank shares for county purposes, they did not rely upon the general language cited above as sufficient to effect such taxation, but specifically included bank stock, grouping it with capital invested in mercantile business, as will appear from the following extract taken from the proceedings of the board at its meeting to lay the tax levy for the year 1915-16:

"Ordered that a levy of 55 cents on the one hundred dollars of all the property in the county of Sussex, both real and personal, subject to local taxation, including bank stock, and capital invested or employed in mercantile business, as provided," etc.

Like words were used in the levy of county taxes in the year 1916, and presumably from that time forward. Apart from the direct and positive testimony of the members of the board, the above change in the wording of their orders very clearly shows that the board did not regard the language used in 1912, 1913, and 1914 as levying a tax on bank stocks.

[8] Further, in view of the doubt whether the orders of the years *supra* impose a tax on these stocks, the persons sought to be charged with such a tax are entitled to the benefit of the principle announced in *Commonwealth v. Hutzler*, 124 Va. 138, 97 S. E. 775, as follows:

"It is well-settled and familiar law that statutes imposing taxes are to be construed most strongly against the government and in favor of the citizen, and are not to be extended by implication beyond the clear import of the language used. Wherever there is a just doubt, that doubt should absolve the taxpayer from his burden."

See, also, *Commonwealth v. Herbert*, 127 Va. —, 103 S. E. 645, where it is stated:

"It is a well-settled and a just and important rule in the construction of all tax laws, * * * that no tax shall be exacted from the citizens of the Commonwealth except in those cases which are clearly embraced within the taxing statute."

To the same effect, *Brown v. Commonwealth*, 98 Va. 366, 36 S. E. 485:

"Laws imposing a license or a tax are strictly construed, and whenever there is doubt as to the meaning or scope of such laws, they are construed more strongly against the government and in favor of the citizen."

See, also, *Supervisors v. Tallant*, 96 Va. 723, 32 S. E. 479.

[10] We are clearly of opinion that the board of supervisors of Sussex county did not order a levy on bank stocks in that county for the years 1912, 1913, and 1914. This being so, upon discovery that there was no assessment upon such stocks for these years, there was no authority in the commissioners to make an assessment for the same. Therefore there is no present authority in this

court to make an assessment, since we can only do in this respect what the commissioners might have done.

[11] The contention, however, is made that the orders of the board of date December 20, 1917, and January 7, 1918, in some fashion constitute a levy on bank stock in the county of Sussex for the omitted years. On their face these orders are not levies, but even conceding that they were intended to have that effect, and in *nunc pro tunc* fashion to levy a tax on the shares of bank stock in said county for the years referred to, the lack of authority to make such orders is apparent.

We are not aware of any statute empowering a board of supervisors to lay a levy for taxes omitted in antecedent years.

"There can be no collection of taxes except in the manner provided by law; and back taxes can be levied only by special legislative authority." *Commonwealth v. United Cigarette Machine Co.*, 120 Va. 842, 92 S. E. 901.

"When authority is not conferred by statute, county commissioners cannot levy taxes upon property for the years that have passed, in which such property has escaped them." *Blackwell on Tax Titles* (5th Ed.) § 298.

"The powers of a municipal corporation are to be construed strictly, and the power to tax must be plainly and unmistakably conferred. In the absence of legislative authority, the corporation has no power to levy back taxes, and when the charter empowers the council to order the collection of taxes for any year, this refers to taxes previously assessed, there being nothing in the charter authorizing a retrospective assessment.

"It is a settled principle that, in the absence of legislative authority, a municipal corporation has no power to levy back taxes. Such authority can exist only by statute."

2 Dill. Mun. Corp. (4th Ed.) § 751.

"The powers and duties of boards of supervisors * * * are fixed by statute, and they have no other powers than those conferred expressly or by necessary implication." *Supervisors v. Powell*, 95 Va. 635, 29 S. E. 682.

Hence, even if the orders, *supra*, were intended to operate as levies on bank stock in the county of Sussex for the omitted years, they were invalid.

Our conclusions summarized are:

First. There was no levy on bank shares in the county of Sussex for county purposes, during the years 1912, 1913, and 1914.

Second. That as there was no levy made on such shares during the years when it was competent for the board to make a levy, the board lacked the authority to make this levy in succeeding years.

Third. That as there was no levy on these shares during the years in question, and no authority to make it in succeeding years, the commissioners in succeeding years could not assess said shares for taxation.

Fourth. That this court has no present authority to do what the board of supervisors and commissioners of the revenue for Sus-

sex county cannot now do—that is, “levy taxes upon property for years that are passed in which such property escaped,” or assess such property for taxation when no levy has been made.

We find no error in the decree of the circuit court of Sussex county of date January 30, 1919, and that decree is affirmed.

Affirmed.

BURKS and SIMS, JJ., absent.

(129 Va. 521)

**STANDARD ICE CO., Inc., v. LYNCHBURG
DIAMOND ICE FACTORY.**

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Sales \S 71(4)—Agreement to deliver “full capacity of the plant” held to have reference to daily capacity.

A contract for the sale and purchase of ice, requiring plaintiff to furnish “the full capacity of the plant” when desired by defendant, held to require plaintiff only to furnish full capacity daily, and not to contemplate weekly capacity, and defendant could not demand on any one day any more than the capacity of the plant on that day.

2. Contracts \S 155—Clause construed against party in whose favor it was inserted.

If there is a doubt as to the construction of a certain feature of a contract, it should be resolved against the party in whose favor it was inserted, since such language should be regarded as that of such party, but such rule should not be invoked where the language of the contract is clear.

3. Contracts \S 170(1)—Sales \S 71(1)—Construction by parties persuasive; seller could waive strict compliance with contract without losing right to invoke subsequently.

Where ice company agreed to sell ice to defendant up to a certain amount on any particular day on notice, it did not lose the right to invoke a strict compliance with the contract, whenever it saw fit to do so at a later date, by reason of having delivered more ice than it was required to do when demanded by the defendant, although a course of dealing will place a practical construction on a contract in cases where the rights of the parties are doubtful.

4. Contracts \S 156—Ejusdem generis rule to be sparingly applied.

The ejusdem generis rule is to be sparingly and cautiously applied.

5. Contracts \S 156—Statutes \S 194—“Ejusdem generis rule” defined.

The ejusdem generis rule, which applies alike to statutes and contracts, requires that where general words follow particular words the former are regarded to be applicable to the persons or things particularly mentioned, and the rule applies even if the general words are broad enough to cover other persons and

things, unless something in the instrument plainly indicates that they are to be otherwise applied.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series Ejusdem Generis.]

6. Sales \S 85(2)—Seller of ice not relieved from delivery by sickness of employees.

An ice company, agreeing to furnish ice demanded by defendant daily up to a certain amount, was not exempt from liability for failure to supply ice during a period of nine days in October, 1918, when it was unable to operate its plant because of sickness among its employees under a clause in the contract that, “In the event the plant * * * is partially disabled by breakdown, fire, high water, washout, or from any other causes whatsoever beyond its control, it shall not be required to furnish any ice,” etc.

7. Trial \S 253(10)—Instruction not objectionable as ignoring duty of plaintiff seller of ice.

An instruction that if the jury believed that defendant failed to take a minimum of ice contracted for during certain months, then they should find for the plaintiff and assess damages at such a sum as it may have lost, etc., was not open to the objection that it was confined to the duty of the defendant to take, and ignores the duty of the plaintiff to furnish the minimum quantity of ice provided for in the contract, as the jury could hardly have been unreasonable enough to find that defendant “failed to take a minimum,” or any part thereof, which plaintiff was obligated to furnish but failed and refused to furnish.

8. Sales \S 384(7)—Instruction as to damages for failure to take ice held erroneous in view of seller's opportunity to resell.

In an action involving damages for failure of defendant to take minimum quantity of ice provided under contract, an instruction that if defendant failed to take such minimum quantity, jury should assess damages at such sum as plaintiff “may have lost and have been damaged by reason of the failure to comply with said contract at \$3.50 per ton,” was erroneous, as it might be understood to mean that plaintiff's measure of damage for every ton of ice which defendant failed to take within the minimum amount was \$3.50 per ton, when plaintiff was in fact selling ice to other persons and had ready sale for all of its ice.

9. Damages \S 62(4)—Party must minimize damages resulting from breach of contract.

Where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with a reasonable endeavor and expense he could not prevent.

Error to Corporation Court of Lynchburg.

Action by the Lynchburg Diamond Ice Factory against the Standard Ice Company, In-

corporated. Judgment for plaintiff, and defendant brings error. Reversed.

Kemp & Barksdale, of Lynchburg, for plaintiff in error.

T. J. O'Brien, of Lynchburg, for defendant in error.

KELLY, P. This is a writ of error to a judgment obtained upon notice of motion by the Lynchburg Diamond Ice Factory, a corporation, against the Standard Ice Company, Incorporated, for a balance alleged to be due the former from the latter upon an account growing out of the dealings between the parties under a certain contract, which was as follows:

"Memorandum of an agreement, made this 4th day of January, 1912, between Lynchburg Diamond Ice Factory, party of the first part, and Standard Ice Co., Inc., party of the second part.

"Witnesseth, that for and in consideration of the mutual advantages to be derived herefrom and of one dollar (\$1.00) cash in hand paid by each of the parties hereto to the other, the receipt of which is hereby acknowledged, the parties hereto agree to and with each other as follows, to wit:

"First. That the said party of the first part will, during the ten (10) years next following the first day of January, 1912, sell unto the said party of the second part merchantable ice suited for retail family trade in the city of Lynchburg at the rate of three dollars and fifty cents (\$3.50) per short ton delivered upon the platform of the said party of the first part at and after five o'clock a. m. each day, except Sunday, said ice to be weighed by the said party of the first part upon scales approved by the inspector of scales.

"Second. The said party of the first part agrees to sell and the said party of the second part agrees to buy a minimum amount of ice which shall equal five thousand (5,000) tons per year to be distributed as follows:

"In November, December, January and February, 300 tons.

"In March, April, May and June, 1,500 tons.

"In July, August, September and October, 3,200 tons.

"And in addition to said five thousand (5,000) tons, said party of the first part hereby agrees to furnish at the option of the said second party, ice of the aforesaid quality and at the price above named up to the full making capacity of the plant of the said party of the first part, namely, forty-five (45) tons every twenty-four (24) hours.

"Third. The said party of the second part agrees that in the event that he shall require more than twenty-five (25) tons of ice per day that he will notify in writing the officer in charge of the plant of said party of the first part twenty-four (24) hours in advance of the amount of ice which he will expect the said party of the first part to furnish under this contract, the amount to be stated as nearly accurate as possible and within five tons per day of the amount that shall be required by the said party of the second part, and when so notified the said party of the first part hereby

agrees to hold for said party of the second part and the said party of the second part hereby agrees to accept the amount so specified.

"Fourth. In consideration of the agreement by said party of the second part to purchase of said party of the first part ice as hereinafter set forth, the said party of the first part agrees for itself, its successors and assigns that it will not sell, within the ten years above specified, to any other person than the party of the second part, either at wholesale or at retail, ice to be delivered, sold or used within the city of Lynchburg or within one mile from its corporate limits as they now are or may be hereafter constituted. The party of the first part shall have the right to sell ice to be used outside of the above limits.

"Fifth. The said party of the second part agrees to pay said party of the first part for all ice delivered unto him, the said party of the second part, by the said party of the first part on the first day of each and every calendar month for the ice so delivered within the previous month. If the first day of said month fall on Sunday payments shall be made upon the Monday following.

"Sixth. In the event the plant of the party of the first part is partially disabled by breakdown, fire, high water, washout, or from any other cause whatsoever beyond its control, it shall not be required to furnish any ice under this contract until it is able by reasonable diligence, to resume operations, except such ice as it is able to manufacture during that time, and the party of the second part shall be entitled to a credit on the minimum amount of ice required to be taken under this contract for the proportionate time said plant is shut down or disabled. In event that the plant of the party of the first part is entirely destroyed, it shall be optional with the said party of the first part to rebuild within a reasonable time and to continue this contract, and the said party of the first part shall give due notice to the party of the second part of its intention to resume or discontinue operations."

Prior to the making of this contract both parties manufactured, stored and sold ice, the plaintiff company selling principally to Williams & Barnett Co., ice retailers in Lynchburg. Mr. G. A. Barnett was president of the plaintiff corporation and one of the owners of the Williams & Barnett Co. When the contract above quoted was made the Standard Ice Company purchased the retail business of Williams & Barnett Co., and this resulted in leaving the retail field in Lynchburg, so far as these three companies were concerned, exclusively to the Standard Ice Company.

The parties to the above-quoted contract have dealt with each other constantly from the date thereof to the present time. No difference arose between them with reference to the meaning and construction of the contract prior to the year 1918. The controversy here involved relates exclusively to transactions during the years 1918 and 1919, and arose because of the increased cost and selling price of ice.

We shall not attempt any analysis of the various items entering into the plaintiff's

claim, and the defenses and offsets offered by the defendant. They are intricate and confusing. The fundamental differences between the parties arise out of the language of the contract itself, and may be stated as follows:

1. What is the maximum quantity of ice which the defendant had the right to demand, and in what daily quantities?

2. Did the sixth clause of the contract exempt the plaintiff from liability for failure to supply ice during a period of nine days in October, 1918, when it claimed to be unable to operate its plant because of sickness among its employees?

The answer to the first question depends upon what the contract means by "the full making capacity of the plant." Does it mean, as plaintiff contends, that the defendant is entitled upon proper notice to demand a maximum of 45 tons each day except Sunday; or does it mean, as the defendant contends, that no daily maximum is fixed, and that it is entitled to demand on any day of the week such quantity as it may need for its retail trade, not to exceed in any one week more than the total capacity of the plant for that week, including Sundays?

[1] Taking the contract as a whole and giving a fair interpretation to all its provisions bearing upon this question, we are of opinion that "the full capacity of the plant" had exclusive reference to the daily, and did not contemplate the weekly, capacity. The first clause provided for a sale of ice "for retail family trade * * * delivered upon the platform of the said party of the first part at and after 5 o'clock a. m. on each day, except Sunday." The second clause provided for a four-month minimum, to be taken by the defendant, in each of the three sections into which each year was by the contract divided, which minimum even in hot seasons was very materially less than the full capacity of the plant; and this clause further provided that the defendant at its option might require the plaintiff to furnish ice "up to the full maximum capacity of the plant * * * namely, forty-five (45) tons every twenty-four (24) hours." The third clause provided that if the defendant should require more than 25 tons per day, it should notify the plaintiff, in writing 24 hours in advance, of the amount which it would expect, to be stated as nearly accurate as possible and within five tons of the amount, and that when so notified the plaintiff should "hold" for the defendant, and the latter should accept the amount so specified in the notice. The fourth clause obligated the plaintiff to refrain, during the period of the contract, from selling ice at wholesale or retail within the city of Lynchburg, or within one mile of the corporate limits, but expressly permitted sales outside of those limits.

[2] The parties are agreed that the defendant was not bound to take ice every day; that

it could take 25 tons on any day, except Sunday, without notice, and could not have more than 25 tons on any day in the absence of written notice, unless, of course, such notice was waived by the plaintiff. The real question is, Could the defendant upon proper notice demand more than 45 tons, the daily capacity of the plant, on any one day? We think it is fairly clear from the language of the contract as a whole that the amount over 25 tons per day which the defendant could require upon the notice aforesaid was intended to be limited to the full capacity of the plant for the day or days for which the notice was given. If there be a doubt as to the construction of this feature of the contract, it should be resolved against the defendant as the party in whose favor it was inserted. Where various stipulations are contained in a contract, some of which are particularly intended for the benefit of one of the parties, and others of which are particularly intended for the benefit of the other party, it is fair to say that the language of such provisions should be regarded as that of the party in whose favor they are inserted, and therefore to be construed most strongly against such party. This rule of construction is not favored by the courts, and should not be invoked where the language of the contract is clear. In this case we think the rule ought to be applied.

It is strongly urged upon us that both parties, when they entered into the contract, knew that the quantities of ice for retail trade depended largely upon weather conditions; that in Lynchburg ice was not delivered to the retail trade on Sundays; that therefore the daily requirements would vary; and that, certainly on Saturdays, the defendant would often need as much as two days' supply, which would be twice the daily maximum capacity of the plant. This argument is not without force, but it is not conclusive, and other considerations appearing in the case outweigh it. The defendant concedes that to sustain this contention we would have to construe the third clause of the contract as meaning that the plaintiff might often be required to hold at least one full day's output in refrigeration for the defendant, and this, we think, was never contemplated. What the contract meant by saying that the plaintiff should on notice "hold" the ice required in excess of 25 tons manifestly was that it should make no other disposition of the excess for that day. If the defendant meant to require the plaintiff to hold ice in storage, the contract failed to say so. The argument, based upon the theory that the parties knew the daily retail sales of ice would fluctuate with the weather, and that more ice would be required on Saturdays than on other days, is very largely met by the provisions of the contract itself. If the construction we have placed

upon it is correct, there still remains a very wide play—from no ice at all to 45 tons in any one day—to cover varying daily demands. If the daily maximum was insufficient on certain days, it is as reasonable to assume, in the absence of more explicit terms on the subject than the contract contains, that the defendant, which had an ice plant of its own, would have to take from the plaintiff and store for itself the extra ice needed for such days, as it would be to hold that the plaintiff was obligated to store it for him.

[3-5] It is further very earnestly insisted that the course of dealing between the parties from 1912 to 1918 placed a practical construction on the contract in accord with that now contended for by the defendant. The dealings of the parties to a contract in relation to its terms are often conclusive upon questions arising as to its effect or meaning. This may be because the parties have deliberately and mutually disregarded its plain terms, or it may be because they have so dealt with each other as to definitely fix the meaning of the terms which would otherwise be of doubtful import. In the former case their plain rights have been waived, and this may apply to either a part or the whole of the period covered by the contract, depending, of course, upon the length of time during which the waiver has been in operation. In the latter case the doubtful rights of the parties have been fixed by their practical dealings with each other. In either case, however, if their course of dealing has been of doubtful purpose and import respecting the meaning of the contract, such dealings are themselves open to explanation and interpretation. In this case it is true that the plaintiff for years delivered ice to the defendant in such daily quantities as the latter demanded, regardless of any maximum provided for in the contract. This happened quite often on Saturdays, but also on other days. No point was made of this, and plaintiff charged and was paid for the ice at the contract price, whether more or less than 45 tons was delivered on any particular day. It is also true, however, that during that period the ice market was apparently not very active, the price was low, and both the plaintiff and the defendant had an average available supply of ice to an amount in excess of the demands of their trade. The defendant sometimes failed to take as much as the sectional minimum which he was plainly required under the terms of the contract to take, and was not required to settle for the shortage. In 1918 the price and demand had increased. Each party then could advantageously use and sell more ice. Prior to that time it had been to the plaintiff's advantage to waive a strict compliance with the contract as to quantity, for it could get no more than the contract price by selling else-

where. This is the frank explanation given by the plaintiff for not insisting upon a strict conformity by the defendant with his contract. It is a reasonable explanation, and we cannot agree with counsel for defendant in charging the plaintiff with bad faith. Of course, if plaintiff was trying to violate his contract because prices had advanced, it was censurable to a high degree; if not, it certainly had the right to waive the terms of the contract for the time and to invoke a strict compliance therewith whenever it saw fit to do so at a later date. This, we think, is what was done. The plaintiff was not given by the lower court, nor do we intend by anything we have said to accord to it any rights which it might have insisted upon, but did not assert under the contract during any past period.

[4-8] We come now to the second question, which involves the sixth clause of the contract. It appears that for nine days in October, 1918, the plaintiff failed to furnish all the ice which the defendant was entitled to, because it was prevented from operating its plant by reason of sickness among its employees and inability to secure other men in their places. For this reason the plaintiff contended and the trial court held that it was entitled to the exemption provided for in the sixth clause. This we think was error. The ejusdem generis rule is to be sparingly and cautiously applied, but it has a proper place in the law, and is applicable here. This rule, which applies alike to statutes and contracts, is a familiar one, and requires that where general words follow particular words, the former are to be regarded as applicable to the persons or things particularly mentioned; and the rule applies even if the general words are broad enough to cover other persons and things, unless something in the instrument plainly indicates that they are to be otherwise applied. *Am. Mang. Co. v. Va. Mang. Co.*, 91 Va. 272, 281, 21 S. E. 466. The language of the contract to be construed here is:

"In the event the plant of the party of the first part is partially disabled by breakdown, fire, high water, washout, or from any other cause whatsoever beyond its control, it shall not be required to furnish any ice," etc.

The idea manifestly is to provide against some physical disability of the plant—a thing which has not occurred in this case, for, as a matter of fact, the plant remained in perfect operating condition, but ice could not be harvested during the nine days in question for want of men. If there were any doubt about the meaning of the language, it would seem to be entirely removed by the next sentence in the contract, which again speaks of the plant, and makes provision for a case in which, instead of being partially disabled, it should be "entirely destroyed." Furthermore, applying the rule here which we ap-

plied above to the language used for the benefit of the defendant, as this language was plainly inserted in the contract for the benefit of the plaintiff, we must adopt a construction which will resolve the doubt, if any, against that party. The language in question cannot, in our opinion, be held to give the plaintiff exemption in case of inability to run its plant for want of men. Whatever the parties might have done if a situation of this sort had been in mind when the contract was written, it seems clear that they were not thinking about such a contingency, and therefore simply failed to deal with it one way or the other.

This disposes of the two main points of difference between the parties on this appeal. Certain other differences between them were settled at the trial, and are not made the subject of any assignments of error by either party, and this opinion is to be construed as approving the action of the trial court in all respects except where the contrary affirmatively appears.

The foregoing discussion makes it unnecessary to discuss seriatim the instructions as offered and given at the former trial of the case. What has been said will in the main be sufficient to indicate our views as to the instructions which should be given if the case is tried again.

Plaintiff's instruction A, however, given over the objection of the defendant, should be specifically adverted to. That instruction was as follows:

"The court instructs the jury that under the contract between the Lynchburg Diamond Ice Factory and the Standard Ice Company, Incorporated, that the Standard Ice Company was required to take at least 5,000 tons of ice a year, to be distributed as follows:

November, December, January, and February	300 tons
March, April, May, and June	1,500 "
July, August, September, and October	3,200 "

"If therefore, they believe from the evidence that during any four months, as aforesaid, the defendant failed to take a minimum, then you shall find for the plaintiff and assess damages at such a sum as it may have lost and have been damaged by reason of the failure of the defendant to comply with said contract, at \$3.50 per ton."

[7] Two objections are made to this instruction. The first is that it is confined to the duty of the defendant to take, and ignores the duty of the plaintiff to furnish, the minimum quantity of ice provided for in the contract. This point is not well taken because the jury could hardly have been unreasonable enough to find that the defendant "failed to take a minimum," or any part thereof, which the plaintiff was obligated to furnish, but failed and refused to furnish.

[8, 9] The second objection is more serious.

The instruction might be understood to say that the plaintiff's measure of damage for every ton of ice which the defendant failed to take within the minimum amount was \$3.50 per ton. It seems probable from the evidence that the plaintiff could, during the period covered by the account here sued on, have sold any ice it had ready, and which the defendant could have been compelled to pay for, at a higher price than the contract figure. The plaintiff was selling outside of Lynchburg and at times had ready sale for all of its ice, as the proof clearly shows.

"Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent." *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 117.

Judge Keith, quoting this proposition in *Stonega Coal Co. v. Addington*, 112 Va. 807, 813, 73 S. E. 257, 259 (37 L. R. A. [N. S.] 969), adds:

"Authorities upon this subject might be multiplied to an almost unlimited extent."

It may be that the instruction was intended to state the measure of damage in accordance with the rule just quoted. If so, it should have been more clearly expressed.

For the reasons stated above the judgment complained of will be reversed, and the cause remanded for a new trial, if defendant shall be so advised, in conformity with the views herein expressed.

Reversed.

SIMS and BURKS, JJ., absent.

(129 Va. 350)

CAMP MFG. CO. v. GREEN et al.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Partition \S 44 — Quieting title \S 29 — Where suit is to remove cloud, and not for partition, doctrine of laches is not strictly applicable.

The general rule that laches does not apply to a partition suit by legal title holder within the statutory period, where no title has been acquired by adverse possession by the defendant or his predecessors is not applicable, where complainants' bill is not merely one for partition, where the parties' rights are clear, but shows adverse claims under deeds running through a period of 50 years, and alleges conveyances constituting a cloud on title, and prays that the rights of all parties be adjudicated.

2. Quieting title \S 1 — Equitable doctrine should control disposition of proceeding to remove cloud.

Where the only controversy in a case arises from deeds claimed void and the adverse

claims thereunder, and the complainants seek relief by removal of cloud on title which only an equity court could give, equitable doctrines should control.

3. Quieting title §29—Laches applies to settling conflicting titles from danger of losing available evidence.

Underlying reason for the doctrine of laches as applied to conflicting land titles, in removing clouds, is that because of lapse of time and the death of the parties it is impossible to ascertain all the facts, and therefore it is just to leave the parties in the position in which they have placed themselves.

4. Evidence §69—Where actors in transactions are dead, honesty rather than questionable motives will be imputed to them.

In a proceeding to remove cloud from alleged void deed after a lapse of about 50 years, and after the actors in the transactions have died, conduct which would have required explanation from the living will be construed to impute intelligence, honesty, and integrity to deceased, rather than ignorance, fraud, chicanery, and intention to do wrong, and parties must be presumed to have known their rights when making a family settlement.

5. Evidence §66 — Presumption that complainants' ancestor had notice of sale of land and either received payment or waived right to collect.

Where neither complainants, seeking removal of cloud, nor their ancestors, made any claim of title for 52 years, it cannot be assumed, because it could not be specifically proved that an ancestor had notice of the transaction by which her husband sold the land, that she had no such notice; but, in the absence of contrary proof, it must be presumed either that the balance to be paid to the parties entitled thereto from the sale of land by the executor was paid to the parties entitled thereto, or that they have waived their right to collect it.

6. Evidence §236(5)—Heirs bound by admission of party from whom they inherit.

In a proceeding to remove cloud on title, consisting of a deed given by an executor, the admission in an affidavit in a chancery suit by one of the heirs that his mother had received her share of the purchase money from the executor is binding upon complainants, wife and children of the affiant.

7. Executors and administrators §149—Heirs barred after 52 years from asserting rights as against executor's deed.

Where an executor sold land without authority, heirs *held* barred from asserting rights which originally existed by the lapse of 50 years, and consequent loss of evidence, acquiescence, and ratification.

8. Estoppel §106—Executors and administrators §149—Available at law; executor's sale ratified by receipt of proceeds.

Equitable estoppel is available in an action at law as well as in equity, and an executor's sale, though void, is ratified, if, without fraud or mistake, the parties receive the proceeds therefrom.

9. Quieting title §29—One remaining silent, and not protecting title to land, until evidence is destroyed, is barred from relief.

While mere lapse of time or inaction by owner with clear record title without adverse possession will not defeat title, yet unexplained and unreasonable delay, with adverse claims and facts and circumstances brought home to the legal title holder, and his failure to act for such time as to destroy all of the evidence of the original transaction out of which adverse claims arose, will bar relief by removal of cloud after the rights and equities of others have supervened.

10. Executors and administrators §149 — Heirs held not entitled to attack deed of executor without accounting for proceeds of sale inherited by their ancestors.

Heirs, seeking to overthrow executor's deed given without authority, who are also heirs of such executor, so that, if executor did not account to their ancestors, they must have received such proceeds through descent from executor, cannot successfully assert title to the property without accounting for the proceeds of sale.

11. Executors and administrators §149 — Heir under whom complainants claim held to have ratified executor's sale.

In a proceeding by heirs to set aside a deed of executor, who was the husband of their ancestor, facts *held* to show that such ancestor was not merely silent, but expressly and conclusively ratified the sale and received the benefits, so that heirs are barred.

Appeal from Circuit Court, Brunswick County.

Suit by Joseph B. Green and others against the Camp Manufacturing Company and others. From a decree, the named defendant appeals. Reversed and rendered.

E. P. Buford, of Lawrenceville, for appellant.

E. R. F. Wells, of Norfolk, B. A. Lewis, of Lawrenceville, and Plummer & Bohannon, of Petersburg, for appellees.

PRENTIS, J. The material facts out of which this controversy arises are these: Miles B. Branch died in 1861, seized of a tract of 787½ acres of land in Brunswick county. By his will, which was probated in October, 1861, he gave his wife one-third of his estate for life, and subject to this life estate he devised the land to his four daughters, Ann R. Green, Rosa M. Branch, Susan E. Branch, and Mary E. Branch. George W. Green, who was the husband of his daughter, Ann R. Green, was named as executor and qualified. Besides his widow, he left surviving him nine children, five sons and the four daughters above named. After his death 266½ acres of the land was assigned to his widow, and this left 521 acres devised in fee to the four daughters. Notwithstanding the fact that the executor had no author-

ity under the will to sell the real estate, he in 1863 sold this 521 acres at public auction. One of the sons, William J. Branch, became the purchaser, and the executor undertook to convey it to him by deed dated January 23, 1864. On October 24, 1878, this son, William J. Branch, executed a deed of trust thereon to secure certain of his own indebtedness, and thereafter he conveyed three parcels thereof, aggregating 150 acres to Goodwyn Grain, Sallie Penn and Lewis Penn, severally, and it is conceded that they have acquired good titles thereto by adverse possession. On August 26, 1882, Leake and Donnan, trustees under the deed of trust, sold and conveyed the residue thereof, 371 acres, to the administrator of Carter R. Bishop. On July 24, 1889, Davis and Mann, special commissioners acting under a decree of the hustings court of the city of Petersburg, sold this 371 acres at public auction to E. G. Temple and conveyed it to him. On September 15, 1889, Temple conveyed the same 371 acres to the Brunswick Lumber Company, and on November 1, 1902, the Brunswick Lumber Company conveyed it to the appellant, Camp Manufacturing Company. This 371 acres has been in a state of nature, covered with a growth of standing timber, since the death of Miles B. Branch, and has not been in actual possession of any of the parties.

The subject of this immediate controversy is only that share of the 371 acres which belonged to Ann R. Green, one-fourth of which she derived under the will of her father, Miles B. Branch, and one thirty-second thereof by descent from one of her four sisters, Rosa M. Branch, who died in 1864, making a total of nine thirty-seconds. George W. Green, the executor, lived until the year 1890, and his widow, the said Ann R. Green, survived him several years, but has been dead for many years. The accounts of the executor, of which he made two, show that he received \$4,689 for the 521 acres so sold by him at public auction, and that a portion thereof was applied to the payment of the claim of Miles B. Branch, Jr., another son of the testator; the personal property for which he accounted being insufficient for that purpose. The purchaser, William J. Branch, died in 1910, more than 80 years old.

Ann R. Green and George W. Green left seven surviving children as their heirs at law. The complainants here are their son, Joseph B. Green, their daughter, Freddie Britton, and the widow and three children of their son, Sidney M. Green; so that J. B. Green and Freddie Britton claim directly as heirs at law of their mother, Ann R. Green, and the other complainants as heirs at law of her son, their father, Sidney M. Green, deceased.

Prior to this litigation (in 1909) the claimant of the undivided interests in the land

which had been devised by the will to Susan E. Branch (who became Mrs. Dunn) and to Mary E. Branch (who became Mrs. Rae) instituted an action of ejectment and recovered eighteen thirty-seconds of the entire tract. The history of that litigation is found in *Seward v. Camp Mfg. Co.*, 112 Va. 479, 71 S. E. 614. After this recovery the Camp Manufacturing Company instituted its suit in equity to enjoin the enforcement of that judgment, upon the ground that the original devisees, Mrs. Rae and Mrs. Dunn, were estopped by laches, and that their grantee, Seward, who had recovered in the action of ejectment, was likewise estopped. In that suit both Mrs. Rae and Mrs. Dunn testified that they had never received any part of the purchase money. The trial court refused the injunction, and this court refused an appeal November 9, 1911. More than 4 years thereafter, in January, 1916, the complainants instituted this suit, claiming their proportions of the nine thirty-seconds of the land as children and grandchildren and as successors in title to Ann R. Green. The bill recites the various conveyances under which the appellant claims title, and alleges that these conveyances constitute clouds upon the title of the complainants and of the other lawful owners thereof as successors in title to Ann R. Green, and so prevent the free alienation of their interests, and prays that, in the event partition in kind cannot be made, the land may be sold and the proceeds divided among those interested therein in accordance with their respective rights and equities, that the rights of all parties to this suit in and to the said land may be adjudged, and for general relief.

The appellant, as one of the defendants, filed its demurrer and answer to this bill, which demurrer the trial court overruled, and, having first established the title of the appellees to the interest in the land which they claimed, referred the cause to a commissioner to ascertain what damage, if any, they had suffered by reason of timber cut and removed from the premises by the appellant; and it is of these decrees that the appellant complains.

The case has been elaborately and ably argued, and this reduces and simplifies our own labor. The appellant here is not relying upon mere silence to bar the assertion of a title to land, originally good, but now alleged to be stale and antiquated, nor does it rely merely upon the doctrine of equitable estoppel by conduct to bar the assertion of the legal title. To use the language of the appellant's learned counsel, it relies upon—

"the defenses of laches and equitable estoppel upon the grounds: (1) That this suit was not brought until 52 years had elapsed after the execution of the deed by George W. Green, executor, which is now assailed; (2) that all the parties to the original transaction have long been dead, and evidence to prove the original

facts and circumstances is no longer available; (3) that the suit was not brought by parties whose rights were affected by the executor's sale, but by members of the second and third generations; (4) that the ancestors of the plaintiffs evidently abandoned all claim to the legal title to the land in controversy; and (5) that the ancestors of the plaintiffs received the benefit of the whole of the proceeds of the sale."

[1] For the appellees it is contended that there is no evidence to sustain these propositions, and that the appellant's case rests entirely on allegations, assertions, and assumptions unsupported by sustaining evidence. It is claimed, and this must be conceded, that the general rule is that the doctrine of laches does not apply to a suit for the partition of land brought by the holder of the legal title within the statutory period, where there has been no title acquired by adverse possession by the defendant or his predecessors in title. It is said in *Cole's Adm'r v. Ballard*, 78 Va. 149, that—

"No principle is better established, or more uniformly acted on in courts of equity, than that in respect to the statute of limitations—equity follows the law—that is to say, if a legal demand be asserted in equity, which at law is barred by statute, it is equally barred in a court of equity; and if not barred by statute at law, neither is it barred in equity."

[2] And, relying upon this doctrine, the claim is made that because the deed from Geo. W. Green, executor, is void, and there has been no adverse possession of the property, the legal title of the complainants is perfect, and the defense of laches cannot be invoked to defeat such a title. In this case, however, the complainants themselves show by their bill that this is not a mere suit for partition, in which the rights of the parties are clear, but the bill itself shows adverse claims under deeds running through a period of over 50 years, alleges that these conveyances constitute a cloud upon the title, and prays that the rights of all of the parties may be adjudicated. This we think sufficient to take the case out of the general rule just alluded to. There is no other controversy in this case, except that which arises out of these deeds and the adverse claims thereunder. The complainants have sought the relief which only a court of equity could give—that is, the removal of the alleged cloud upon their title created only by these conveyances and the consequential adverse claims thereunder. Hence, equitable doctrines should control the disposition of the case.

[3] The underlying reason for the doctrine of laches is that because of the lapse of time, and the death of parties, it is impossible to ascertain all the facts, and therefore it is just to leave the parties in the position in which they have placed themselves.

In the case of *Akins v. Hill*, 7 Ga. 577, it is said:

"Equity will not aid in the enforcement of stale demands. Although statutes of limitations are obligatory in equity as well as at law, yet there are cases where that court will make time a bar, although not strictly pleadable as a limitation. * * * The peace of society requires that there should be limits put to litigation. The justice and sense of civilized communities have ever favored limitation laws. There is no principle of equity sounder, more conservative and more prolific, in all the fruits of peace, than this: That he who slumbers over his rights, with no impediment to his asserting them, until the evidence upon which a counterclaim is founded, may, from lapse of time, be presumed to be lost; until the generation cognizant of the transactions between the parties has passed away, and until original actors are in their graves, and their affairs are left to representatives—the law, in the exercise of an equitable sovereignty, presumes it to be unjust, that under such circumstances, a complainant should be heard; and in nine cases out of ten, it is unjust in fact, as well as in theory. It is presumed, and the presumption grows out of the principles of human nature, developed in universal experience, that men will use reasonable diligence to get what rightfully belongs to them."

[4] The fact that all of those interested in the property at the time the original void conveyance was made, all of the actors in the transactions out of which this controversy arises have died, makes it necessary, in order to do justice, to consider every circumstance from which any inference may be fairly drawn. Conduct which would have required explanation from those responsible for and familiar with the transactions under criticism will be construed so as to impute intelligence, honesty, and integrity to the actors who cannot now speak, rather than ignorance, fraud, chicanery, and intention to do wrong. The executor, who was the husband of Ann R. Green, and who sold her property, is dead; the purchaser, her brother, who paid for the land which he had bought at public auction, is dead, and another of her brothers who received a part of the proceeds of sale, claiming to be a creditor of their father, the testator, is dead. Thus all of those who were then interested in the property, and must therefore be presumed to have known their rights, are dead; so that we can only speculate as to the truth from the meager facts developed as to this long past family settlement made by these four thus bound by ties of affection and interest each to all the others.

[5] The time itself is most impressive—that is, the fact that for 52 years, until this suit was instituted, there was no claim of title by these appellees, their parents and their grandparents under whom they claim. What other inference can be fairly drawn from these circumstances than that Ann R. Green herself acquiesced in these transactions? Her husband was the executor, her mother lived upon that adjacent portion of

the original tract of land which had been assigned to her for life, two of these sales were at public auction, and 150 acres of the original tract has been occupied by claimants under deeds equally invalid as those under which the appellant claims. It taxes human credulity too much to assume, because notice is not specifically proved, that Ann R. Green had no notice of these transactions.

While it is true under the doctrine of *Leavell v. Smith's Ex'rs*, 99 Va. 374, 38 S. E. 202, that the ex parte accounts of executors and administrators are not evidence of overpayments by them, or that the claims stated in such accounts were debts justly due by the deceased and chargeable upon his real assets, nevertheless, it is proper in this case that we should consider the fact that the accounts of the executor exist, that they indicate that the personal estate was insufficient to pay the debts of the testator, and if this was true that it would have been necessary to sell the real estate for the purpose of providing the funds for the payment of such debts. This, however, is not for the purpose of now establishing these debts against the estate of the heirs at law, for they have long since been barred, but in order to show that the fact thus indicated by the accounts was thereby called to the attention of the devisees, and therefore supplies the motive which may have gulled them in acquiescing in the illegal sale of their property. Then again that account can be adverted to for the purpose of showing that the executor himself admitted his own liability to the owners of the land for the balance of \$3,434.58 shown to be due by him on December 31, 1863. Certainly, in the absence of contrary proof, there must be a presumption which would be enforced in every forum, either that this balance has been paid to the parties entitled thereto, or that they have waived their right to collect it. It inevitably follows that if Ann R. Green, under whom the appellees claim title, has received her share of this balance arising from the proceeds of sale of her land, they are estopped from asserting title to the land itself.

[6] As to the claim of the children of Sidney M. Green, there is still an additional circumstance to be considered—that is, that Sidney M. Green himself made an affidavit in the chancery suit of *Camp Manufacturing Company v. Seward*, in which that company was endeavoring to enjoin the judgment in the action of ejectment above referred to, which contains the statement that he was sure that his mother, Ann R. Green, had received her share of that purchase money. This statement is made in reply to a question which had no reference to Ann R. Green's interest, but only related to the interest of two of her sisters which was involved in that litigation, and as to one of these sisters he stated that she had received her share,

while as to the other that she had not, and then he volunteered to say that he was sure that his mother had received her share, his impression however being based upon information received as a member of the family. While this deposition in its entirety may not be admissible as evidence in this case, it is certainly true that the admission of a party in interest against his own interest, however and whenever such admission may be made, can always be introduced when it affects either his own claim or that of those claiming under him. It is proper to observe in this connection that although this statement was made in 1911, he, Sidney M. Green, the eldest son of Ann R. Green, the husband of one and the father of three of these complainants, lived until 1915, and this suit was not instituted until 1916. It may be regarded as absolutely certain that if Sidney M. Green thereafter, in his lifetime, had brought suit asserting such a claim of title as his widow and children here assert, this admission on his part would have defeated it.

[7] It does not seem necessary to cite authority for our conclusion that these parties are barred from asserting the rights which originally existed by reason of the lapse of time, and consequent loss of evidence from which the court might ascertain the truth, as to such acquiescence and ratification; but such authority is not lacking in cases resembling this.

[8] In *Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394, it is held that the doctrine of equitable estoppel is legally available in an action at law as well as in equity. Hence, if a guardian has made a void sale of his ward's real estate, but in good faith, there being no fraud or mistake, and the ward has received the benefits of the proceeds of such sale, and has, by his conduct, ratified and affirmed it after he became of age, with full knowledge of the facts, the doctrine of equitable estoppel applies, and neither the ward nor those claiming under him, can afterwards recover the land itself. We do not mean by this citation to weaken the force of the rules generally applicable when the doctrine of equitable estoppel is invoked, for one of the essentials of that doctrine is that the party claiming the benefit of it has been deceived by the action of the party having the legal title to land, and where the facts are disclosed by the record itself, as in this case, the doctrine does not apply. *C. & O. Ry. Co. v. Walker*, 100 Va. 69, 40 S. E. 633, 914.

In *Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243, it is held that, where the land of a Shawnee Indian (and there are special statutes protecting Indians from the defense of laches) was sold, while he was a minor, by a guardian appointed by a probate court, and the Indian, after coming of age, delayed for more than 21 years to question the validity of the deed, and the property had in the

meantime greatly increased in value, and passed into the hands of different owners, no fraud or concealment or other exceptional circumstances tending to excuse the delay being shown, he cannot afterwards be permitted to attack the deed on the ground that the proceedings upon which it was based were void for want of jurisdiction.

In *Choteau v. Klapmeyer*, 68 Kan. 829, 75 Pac. 1009, there is the same result where a void deed had been given for land of a half-breed Indian, and he did not begin his action for it until after the lapse of 24 years. He was held barred of his right by his own laches.

In *Howe v. South Park Commissioners*, 119 Ill. 101, 7 N. E. 333, it is said that the principle that lies at the foundation of all cases in that court on this subject is:

"The party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title, or render it invalid, and diligent in his application for relief. Unreasonable delay, not explained by equitable circumstances, has always been declared evidence of acquiescence, and will bar relief."

[9] We do not mean that mere lapse of time or inaction on the part of the owner of real estate by clear record title, where there is no adverse possession, will defeat such title, but that unexplained and unreasonable delay, the existence of adverse claims of title, and of facts and circumstances fairly brought home to the knowledge of the owner of the legal title, and the failure to act for the protection of such legal title for such a length of time as to destroy all of the evidence of the original transaction out of which such adverse claim arises, will and ought to bar such relief, for the sound reason, so often stated that he who fails to speak when he ought to will not be heard if he attempts to speak after the rights and equities of others have supervened, when he ought to be silent.

The bill in this case recites the chain of conveyances running through half a century, shows that the appellant and its predecessors have claimed thereunder, but does not allege either ignorance of their rights or any other matter constituting any impediment whatever to an earlier prosecution of his suit. In *Hogg v. Shield*, 114 Va. 403, 76 S. E. 934, this is said:

"A party who seeks the aid of a court of equity, after long delay in the assertion of a claim, should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means, if any, used by the defendant to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider the case, on his own showing, without inquiring whether there is a demurrer,

or formal plea of the statute of limitations contained in the answer."

Here there were both the demurrer and the answer, setting up the defenses alluded to, so that the doctrine as stated in the case cited, and in many others which might be cited, applies.

[10] There is still another circumstance which is sufficient to defeat the relief prayed for in the bill. All of these appellees are either children or grandchildren of George W. Green, or claim under them. He received, according to his own executorial accounts, the entire proceeds arising from the sale of this land. If he has not accounted therefor, then his heirs at law and distributees or those claiming under them, have thus received the proceeds of the sale by so much as George W. Green's estate was thereby augmented, if he did so fail to account. Upon equitable principles, it is evident that, before these appellees can successfully assert title to this property, they must account for the proceeds of its sale which their ancestor received.

This from *Merwin's Equity and Equity Pleading*, § 908, cited by this court in *Inge v. Inge*, 120 Va. 329, 91 S. E. 142, is appropriate:

"From the nature of the case, no rigid rule can be laid down as to what delay will constitute laches; every suit must depend upon its own circumstances. But whenever the delay fairly justifies the inference of acquiescence in the adverse claim, or whenever it has been of such a character as to induce other persons to alter their circumstances or conduct, so that the element of estoppel is introduced, a court of equity will commonly hold the delay to operate as an absolute bar."

In *Parker v. Stephenson*, 127 Va. —, 104 S. E. 39, which was a suit for partition and the removal of a cloud, this is said:

"The infant complainant in the present suit has come into a court of equity, asking its aid and assistance to have the deed of trust and the deed made to the appellee in pursuance of the sale made thereunder 'declared void and of no effect as to said two-thirds of your orator,' and hence removed as a cloud on his title. Where the situation is such that equity can be done between the parties, the infancy of a complainant does not exclude him from the operation of the maxim that he who asks equity must do equity."

[11] The logic of these meager facts leads us irresistibly to these conclusions: While true, as a general rule, that the mere silence of the owner will not defeat a good record title to real estate, we have here the unequivocal declaration of the husband of one and the father of three of these claimants that his mother, Ann R. Green, received her share of the proceeds of sale, and this language is the antithesis of mere silence on his part. So, also, if the statement be true, such action on Ann R. Green's part, under whom all of the appellees claim, is not mere silence,

but express ratification, which is conclusive against all who claim under her, and it may be added that the truth of Sidney M. Green's statement is also fairly inferable from her own conduct, both during her husband's life and during the many years in which she survived him.

Upon the whole case, we are of opinion that the appellees are estopped by facts and circumstances which show that the evidence of the parties to the transaction, which might have established a complete defense, has been lost by lapse of time; that from the facts which do appear it may be fairly inferred that Ann R. Green, their common ancestor, under whom they claim, consented to the sale, and abandoned her title, and received her share of the purchase price; and in addition to this, because all of the claimants are either heirs at law of George W. Green, or claim as their successors in title, and so cannot repudiate his deed without accounting for the purchase price to the extent that his estate was increased thereby.

For the reasons indicated, we are of opinion that the trial court should have dismissed the bill, and in accordance with the prayer of the cross-bill of the appellant, should have entered a decree confirming its title to the land in controversy, and we will enter such a decree here.

Reversed.

SIMS and BURKS, JJ., absent.

(129 Va. 377)

CITY OF CLIFTON FORGE v. VIRGINIA-WESTERN POWER CO.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Electricity ☞11—Franchise covering night electric light service held not to cover day service also.

Where the franchise of an electric light and power company required it only to furnish incandescent lights "at all hours from sunset to sunrise, or as much earlier or as much later as weather conditions make it necessary," the franchise did not cover both night and day service in respect to compensation to be charged, notwithstanding that the company in fact had also been furnishing day service.

2. Estoppel ☞62(2), 78(1) — That electric light company furnished additional service held not to estop it from claiming that the franchise did not cover such additional service.

Where a light and power company operating under a franchise covering night service had for more than 10 years also furnished day service, such fact held not to estop the company from denying that the franchise covered day service also, and the police power of the state as exercised through the State Corporation Commission could not be ousted by such an estoppel in pais operating on the parties.

3. Appeal and error ☞1097(1)—Adverse decision on former hearing of same case not subject to review.

A contention fully considered and answered adversely to appellant on a former hearing of the same case is not subject to review on appeal.

4. Electricity ☞11—State Corporation Commission may fix rates for electric service not covered by franchise.

Where the use of streets, alleys, and other public property in a city for the purpose of furnishing electric service has been in existence without objection on the city's part for over 10 years, but no rate therefor has ever been fixed by contract, the State Corporation Commission may under Act March 27, 1914 (Laws 1914, c. 340), as amended (Laws 1918, c. 407), fix rates therefor, the act of the Commission being not a grant of a use, but a determination of rates for a use already in existence.

5. Electricity ☞11—State Corporation Commission may on its own motion alter rate schedules and substitute rates for light and power deemed just and reasonable.

The State Corporation Commission may on its own motion or on complaint of a proper party alter schedules of electric light and power rates filed before it and substitute therefor such rates as it may deem just and reasonable in view of Code 1919, §§ 4058-4073.

6. Electricity ☞11—Procedure for fixing light and power rates held to provide reasonable opportunity for hearing on part of city.

Since under Code 1919, § 4071, it is the duty of the State Corporation Commission to fix and order substituted for electric light and power rates filed, such rates as shall be just and reasonable, such procedure gives a city wherein the light and power company is operating ample opportunity to be heard as to the justness and reasonableness of the rates charged.

Appeal from State Corporation Commission.

Petition by the Virginia-Western Power Company before the State Corporation Commission for permission to withdraw in the City of Clifton Forge electric light and power service or for a determination of adequate service and to fix rates therefor. From the order of the Commission, the City appeals. Affirmed.

O. B. Harvey, of Clifton Forge, for appellant.

F. W. King, of Clifton Forge, for appellee.

BURKS, J. This is a continuation of the litigation involved in the case of the Virginia-Western Power Co. v. City of Clifton Forge, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148. On the former appeal the respective rights and duties of the parties were very fully considered and passed upon, and the validity and binding effect of the contract of franchise between the city and the predecessor

In title of the appellee were upheld as to the service stipulated for in the franchise. It was also held that as to services not so stipulated for jurisdiction over the same was vested in the State Corporation Commission, and it was its duty to exercise the same. On that appeal the cases of several cities and towns, involving practically the same questions, were heard together, and the Commission refused to take any jurisdiction whatever of them and dismissed the application of the appellee for an increase of rates on the ground that it could not approve rates within the corporate limits of such cities and towns in excess of those fixed by the respective franchises. This court affirmed the holding of the Commission as to franchise rates for franchise services, but in concluding its opinion said:

"For the foregoing reasons we find no error in the orders of the State Corporation Commission under review, save to the extent that they, without any investigation or consideration thereof, refuse approval of the rates filed with the Commission by the plaintiff in error which apply to services within the respective corporate limits of the defendants in error which are not attempted to be fixed or affected by the franchises involved in these cases. As to the latter rates, the Commission has jurisdiction under the statute of 1914, aforesaid, and it should assume such jurisdiction, make the investigation, and otherwise act with respect thereto in accordance with the provisions of the 1914 statute."

The powers and duties of the Commission under this decision were very plain. It was to ascertain whether or not the appellee was supplying any services within the corporate limits of the appellant which were not attempted to be fixed or affected by the franchise granted by the appellant, and, if so, to exercise jurisdiction over the same according to the provisions of the 1914 statute (Laws 1914, c. 340).

After the above-mentioned opinion was handed down, to wit, on April 7, 1920, the appellee filed its petition before the State Corporation Commission in which it undertook to set out the facts of the case and prayed that it might be permitted to withdraw in the city of Clifton Forge all service not required by the franchise granted by said city, or in lieu thereof that the Commission would determine what was an adequate and sufficient service in said city and fix just and reasonable rates for same. The city of Clifton Forge appeared by counsel and filed a lengthy plea to the jurisdiction of the Commission, the grounds of which will be more particularly noticed hereinafter. The appellee moved to strike out the plea. The Commission heard the case "upon the entire record and especially upon the said petition, the said plea, and motion to strike out, and the order of the Supreme Court of Appeals of Virginia," and struck

out the plea, but refused to allow the appellee to withdraw the present service from the city of Clifton Forge. The Commission thereupon ordered:

That, so long as the appellee "renders an electric service within the city of Clifton Forge other than that required by the franchise agreement aforesaid, it shall keep on file with this Commission a schedule showing its rates, tolls, charges, rules, and regulations applicable to such service as required by law, and that until the further order of this Commission the said company shall, so long as it renders within the city limits of the city of Clifton Forge, the service now being rendered, charge uniformly therefor the rates as set out in its schedule filed with the Commission on March 20, 1918. But this order shall be without prejudice to the right of the city of Clifton Forge to require the Virginia-Western Power Company to reinstate the service required of it by the franchise agreement and at the rates therein specified for the franchise service."

From this order the present appeal was taken.

The chairman of the Commission, in an elaborate and able opinion copied into the record, maintained the jurisdiction of the Commission over the rates for services rendered in the city which were not covered by the franchise and rightly interpreted the mandate of this court in that respect.

Under the franchise, the predecessor in title of the appellee and its successor or assigns were granted the right—

"to conduct, maintain, and operate for a period of 15 years from the granting of this franchise an electric light system in, and for the said city and the citizens thereof. And the said company is hereby granted permission to conduct, erect, and maintain in the streets and alleys of the said city all poles and wires and other appliances and use such currents of electricity that may be necessary for it to operate its said system to light said city and supply the citizens thereof with electricity and from time to time make such repairs and alterations therein as may be considered necessary for the conduct of its business."

In consideration for the grant, the grantee agreed to pay the city \$800, to furnish the city a specified number of arc lights at \$50 each per annum, others in excess thereof at \$40 each per annum, and to furnish incandescent lights to citizens at a scale of prices set forth in the franchise. As to the lights to be furnished to citizens, the franchise provides:

"Upon the completion of the said electric lighting system the said company shall furnish electric lights to all the citizens of said city who shall agree to take it and equip their houses with the necessary appliances therefor at all hours from sunset until sunrise, or as much earlier and as much later as weather conditions may make it necessary."

A few months after the franchise was granted the grantee thereof, without other

consideration than has been stated, began to furnish a continuous day and night service for lighting, and also a like service for heat and power, and this service has thence hitherto been and is now being furnished. It was conceded before the Commission that the night and day service could not be so dissociated as to permit the Commission to regulate rates for the latter service while maintaining the contract rate for the former, and the city not only refused to assent to the abrogation of the day service, but insisted upon its maintenance without increase of rates. The Commission was of opinion and decided that the continuous day and night service of lighting was a new service differing from and not covered by the franchise, as was also the service of heat and power, and that it had jurisdiction to fix the rates therefor. Its order, however, was "without prejudice to the rights of the city of Clifton Forge to require the Virginia-Western Power Company to reinstate the service required of it by the franchise agreement and at the rates therein specified for the franchise service."

Nearly every question raised on this appeal was settled on the former appeal, which we have neither the power nor the inclination to disturb.

In the petition for appeal it is said that three questions are involved in the case. They will be stated and numbered as in the petition:

[1] 1. "Does the franchise of April 13, 1907, and the contract of March 4, 1911, cover both night and day service in the city of Clifton Forge?" A mere reading of the franchise hereinbefore copied would seem sufficient to show that it did not cover such service. The grantee was only required to furnish incandescent lights "at all hours from sunset to sunrise or as much earlier and as much later as weather conditions make it necessary." There was no undertaking for a daytime service, and the city could not demand it. The contract of March 14, 1911, as shown on its face, was a mere compromise agreement to settle a dispute between the city and the power company as to the right of the latter, under its franchise, to charge citizens a minimum rate of \$1 for electrical services. It dealt with no other question connected with the franchise, and in no way affects the jurisdiction and power of the Commission over matters not covered by the franchise of April 13, 1907; nor was it a recognition that the franchise applied to both day and night service, nor a construction by the parties of any other feature of the franchise except the right to make a minimum charge under the franchise for the franchise service.

The occupation of the streets of the city by the poles and wires of the appellee was fully warranted by the franchise hereinbefore quoted. Sending the current along said wires in the day time, without objection from

the city, did not subject the appellee to the franchise agreement for the night service.

As pointed out by the Commission, the continuous day and night service is an inseparable service and one that is essentially different from that provided for by the franchise, hence, under the very terms of our former decision, is subject to the jurisdiction of the Commission.

[2] 2. "Has the Virginia-Western Power Company by rendering a continuous service within the city of Clifton Forge for more than 10 years estopped itself from denying that the said franchise does cover all classes of service?" The poles and wires of the power company were already occupying the streets of the city under the terms of the franchise, and for the mutual benefit of the citizens and of the power company a daylight service and heat and power were furnished the citizens at the same rate at which the night service had been furnished, but there was no obligation on the power company to furnish it at that price, the city had no right to demand it, nor was the rate for that service fixed by the franchise. It is said in the opinion of the chairman of the Commission that the contention that the day service is covered by the franchise contract is based "upon the theory that the voluntary rendition by the company, over a period of years, of the day service has resulted in a contract by estoppel. We can find no authority, statutory or otherwise, in support of such a contention, and cannot agree that the police power of the state, as exercised through the Commission, the constitutional repository of that power, can be rendered ineffective by an estoppel in pais, effective, if at all, only upon the parties to the contract." We concur in the conclusion reached by the chairman.

[3] 3. "Has the State Corporation Commission jurisdiction to fix any rates to be charged the citizens of the city of Clifton Forge for any services rendered them by said company?" In the reply brief for the appellant the contention of the appellant under this head is put thus:

"The city further maintains that the General Assembly has not conferred upon the State Corporation Commission jurisdiction to consider and determine any rates to be charged for electric service rendered wholly within the corporate limits of the city."

[4] This contention was fully considered and answered adversely to the appellant on the former hearing of this case, and is not now subject to review. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684. The city further insists:

"That, if the said act of 1914, as amended, be construed as giving the State Corporation Commission power to grant the right to use the streets, alleys, and other public property for the purpose of furnishing day electric service,

when the city has granted no franchise for such service, said act is unconstitutional and void."

The use of the streets, alleys, and other public property for the purpose of furnishing day electric service has been in existence, without objection on the part of the city, for over 10 years, but no rate therefor has ever been fixed by any contract between the city and the power company. The Commission is not granting a use, but fixing a rate for a use already in existence and not covered by the franchise agreement. In this it was entirely within its powers. The reserved police power of the state and the manner of its exercise has been so fully considered and discussed in cases recently decided by this court that it is not deemed necessary to do more than refer to them. *Virginia-Western Power Co. v. Clifton Forge*, supra.; *City of Richmond v. Ches. & Potomac Tel. Co.*, 127 Va. —, 105 S. E. 127.

The city further contends:

"That the record shows that the State Corporation Commission made no investigation as to the rates which it authorized to be charged the citizens of Clifton Forge and changed the same as fixed by franchise provisions without investigation and without an opportunity by the city to be heard."

This contention is fully answered by the Commission as follows:

"Under the provisions of the act of March 27, 1914, as amended (Acts 1918, c. 407), schedules of rates filed with the Commission by public utilities automatically become effective 30 days after filing unless suspended by the Commission upon its own motion or upon complaint of interested parties. The rates filed by the company on March 18, 1918, are not out of line with rates approved by the Commission in other communities in which the equipment in use and the operating conditions are substantially similar, and there appears to be no reason why the Commission, of its own motion, should suspend the rates as filed. No complaint has been filed with the Commission, and no representation made that said schedule of rates is 'unjust, unreasonable, unjustly discriminatory, or preferential,' and, the Commission having jurisdiction of such rates, the schedule filed with the Commission on March 18, 1918, is legally effective until changed in the manner prescribed by the statute."

[5, 6] The Commission had no power to change franchise rates for franchise services and did not attempt to do so. The power company had filed with the Commission in March, 1918, a schedule of rates for an entirely different service. This the Commission had power to change if, upon investigation, the rates were found to be unjust or unreasonable. The Commission does not initiate rates, but may alter schedules filed before it and fix and order substituted therefor such rates as it may deem just and reasonable. Code, c. 160. This it may do of its

own motion, if it deems it proper, or on complaint of a proper party. In the case at bar the Commission made no investigation and no change because the rates filed "are not out of line with rates approved by the Commission in other communities in which the equipment in use and the operating conditions are substantially similar and there appears to be no reason why the Commission, of its own motion, should suspend the rates as filed," and there have been no complaints. The appellant is in no wise hurt, as it may at any time hereafter go before the Commission and make complaint that the rates are unjust and unreasonable, and, if the complaint is well founded, it will be the duty of the Commission to fix and order substituted for the rates filed such rates as shall be just and reasonable. Code, § 4071. This procedure gives the city ample opportunity to be heard as to the justness and reasonableness of the rates charged.

We find no error in the order of the State Corporation Commission, and it is accordingly affirmed.

Affirmed.

PRENTIS, J., absent.

(129 Va. 388)

CITY OF RICHMOND v. CARNEAL et al.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Constitutional law §38—Constitutionality depends upon what may be done under statute.

The test of the validity of a statute claimed to be unconstitutional is, not merely what has been done under it, but what may be done under it.

2. Eminent domain §66—Whether land is taken for a public use is a judicial question for the court.

The question of the necessity, propriety, or expediency of resorting to the exercise of the power of eminent domain is a legislative function, in the absence of a constitutional inhibition, but the question of what constitutes a "public use" within the rule that private property can be taken only for a "public use" is a judicial question to be decided by the courts, not as a matter of discretion, but in the exercise of sound judgment under all the facts and circumstances of a particular case.

3. Constitutional law §52—Legislature cannot conclude constitutionality of its statutes.

The Legislature cannot conclude the constitutionality of its own enactments.

4. Eminent domain §13—Private property can be taken only for public use.

Under the Constitution, the power of eminent domain is limited to the taking or damaging of private property for public use.

5. Eminent domain \Leftrightarrow 19—Statute authorizing city to acquire land additional to that required for street held unconstitutional as authorizing the taking for other than a "public use."

Acts 1916, c. 71, in so far as it amends Acts 1906, c. 194 (Code 1919, § 3065, par. 2), authorizing city in street opening proceedings to acquire land in excess of that required and to replat and dispose of the excess in such manner as it may see fit, where such land is injuriously affected by the taking of a portion thereof for street purposes, held unconstitutional; the taking of such excess portion of the land not being for a "public use" within the Constitution limiting the taking or damaging of private property to a "public use."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use.]

Error to Hastings Court of Richmond.

Petition by the City of Richmond to condemn land, opposed by James D. Carneal and others. Petition dismissed as to a portion of the land sought to be taken, and the city brings error. Affirmed.

H. R. Pollard, of Richmond, for plaintiff in error.

J. Thomas Hewin, Jas. T. Carter, J. Samuel Parrish, D. C. O'Flaherty, and H. W. Goodwyn, all of Richmond, for defendants in error.

BURKS, J. The chief point involved in this case is the constitutionality of an act of assembly approved February 29, 1916, amending a previous act, relating to the opening and widening of streets by cities and towns. Acts 1916, pp. 112, 113. So much of the act as need be quoted is as follows:

"Any city or town in this commonwealth proposing to open or widen a street by taking any part of a block or square in such a manner that the value of the property abutting the proposed street, would be injuriously affected unless the property on such block or square is replatted and the property line readjusted, then and in that event the city or town * * * may * * * acquire by * * * condemnation * * * all or any part of the property on such squares or blocks and may subsequently replat and dispose of the property so acquired, in whole or in parts, making such limitations as to the uses thereof as it may see fit."

The city had annexed to its boundaries the town of Ginter Park, and under the decree of annexation was required to open a suitable and adequate highway from said town to the business center of the city. Pursuant to that decree, and by virtue of the authority of said act of assembly, the city by its constituted authorities petitioned the hustings court of the city to open a boulevard 80 feet wide between two designated points in the city as enlarged, and filed with its petition a map or diagram of the proposed boulevard showing

the land proposed to be taken for the location of the boulevard, and also the land on each side thereof proposed to be taken. The petition states that the land proposed to be condemned is needed for the opening and maintenance of a public street. The map or diagram filed with the petition shows that the proposed boulevard is of a uniform width of 80 feet, with a parkway in the center, and that it cuts diagonally across one or more squares or blocks of the city, so that the residue of lots therein not taken for the boulevard would touch the said boulevard obliquely and not on perpendicular lines. In some instances it would take a large portion of the lot through which it runs, in others only a small portion. It is stated in the resolution of the city council directing the condemnation, and also in the petition, that the city council is of opinion that not to acquire all or parts of the proposed property on certain blocks, squares or lots, through which the said proposed street will pass, would render it impracticable, without extraordinary expense, to make the proposed improvements, and it was also of opinion that certain of the properties abutting on the strips or parcels of land so to be acquired for the opening of the said street would be injuriously affected in value unless the whole or certain parts of the property in such blocks or squares are replatted and the lines readjusted to the new proposed street lines. The map or plat shows distinctly not only the lines of the street or boulevard proposed to be taken, but also the land on each side thereof proposed to be taken. Certain of the proprietors of lands proposed to be taken appeared and moved to dismiss the city's petition on several grounds, but chiefly on the ground that the statute aforesaid and the ordinance of the city passed in pursuance thereof are unconstitutional and void in so far as they authorized the taking of the lands outside of the strip 80 feet wide which was to be used for the street, because the use to which they were to be applied was not a public use. The hustings court took this view of the case, and while it directed the establishment of the street or boulevard, of the uniform width of 80 feet as shown on the map or plat, it dismissed the petition as to the lands outside of said street or boulevard. To this order a writ of error was awarded by this court.

The ordinance of the city and also the petition cite and rely upon the act of February 29, 1916, as authority for the right to condemn the lands outside of the lines of said street or boulevard. It is obvious, therefore, that the determinative question in the case is the validity of the statute aforesaid.

The only evidence offered in the cause was the map aforesaid and the resolution of the city council, which were filed as exhibits

with the petition, and which are also referred to by the commissioners who assessed the damages.

[1] We remark in limine that the test of the validity of the statute is not merely what has been done under it, but what may be done under it. *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825.

Under the act above quoted, if the proposed street takes only a small portion of a lot, leaving the owner's dwelling or place of business, or both, untouched, the city may nevertheless take the residue also, if the other conditions mentioned in the act exist, and the statement in the brief of counsel for J. D. Carneal is that just this condition exists in the instant case. That statement is that—

"The street or parkway cuts off a little corner of his lot; outside of that is a house, which is a home and a place of business, where the owner has been for 30 or 40 years."

So that the question presented for consideration is not merely what is possible under the act, but what is actually proposed to be done under it. We must consider, therefore, whether the taking of such residue, not needed for the street, is a taking for a public use.

The statute requires the petition to state the object for which the condemnation is asked. Code, § 3464. The petition in this case states the object as "the opening and maintenance of a public street." The opening of a public street is recognized everywhere as a public use, and the taking is not resisted as to so much of the land as is needed for the street. It is resisted only as to what is termed the "excess condemnation." As to the taking for the purpose of "maintenance of a public street," we know of no law to warrant it.

It has been urged upon us that "forward looking legislation has broadened state control over private property to meet social needs, and that the courts have likewise advanced, in sustaining the broadening legislation," and that within the last half century there has been a continued movement toward the enlargement of the powers of municipal corporations. Amongst other illustrations given are condemnations for public parks, boulevards and pleasure drives, public baths, playgrounds, libraries, museums, and the like, and even for æsthetic purposes. No such use is proposed in the present case, and it is beside the mark to discuss it. What is here proposed is to condemn land not needed for the street, replot it and sell it to others, presumably at a profit as no reason is assigned for the "excess condemnation," except that the city council is of opinion "that not to acquire all, or parts of the property on certain blocks, squares or lots, through which the said proposed street will pass, would render

it impracticable, without extraordinary expense, to make the proposed improvement." The lot owners are no more concerned than other taxpayers of the city with the cost of opening the street, but they have the right to insist that their property adjacent to the street shall not be taken from them and sold at a profit, either to pay or to reduce the expense of opening the street. Such a transaction may be good financing on the part of the city, and greatly to its benefit, but such use of private property is not a public use. "Public use" and "public benefit" are not synonymous terms.

Counsel for the city has been affluent in his citation of cases and text-books on the subject of "public use," and some of the cases thought by him to be most apposite will be hereinafter noticed, but none of them has gone to the extent here claimed. There have been a number of decisions in this state on the subject of what constitutes a public use, some of them of recent date, and while none of them involved the precise point now before us, they throw sufficient light upon the subject to guide us to a sound conclusion. We shall consider these first.

[2,3] While the question of the necessity, propriety, or expediency of resorting to the exercise of the power of eminent domain is a legislative function, in the absence of a constitutional inhibition (*Zircle v. Southern Ry. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 806), what constitutes a "public use" is a judicial question to be decided by the courts. The Legislature is forbidden to enact "any law whereby private property shall be taken or damaged for public uses, without just compensation," which in effect carries out the fundamental law of England and America that private property cannot be taken for private use, with or without compensation, but can only be taken for a public use. This inhibition, like other constitutional provisions, it is the duty of the courts to enforce. The Legislature cannot conclude the constitutionality of its own enactments. *Miller v. Pulaski*, 109 Va. 137, 63 S. E. 880, 22 L. R. A. (N. S.) 552; *Jeter v. Vinton-Water Co.*, 114 Va. 769, 76 S. E. 921, Ann. Cas. 1914C, 1029; *Boyd v. Ritter Lumber Co.*, 119 Va. 348, 80 S. E. 273, L. R. A. 1917A, 94.

In *Roanoke City v. Berkowitz*, 80 Va. 616, 622, this court referring to the general statute on eminent domain which required the condemnation of the fee, and which was attacked as repugnant to the Constitution, said:

"The Constitution imposes no other limitation on the power of the Legislature in this particular than that contained in the clause which forbids the taking of private property for public use without just compensation; and the authorities all agree that under a general statute, like the one in question, no more can be rightfully taken, without the owner's consent, than the necessity of the case requires."

Thus, where a part only of a man's land is needed for a court house or other public purpose, the necessity for the appropriation of that part will not justify the taking of the whole against his will, even though compensation be made therefor."

In *Fallsburg v. Alexander*, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855, the subject of "public use" is carefully considered and many authorities are cited to support the conclusion of the court, which is expressed in paragraph 2 of the syllabus as follows:

"A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain."

In the course of the opinion *Cooley's Constitutional Limitations* is cited with approval, for the statement that "the public use implies a *possession, occupation and enjoyment of the land* by the public at large, or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owners and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it" (italics supplied); and section 165 of *Lewis on Eminent Domain*, for the statement that "'public use' means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question."

In *Miller v. Pulaski*, 109 Va. 137, 63 S. E. 880, 22 L. R. A. (N. S.) 552, the subject of "public use" is again discussed, and the powers and duties of the Legislature and of the courts, respectively, are defined, and it was held that an act which authorizes a town to condemn land for the purpose of supplying the inhabitants of said town "or other persons, companies or corporations" with electric lights or power embraces an object which is constitutional with one which is unconstitutional, and where they are so united as to be inseparable, the whole grant of power is unconstitutional, and that the right to furnish lights or power to "other persons, companies or corporations" is a private use, and where a private use is so combined with the public use that the two cannot be separated, the whole act is void.

The subject of "public use" is also discussed at length and a similar conclusion reached in *Jeter v. Vinton-Roanoke Water Co.*, 114 Va. 769, 76 S. E. 921, Ann. Cas. 1914C, 1029.

In *Boyd v. Ritter Lumber Co.*, 119 Va. 348, 89 S. E. 273, L. R. A. 1917A, 94, many of the previous cases in this state, as well as cases from other states, are reviewed, and the conclusions stated is that "public use" means a use by the public, and that whether a particular use is public or not is a question for the judiciary and not for the Legislature, and that the Legislature cannot make a private use public by calling it so, in order to justify the exercise of the power of eminent domain. The opinion quotes with approval from *Bloodgood v. Mohawk*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313, as follows:

"When we depart from the natural import of the term 'public use' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage, or convenience, or that still more indefinite term 'public improvement' is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded and we permit ourselves to be governed by speculations, upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us. * * *

"Mr. Lewis, in discussing this identical proposition in section 165, after giving a history of the earlier decisions, concludes as follows: "Public use means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are:

"First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier Constitutions; third, it is the only view which gives the words any force as a limitation, or renders them capable of any definite and practical application. If the Constitution means that private property can be taken only for use by the public, it affords a definite guide to both the Legislature and the courts."

In *School Board v. Alexander*, 126 Va. 407, 412, 413, 101 S. E. 349, 351, it is said:

"The taking of private property, however, is a matter of serious import and is not to be permitted except where the right is plainly conferred and the manner of its exercise has been strictly followed. There must be no doubt or uncertainty about the existence of the power. If it is not plainly conferred it does not exist. The state may grant the power generally to condemn any property for a public use, or it may place such restrictions upon the power, the manner of its exercise or the character of the property, that may or may not be taken as it pleases, and when such restrictions are imposed they must be obeyed. If the limitations or restrictions imposed involve public convenience, or retard the progress of public improvements, the remedy is an appeal to the Legislature. They cannot be re-

moved by judicial construction. The courts cannot enlarge a power which the Legislature has restricted. *Charlottesville v. Maury*, 96 Va. 383, 31 S. E. 520; *A. & F. R. Co. v. A. & W. R. Co.*, 75 Va. 780, 40 Am. Rep. 743. It is said that, in the construction of statutes conferring the power of eminent domain, every reasonable doubt is to be solved adversely to the right; that the affirmative must be shown, as silence is negation; and that unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. Ed. 1036; *Providence, etc., R. Co. v. Petitioner*, 17 R. I. 324, 21 Atl. 965, 972; *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179."

[4] We have no disposition to curtail or embarrass the exercise of the power of eminent domain in proper cases, even if we had the power to do so; but the remedy is a drastic one and its application is restrained by the Constitution to those cases where the taking or damaging of private property is for "public use." What is a "public use" is not a matter of discretion with the courts, but is one of sound judgment, under all the facts and circumstances of the particular case. Different courts sometimes arrive at different conclusions upon the same state of facts; but, whenever the remedy is applied, it should always be because there is a direct "public use" of the property taken, and not a mere incidental or indirect public benefit.

We have not been referred to, nor have we found, any case directly in point which upholds the contention of the city. The case of *State ex rel., etc., v. Houghton*, 144 Minn. 1, 176 N. W. 159, 8 A. L. R. 585, much relied on by counsel for the city, involved the validity of a statute creating restricted residence districts in cities of the first class. The districts were established by the exercise of the power of eminent domain, and apartment houses, among other classes of buildings, were prohibited therein. It was held that the restrictions, as applied to apartment houses, were based upon a "public use," and that the statute providing for condemnation was valid. Upon the first hearing the statute was held to be invalid (see 144 Minn. 1, 174 N. W. 885), the court being divided three to two; but upon a rehearing the former decision was reversed, the court against standing three to two.

The decision is rested largely on æsthetic grounds, and while we do not dissent from much that is said about the expansion and application of the term "public use," the majority holding is of no value to us in arriving at a proper conclusion upon the facts of this case, which are entirely different from the facts in that case.

In the petition for the writ of error it is said:

"For a case which is practically on all fours with the one in judgment, your petitioner cites

with great confidence the case of *Bond v. Mayor, etc., of Balto*, 116 Md. 683," 82 Atl. 978.

Section 1 of the act there under review (Acts 1910, c. 110) gave the termini of the highway to be constructed, and authorized the city to "acquire for said purposes landed or other property in the bed of said highway and adjacent thereto on either or both sides thereof." In another section of the act it was provided:

"That any landed or other property acquired under the provisions of this act, excepting lands lying in the bed of said highway, may, after said highway has been laid out, be sold by the mayor and city council of Baltimore or said commission, if power to make such sales be, as it may be, delegated by ordinance to said commission, for such prices, at such times and on such terms as may by ordinance be provided." Section 4.

The court held that the words, "landed or other property acquired," mentioned in other sections than section 1, manifestly refer and relate to landed or other property acquired for the purposes set forth in section one; that it clearly appears that the purpose for which the land is to be acquired is that of construction of the public improvement. In other words, that the land could only be acquired for the purpose of constructing the highway, and the court says that the validity of the power to acquire land adjacent to the highway on either or both sides thereof, incident to and for the purpose of constructing the highway and its connections, has uniformly been upheld by the courts. This is far from being on all fours with the case at bar. It is further said in the opinion in that case that—

"It cannot be assumed in this case that the city will undertake to condemn or take property for purposes other than those authorized by the act. The presumption is that the city will act within its rights and not beyond them. It will be time enough to pass upon this question when it properly arises before us."

In the case at bar, not only are we dealing with a statute under which "excess condemnation" is permitted, but are also confronted with a case in which the city is attempting to take from the owner his private property which confessedly is not needed for the proposed new street. The case cited cannot be accepted by this court as authority for the contention of the city in this case.

The cases from Massachusetts are more in accord with our views. In the business part of the city of Boston certain of the streets were narrow, nonparallel, and of tortuous nature, and there were a great number of small sized and irregular shaped individual estates abutting on these streets, and under the existing statutes facilities could not be furnished for laying out and constructing new thoroughfares or streets

and the sale or lease of such odd parcels or remnants of land as might be left in the hands of the public authorities if proper streets were laid out under the existing statutes. The city was anxious to provide broad and convenient thoroughfares for the transportation of goods and merchandise, and for the existence upon such thoroughfares of sites adequate in size and means of access, both front and rear, for the construction and use of warehouses, mercantile establishments, and other buildings suited to the needs of trade and commerce as then carried on in the principal cities of other states and countries. The House of Representatives thereupon applied to the Supreme Judicial Court to know whether the Legislature could authorize the city to exercise the right of eminent domain in connection with laying out proper streets and taking land adjoining outside of the proposed thoroughfares, with a view to conveying and leasing it to private individuals who might promote trade and manufacturing by the erection of suitable buildings on the land. This question the court answered in the negative, saying in part:

"The proposed legislation to which the inquiry relates, necessarily would contemplate action by the city in the procurement, management and control of land along a street within the city, for no other purpose than to induce and promote a use of it by merchants or traders. It would contemplate a taking of private property in the exercise of the right of eminent domain, and an expenditure of money to pay for it and fit it for occupation.

"It is a rule of law universally recognized in this country, that neither of these things can be done unless the taking or expenditure is for a public use. This has been stated so often, and the principles on which it is founded have been considered so fully, that it is unnecessary to discuss it or to cite authorities. The only question about which there is a possibility of doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of the property to obtain the possible income or profit that might enure to the city from the ownership and control of it would not be a public use. The city cannot be authorized to take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain money for such a use. It could as well tax them to raise money to carry on any other private business with a hope of gain. Such proceedings are entirely outside the functions of a state or of any subdivision of a state."

After discussing the authorities to sustain the foregoing views, the court said further:

"An affirmative answer to this question would make it possible for the city to take the home of a resident near the line of the thoroughfare, or the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the authorities of the city, some other use of the land would be

more profitable, and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain or the expenditure of public money has been justified on such grounds." Opinion of Justices, 204 Mass. 607, 91 N. E. 406, 27 L. R. A. (N. S.) 483.

This opinion was given March 4, 1910. Subsequently, the Senate propounded to the same court questions which the court says "differ but little in substance" from those previously propounded by the House of Representatives. To the latter questions the court replied on April 10, 1910, and it is said in the petition in the instant case that this last reply "modified in no small degree the holding in the former opinion," and there is vouched in support of that conclusion a part of a sentence in the first syllabus of the case. No such conclusion can be properly drawn from the second opinion. The syllabus to the second opinion is fully sustained by the opinion, and in its integrity is as follows:

"It is not within the power of the Legislature, in connection with the widening of a highway or the laying out of a new highway in the city of Boston, to authorize that city to take by right of eminent domain real estate in excess of those parcels which in whole or in part are necessary for the highway itself, with a view to the subsequent sale by the city of such excess of real estate at its full value subject to restrictions or conditions designed to promote the commercial and industrial welfare or growth of the municipality by insuring an opportunity for the construction along such highway of buildings adapted to the requirements of commerce, trade and industry and especially to the requirements of those forms of business which to a large extent employ teaming, thereby relieving, or helping to prevent the increase of, congestion of teaming traffic and so facilitating the transportation of freight and passengers through the section of the city in which such highway is to be widened or laid out.

"Although the Legislature cannot authorize a city or town to take land outside a public work for the purpose of selling it, there may be, as contemplated by St. 1904, c. 443, § 6, a remnant of an estate, of which the greater part necessarily is taken for the public purpose, which is so small or of such a shape and of so little value that the taking of it in the interest of public economy or utility, or in some other public interest, may be fairly incidental to and reasonably necessary in connection with the taking of the greater portion of the land for the public work; but this exception cannot be extended so as to permit the taking of land outside the public work with a view to its sale afterwards in violation of the limitation of power stated above."

Opinion of Justices, 204 Mass. 616, 91 N. E. 578.

In a still more recent case, decided June 21, 1913, it was held that private property cannot be taken ostensibly for a public use

and then diverted to a private use, and that legislation so designed or framed as to permit such a result is invalid. *Sallsbury Land & Imp. Co. v. Commonwealth*, 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. S.) 1196.

[5] We deem it unnecessary to cite further authorities. We concur with the judge of the hustings court of the city of Richmond that so much of the act of assembly, approved February 29, 1916, found in Acts of 1916 at pages 112, 113, as is an amendment of the act of assembly approved March 14, 1906, found in Acts of 1906, at page 317—said amendment now constituting the second and last paragraph of section 3063 of the Code—is unconstitutional, null, and void, and so much of the joint resolutions of the council of the city of Richmond, approved March 5, 1919, as was adopted in pursuance of said amendment, is likewise invalid.

In the order made by the hustings court in this cause, it is ordered:

"That the title to the several parcels of land for which such compensation and damages were allowed be and the same is hereby absolutely vested in the city of Richmond in fee simple."

The record does not disclose, and we have no means of knowing, whether or not the order applies to land outside of the lines of the proposed new street. If it does, the said order should be amended by said hustings court, in which the cause is still pending, as to the land lying outside of the lines of said street.

Affirmed.

KELLY, P., absent.

(88 W. Va. 173)

HALE et al. v. GROW et al. (No. 4110.)

(Supreme Court of Appeals of West Virginia.
March 8, 1921.)

(Syllabus by the Court.)

1. Attachment \S 103—Affidavit disclosing elements of claim which would suffice in declaration or bill held sufficient.

A statement of the nature of the plaintiff's claim in an affidavit filed for an attachment, which makes such a disclosure of its elements as would suffice in a declaration or bill setting it up, is sufficient.

2. Attachment \S 116—Defendant's title need not be stated in affidavit as fully as is necessary in a pleading.

The defendant's title to property need not be stated as fully nor with the same degree of accuracy, in such a statement or a pleading filed by the plaintiff, as would be required in setting it up, if it were the title of the plaintiff, because the character of the title of the defendant lies peculiarly within his own knowledge.

3. Attachment \S 116—Affidavit held sufficient as against assignee of lease in attachment for rentals.

In an affidavit for an attachment against an assignee of a lease, for rentals accrued under the terms thereof, and in a bill in equity filed in the suit in which the affidavit was filed, it suffices, as to the assignment required by law to be effected by deed, to state and allege that the lease had been assigned and conveyed to the defendant.

4. Attachment \S 105—Affidavit for attachment in equity held not vitiated on ground of departure from statute.

An affidavit for an attachment filed in a suit in equity against a real debtor and others who are merely formal defendants is not vitiated, on the ground of departure from statutory terms, or omission thereof, by the use of the words "that in said suit the plaintiffs, as affiant verily believes, are justly entitled to recover, at the least, against the defendant [naming the debtor], the said sum" demanded, specifying the amount thereof.

5. Landlord and tenant \S 208(2)—Assignee liable for rent, though not in possession.

An assignee of a lease in which there is a covenant to pay the lessor rent, in specified amounts, at stated periods, assumes the obligations imposed by such covenant, and is liable for the rent, even though he has not entered into possession of the leased premises, unless he was prevented from so doing by the lessor.

6. Mines and minerals \S 55(2)—Clause in deed held exception of title to minerals in place.

A clause in a deed conveying a tract of land, which, in terms, reserves the right to all oil, coal and other minerals taken from the land, with the privilege of entering thereon and obtaining the same and binds the grantor to pay to the grantee, as rental, one-tenth of such minerals, if any should be obtained, constitutes an exception and retention of the title to minerals in place.

7. Landlord and tenant \S 80½—Proof of assignment in writing under seal makes a prima facie case of assignment by deed.

Proof that an assignment of a lease was effected by the execution of an instrument of writing under seal makes out a prima facie case of assignment thereof by deed.

8. Evidence \S 368(12)—Failure to produce instrument held to raise presumption that paper exists.

If the party against whom such case is so made out in litigation presumptively has such instrument in his possession and does not deny possession thereof nor produce it, upon demand therefor, these circumstances raise a presumption that it is such a paper as is described in the evidence.

9. Landlord and tenant \S 232—That remote assignment may be defective held not to authorize denial of relief for failure of consideration.

If, in an action or suit against an assignee of a lease, to recover rent accrued to the lea-

sor on a covenant therein, it appears that a remote assignment thereof may be defective and insufficient as to an undivided half thereof, recovery cannot be denied on the ground of total failure of consideration, and, if partial failure of consideration has not been set up and relied upon in the defensive pleadings, as a ground of defense, the judgment or decree should be for the entire amount of the rent accrued.

10. Limitation of actions §24(2)—Five-year statute inapplicable to demand for rents against assignee of written lease.

To a demand against an assignee of a written lease, for rent accrued thereon, the 5-year statute of limitations is inapplicable.

Appeal from Circuit Court, Wirt County.

Suit by B. T. Hale and others against O. E. Grow and others. Decree for plaintiffs, and defendants appeal. Affirmed.

William Beard, of Parkersburg, for appellants.

L. N. Tavenner, of Parkersburg, for appellees.

POFFENBARGER, J. On the ground of nonresidence of the principal defendant, this suit in equity with an attachment was instituted and prosecuted to a final decree for the sum of \$1,168.80, which is a lien upon the leasehold interests in five several tracts of land, and certain personal property located thereon, by virtue of the levy of the attachment issued in this cause, on that property. Said leaseholds are oil and gas properties and the personal property involved consists of machinery and materials used in oil and gas operations. The money demand sued for consists of rentals alleged to have accrued on one of the leases, at the rate of \$120 per year, payable quarterly, in a period of more than six years. The five leases levied on include the one under which the rentals sued for are alleged to have accrued. The two general assignments of error found in the petition are based upon the overruling of a motion to quash the attachment and the final decree. Lack of a sufficient statement of the cause of action and departure from statutory requirements are asserted in the attack upon the sufficiency of the affidavit. Under the other assignment, it is urged that the demurrer to the bill should have been sustained, and also that the evidence adduced does not prove any cause of action.

A motion to quash the attachment on the ground of insufficiency of the affidavit, made by G. N. Grow, principal defendant, on a special appearance, was overruled. A year or two later he died, and the cause was revived against Geo. C. Grow and Otis E. Grow, executors of his will. They interposed a demurrer to the bill, which was overruled, and filed an answer.

The affidavit for the attachment states, in substance, that the claim of the plaintiffs is

for recovery of rentals for oil rights and rights to operate for oil on a tract of 46½ acres of land, which is sufficiently described; that it is based upon a lease executed January 7, 1902, executed by B. T. Hale and wife, Emily Keys and husband, Anna C. Miller and husband, and J. C. Hale and wife, by which the tract of land was demised and let to Stuart and Young, in consideration of the payment of certain moneys and their agreements to be kept and performed, one of which was that they would pay to the lessors, quarterly in advance, the sum of \$30 beginning with the 1st day of January, 1902; that, by virtue of the last will and testament of J. C. Hale, Mamie S. Hale had succeeded to all of his rights; that Stuart and Young, by certain deed, had assigned and conveyed all of their rights, titles, and interests in the agreement and the land to Henry W. Brown; that Brown had conveyed away certain interests to William C. Edwards, H. H. Burns, and H. J. Parker; and that afterwards, Brown, Parker, Edwards, and Burns had "assigned and conveyed" all of their rights and interests in the agreement to the defendant G. N. Grow; that Grow had agreed for the use and benefit of the plaintiffs and thereby became, and had been, and was, liable to pay to the plaintiffs said sum of \$30 quarterly in advance; that the claim sued for was for quarterly payments for the years 1910, 1911, 1912, 1913, 1914, 1915, and three quarters of 1916, with interest on all of such payments, as they became due under the terms of the lease; and that the plaintiffs were "justly entitled to recover, at the least, against the defendant G. N. Grow," the sum of \$972.60, with interest thereon from the 1st day of August, 1916. Other persons against whom no demand is set up were made codefendants with Grow, on account of their relation to the lease and the rentals sued for.

[1-3] Failure of the affidavit to state that the lease was assigned by a deed, relied upon as the principal ground of criticism and objection, does not vitiate it. The nature of the cause of action need not be set forth in an affidavit for an attachment with a greater degree of strictness or certainty than is required in a pleading, nor with the extremely high degree of certainty required in the statement of the grounds of attachment. The statute requires mere disclosure of the "nature" of the claim. Some of our decisions require such a statement as discloses a cause of action. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787; *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 82 S. E. 1094; *Eplin v. Blessing*, 73 W. Va. 283, 80 S. E. 458. Others do not go even that far. *Hudkins v. Haskins*, 22 W. Va. 645; *McCluny v. Jackson*, 6 Grat. (Va.) 96. In its requirements as to the statement of facts in support of the ground of attachment, however, the statute is much more

rigid and exacting. The facts stated must conclusively show existence of the ground set up. The statement must be certain to a certain intent in particular, and exclude every hypothesis inconsistent with such ground. *Teter v. George*, 103 S. E. 275. Though some of the decisions above referred to require disclosure of a cause of action, they do not require such disclosure in any particular or formal manner, nor with the detail of particulars characteristic of a pleading. In *Sommers v. Allen*, cited, the first case in which anything more than a general and indefinite statement was required, Judge Brannon impliedly said "mere details" need not be stated. Here there is no omission of the necessary element of assignment. It is positively stated and the manner of it is indicated by the word "conveyed," which is equivalent in law to the word "granted." *Uhl v. Ohio River R. Co.*, 51 W. Va. 106, 114, 41 S. E. 340. If this were an allegation of the plaintiff's title in a pleading, it might not suffice, but, if it were an allegation of the defendant's, it would. The omission of the manner of the assignment is justified by the fact that the character of the assignment lies peculiarly within the knowledge of the defendant. *Andrews' Stephen's Pl.* p. 353, citing numerous authorities. As the statement of the assignment in the affidavit would suffice in a pleading in a court of law, it suffices in the affidavit.

[4] There is no actual nor logical departure from the language of the statute, in the part of the affidavit that relates to the amount of the claim. It uses the statutory terms "justly entitled" and "at the least" in the assertion of right to recover and in description of the amount of the claim. Though it omits the word "amount," it is necessarily implied in the statement of the amount. In its limitation of liability to G. N. Grow, one of the several defendants, there is no departure from the statute, and the limitation conforms to the cause of action described in the affidavit, which states no ground of liability against any of the other defendants who were made formal parties, on account of their connection with the lease and the assignment thereof.

Lack of an allegation that the assignment of the lease was by deed is one of the grounds of demurrer to the bill, which charges that it was "assigned, granted, transferred, and conveyed" to Grow, after having alleged that the records of the county in which the lands are do not show any conveyance to him from his alleged assignors. A conclusion already stated, respecting the affidavit, makes this ground untenable.

[5] If there was such a lease and such an assignment as the bill sets up, omission of an allegation of possession of the premises by the assignee is immaterial. Nor does it matter whether the promise alleged was made for the sole benefit of the plaintiffs. A

single legal proposition obliterates the contentions in argument based upon the omission and the supposed lack of soleness of benefit. "A person who accepts an oil or gas lease with a stipulation therein contained to pay a monthly rental until a well is completed or until the expiration of a certain fixed term is bound to pay such rental, although he does not within such term enter upon the land and complete such well, unless he was prevented from doing so by the plaintiffs, and not by mere personal default." *Lawson v. Kirchner*, 50 W. Va. 344, pt. 3, syl. 40 S. E. 344. See, also, the numerous cases cited in *Archer, Oil and Gas*, p. 364, applying the principle to assignees of oil and gas leases. As there is no proof of possession of the land embraced by the lease in question, on the part of the assignee, these contentions are renewed and repeated in the assault upon the decree, and in that connection they are equally unavailing. These authorities impose liability on the ground of acceptance of an assignment of the lease, by the assignee, not on his express agreement to pay rent, wherefore it is not necessary to say whether the promise to pay was made for the sole benefit of the plaintiffs.

Correctness of the decision of the issue raised by the pleadings, as settled by the court below, is challenged on several grounds, the principal of which are: That the plaintiffs had no title to the subject-matter of the lease; that the lease was not assigned to Grow by deed; that it had not been validly assigned by Stuart and Young to Brown, because Young alone, one member of the firm, had executed the deed of assignment, professing to act under a power of attorney from Young; and that part of the claim was barred by the statute of limitations.

[6] The plaintiffs claim the title to the minerals in the land, under an exception or reservation in a deed from their ancestors, Joseph W. Hale and his wife, to Jas. V. Nutter, conveying the land, subject to the reserved or excepted mineral right. The clause under which title is so claimed reads:

"The said parties of the first part expressly reserve, however, the right to all oil, coal or other minerals pumped or excavated from the land herein conveyed, with the privilege of working upon said land for the purpose of obtaining such oil or minerals, the right of ingress and egress to and from the portion of said land necessarily occupied by such mining or pumping, paying therefor as rental to the second party the one-tenth part of all such oil, coal or other minerals, if any should be obtained."

Notwithstanding inconsistent expressions, importing intent only to reserve minerals after severance thereof and to pay a royalty to the grantee in the deed, as in the case of landlord and tenant, the intention of the parties to except the minerals is reasonably clear. The right to all oil, coal, and other

minerals is expressly reserved. Obviously, "right" may mean title. With this right, the privilege of taking out the minerals was retained. Reservation of right to take out all of the minerals negatives intent to retain a mere mining privilege to be enjoyed with the grantee also mining as owner. If it were a lease, it would be assignable, and a lease of the minerals by the lessee to a third party would confer a right and constitute consideration for an obligation to pay rent. But it does not purport to be a reservation of a term in the land or minerals. There is no time limit in it. The provision conferring right to one-tenth of the minerals, upon the grantee, may be a grant thereof or a stipulation for compensation. It does not necessarily import intention to make the parties landlord and tenant. Conferring unlimited right to take out all of the minerals and absolute title to at least nine-tenths of them, the clause falls within the principle enunciated in *Higgins v. Round Bottom Coal Co.*, 63 W. Va. 218, 59 S. E. 1064, and *List v. Cotts*, 4 W. Va. 543, and retains title to minerals in place.

[7, 8] There is oral evidence tending to prove that the assignment to Grow was made by an instrument under seal. Ordinarily, such an instrument purporting to pass title to a term for years in land is a deed, wherefore this evidence makes out a prima facie case of assignment by deed, which the defendants have not rebutted by production of the instrument. There is no denial in evidence that they have it, nor any specific denial of its existence in the answer. Their failure to produce it raises a presumption that, if produced, it would be an instrument under seal. *Stout v. Sands*, 56 W. Va. 663, 49 S. E. 428.

[9] The assignment from Stuart and Young to Brown bears date December 4, 1902. It carried other leases of adjoining land, as did the assignment to Grow. Mining opera-

tions seem to have been conducted on two of the leases, when Grow got them in 1909, since which date they have continued. At no time from 1902 until now has Stuart ever raised any question about the disposition of his interest in these properties. For a period of about 14 years, he had acquiesced in it, before the institution of this suit, and continues to do so. During about 5 years of that period, mining operations were conducted on some of the leases, under the assignment. The power of attorney under which Young executed the assignment has not been produced for some reason. It is unnecessary to inquire whether failure to produce it would limit the relief sought by the plaintiffs, if its absence had been relied upon in the answer. The deed executed by Young passed his interest in the leases, wherefore there could not have been a total failure of consideration. *Gaffney v. Stowers*, 73 W. Va. 420, 80 S. E. 501. The defect, if any, would have afforded ground only for abatement or reduction of the rentals, for which no basis was laid in the answer. In it there is not even a specific denial of authority in Young to execute the deed on behalf of Stuart. To make the defect in title available as partial failure of consideration, it was necessary to plead it and rely upon it by way of defense. *Gaffney v. Stowers*, cited. Moreover, if such defense had been made, the power of attorney might have been found and put into the record.

[10] As the demand asserted by the plaintiffs accrued under the stipulations of the lease, a written instrument, the 5-year statute of limitations does not apply, and the plaintiffs were entitled to a decree for the entire amount claimed, right of action for all of which had accrued within 10 years before this suit was instituted.

Seeing no error in the decree, we will affirm it.

(88 W. Va. 102)

HECK v. MORGAN et al. (No. 4174.)(Supreme Court of Appeals of West Virginia.
March 1, 1921.)*(Syllabus by the Court.)*

1. Acknowledgment \S 4—Conveyance of realty need not be acknowledged except in case of married woman.

It is not necessary to the validity of a conveyance of real estate that the same be acknowledged, except in the case of a married woman, and if a grantor under no disability signs, seals, and delivers a deed without acknowledgment, it will be effective between the parties to pass his title.

2. Deeds \S 208(3)—Possession by grantee is prima facie evidence of delivery.

Possession by the grantee of a deed or instrument conveying an interest in real estate is prima facie evidence of its delivery.

3. Deeds \S 60—Deed to realty cannot be delivered to grantee in escrow.

A deed or other instrument conveying an interest in real estate cannot be delivered to the grantee in escrow. A delivery to him, even though stipulated to be upon certain conditions, will be treated as an absolute delivery.

4. Escrows \S 3—Deed cannot be delivered to grantee's agent to procure it.

A deed cannot be delivered in escrow to the agent of the grantee, who is charged by his principal with the particular duty of securing it, and who represents the principal in the particular transaction resulting in the deed. The conditional acceptance of the deed by such an agent under such circumstances is inconsistent with his duty to his principal.

5. Deeds \S 58(7)—Return of deed by grantee to grantor for acknowledgment not a surrender of title.

Where the grantee in a deed returns it to the grantor for the purpose of having it acknowledged, he does not thereby surrender the title acquired by the deed.

6. Vendor and purchaser \S 229(1)—Law imputes information which would be conveyed by actual viewing of premises.

The law imputes to a purchaser of real estate, or an interest in real estate, all information which would be conveyed to him by an actual view of the premises.

7. Mines and minerals \S 81 — Possession of lessee under unrecorded oil and gas lease is notice to subsequent lessee.

Where the lessee in an unrecorded oil and gas lease enters upon the premises, locates a well, and employs a force of men thereon in the building and construction of roads leading from the highway to such location, which roads and the work being done upon such premises by said lessee could be for no other reasonable purpose than the development of said premises for oil and gas, such lessee is in possession under his lease, and such possession will be notice to a subsequent lessee of his claim to the oil and gas in the lands.

8. Vendor and purchaser \S 235 — Rights of grantee under unrecorded deed not subordinate to rights of subsequent grantee with notice who has not paid price.

The rights of a grantee under an unrecorded deed are not subordinate to the rights of a subsequent grantee from the same grantor of the same land, where it appears that such subsequent grantee, at the time he becomes fully informed of the prior grantee's rights, has not paid the purchase money. He is not a complete purchaser, and his rights are subordinate to the rights of the first grantee.

9. Equity \S 65(3)—When maxim that "He who comes into equity must come with clean hands" affects right to sue stated.

The maxim "He who comes into equity must come with clean hands" does not deprive a suitor of a right to appeal to a court of equity on account of general iniquitous conduct, unconnected with the act of the defendant, which the complaining party sets up as his ground or cause of action, but only when the evil practices and wrongful conduct pertain to the particular matter or transaction in respect to which judicial protection or redress is sought.

Appeal from Circuit Court, Roane County.

Suit by A. S. Heck against O. B. Morgan and others. Decree for plaintiff, and defendants appeal. Affirmed.

R. E. Bills, of Parkersburg, and Thos. P. Ryan, of Spencer, for appellants.

Walter Pendleton and S. P. Bell, both of Grantsville, for appellee.

RITZ, P. The defendant O. B. Morgan is the owner of a small tract of land situate in Reedy district in Roane county. The plaintiff conceived the idea of developing or testing the territory in that neighborhood for oil and gas. At that time it was what is termed in the nomenclature of the oil and gas fraternity "wildcat" territory, that is, such territory as has not been reasonably demonstrated to be productive of these minerals. O. J. Brown and G. B. Davis, two residents of that neighborhood who were interested in having the same tested, undertook to assist the plaintiff in procuring leases upon such of the territory as he might desire. The plaintiff advised them that if he could procure leases on several thousand acres of land in a solid block he would incur the expense of drilling a well to determine whether or not there was oil or gas underlying the lands. Brown and Davis, together with one Byron L. Morford, plaintiff's son-in-law and agent for the purpose of procuring the leases, went into the neighborhood and secured such leases from a great number of the landowners. On the 17th of March, 1919, while Morford and Brown were engaged in this work, they went to the residence of the defendant Morgan for the purpose of securing such a lease upon

his 17-acre tract. He was not at home, but they were advised by his wife that he would return in all probability in a short time. Shortly after leaving his house they met him in the road, and Brown, being acquainted with him, accosted him in regard to securing the lease. He was advised that the plaintiff had determined to test the territory for oil and gas if he could secure leases upon a solid block containing several thousand acres, and that they had already procured such leases upon practically all of the land in proximity to his tract. It was explained to him that Heck was paying only a nominal consideration of 5 cents an acre for the leases, with the provision to deliver one-eighth of the oil or gas produced to the credit of the lessor, or to pay \$200 a year for each producing gas well. Morgan stated that he had talked with another party about leasing his land, and thought he might get more favorable terms if he waited until the land was tested and it should turn out that it was oil-producing territory, but finally agreed that he would not stand in the way of securing the development in the neighborhood, and agreed to execute a lease upon the terms proposed to him. It then began to rain, and in order to prepare the lease the parties stepped into a hay shed by the wayside, and plaintiff's agent, Morford, filled in the blanks upon a printed form, and Morgan thereupon signed the paper and turned the same over to Morford; Morford at the same time giving him a check for 85 cents. It seems that Morford's instructions were to pay a minimum of \$1, but he overlooked it in this case and only made the check for 5 cents an acre. It was there understood between the parties that in the next day or two the lease would be taken to Morgan's residence to be executed by his wife. Morgan says that he delivered the lease to Morford with the understanding that he was to have a copy of it, and that it was not to be a binding contract unless he was furnished a copy; that if he was furnished such copy it would be all right. Morford and Brown both testify that there was no such understanding as this. On the next day the lease was executed by Morgan's wife, but was not acknowledged by either of them before a notary public, or other officer authorized to take acknowledgments. Morford says that Morgan did ask for a copy of the lease at the time he executed it, and that he was informed that a copy would be made at the office, and when a notary came around to take the acknowledgment of his wife and himself to the paper such copy would be delivered to him.

Morford turned this paper over to the plaintiff, Heck, with the advice that Morgan desired a copy. The plaintiff thereupon procured one C. S. McClung, a notary, to take all of the leases which he had secured and make copies of those of which the lessors de-

sired to have copies, and then go to the residences of the various lessors and take their acknowledgments to the leases, at the time delivering the copies. McClung did make a copy of the Morgan lease among others, and did call upon the various lessors to take their acknowledgments. When he called at the Morgan residence for the purpose of taking the acknowledgment of Morgan and his wife he was advised that Morgan had gone to Gilmer county to work on a bridge, but was given his post office address. Mrs. Morgan acknowledged the lease at that time. McClung returned the lease, together with the copy of it, to the plaintiff, with the advice that Morgan was not at home, and also furnished the plaintiff with Morgan's post office address, in order that he might be communicated with. There was one other lease executed by a man by the name of Wade, who was also absent, and who was at work at the same place with Morgan. Heck was in the neighborhood very shortly afterward and made further inquiries as to Morgan's address, and receiving confirmation of the information given him by McClung he wrote a letter to Morgan, inclosing the lease, together with the Wade lease, and asked him to acknowledge it and have Wade acknowledge his lease and return the same to him, and in this letter inclosed a check for \$1 to pay the fees of the notary for taking the acknowledgment. He got no reply to this letter.

A short time thereafter he was informed that Morgan was at home, and with a view to getting the lease acknowledged he called up Brown and asked him to go to Morgan's residence in his automobile, and get both Morgan and his wife and take them before a notary and have the lease acknowledged. Brown did call up Morgan and advised him that he desired to call upon him and take him and his wife before an officer and have the lease acknowledged, upon which Morgan advised him that he had left the lease over in Gilmer county, where he had been at work; that when he left there he did not expect to come home, but only to go to Clarksburg to have some machinery repaired, and finding that it would take longer to make the repairs than he expected he determined to make a visit to his home. Brown communicated this information to Heck. The next morning Heck met Morgan on the train returning to his work and approached him in regard to acknowledging the lease and returning it. Morgan at that time called his attention to the fact that the lease recited a consideration of \$1, when he had only received 85 cents. Heck thereupon informed him that this was a mistake, and that it was the first he knew of it, and offered to pay him the difference at that time, but Morgan informed him that that made no difference; that he would execute the lease whether he

got any consideration or not. He made some suggestion in regard to the term being rather long, and stated that he had had a notion to change the ten years to two years and acknowledge it and return it. Heck replied to him that development would be begun at once; that he intended to begin the well immediately, and if the territory was found to be producing territory the development would be continued, and that if he had changed the lease to two years he (Heck) would likely have accepted it. He insisted upon Morgan acknowledging the paper at once and returning it to him, advising him that he desired to at once proceed with his development, but did not want to do so until he had all of the matters closed up. Morgan thereupon advised him, according to Heck, that he need not delay his operations awaiting the lease; that just as soon as he returned he would acknowledge it and return it, and that he (Heck) might go on with his plans for development with the full assurance that the lease would be acknowledged and returned to him.

Heck did immediately begin operations on an adjoining tract of land known as the Hess tract. Not receiving the lease from Morgan after waiting a considerable time, Heck wrote him a letter calling his attention to his promise to acknowledge it and return it, and advising him that he was relying upon that promise, and asking him to comply with it immediately, and also to return the Wade lease which he had theretofore sent him. To this letter Morgan made an equivocal reply in which he returned the Wade lease, but for the first time, according to Heck, raised some question about the payment of 85 cents not being legal, and about having a copy of the lease furnished to him which had not been furnished, and advised that they would let the matter rest until some future time. Upon receipt of this letter Heck immediately wrote him again, inclosing him \$1 to take the place of the 85 cents which had been paid him, and advising him that as soon as he acknowledged the lease and returned it he would be furnished a copy, and asked him to do so at once. To this letter Morgan replied, returning the check, and advised that he did not know where the lease was unless it had been returned to him with his former letter. This letter was written about June 17, 1919.

It seems that no further communication was had with Morgan until some time in the early part of September. Heck pursued his developments, and on the 11th of September his well on the Hess land came in a substantial producer. It seems about this time that he had another conference with Morgan, in which Morgan told him he did not know what he was going to do about his lease; that he wanted to do what was right, but he did not know what that was. It became

apparent to Heck by this time that Morgan did not intend to acknowledge the lease and return it, but was endeavoring to escape the effect of it if he could do so.

In the meantime Heck had consulted counsel as to his rights upon the Morgan land, and was advised that the acknowledgment was not necessary in order to make the lease a valid one so far as Morgan was concerned. On the evening of September 11th, at the time the well came in on the Hess land, Heck, for the purpose of protecting his interest in the Morgan land, announced to his employes and others who were present that he was going to the Morgan land and make a location for a well. Accompanied by several of his employes he did go to the Morgan place and called at the Morgan residence. Morgan was not there, but he informed Mrs. Morgan that he had secured a good well on the Hess land adjoining, and was then going to locate a well on the Morgan 17 acres. She stated that she wished Mr. Morgan was at home, and Mr. Heck also advised that he would have been glad if Morgan were present, but that he could not delay making the location; that he thereupon measured the distance from the house, and the distance from several other points, and made a location, to indicate which he took a broom handle and with a knife flattened off one side of it, and marked thereon "O. B. Morgan, No. 1," and drove it into the ground; that he then advised Mrs. Morgan, upon his return from the point of location, that the same had been made, and that work would begin at once.

He instructed his men to proceed to this Morgan land on the next morning and commence the building of a road from the highway to the point at which the well had been located, so that material could be moved upon the land preparatory to drilling a well, but on account of some happening at the Hess well the services of the men were required there, and they did not go upon the Morgan land for the purpose of commencing the work there until Monday morning, the 15th day of September. At that time a force of men did go upon the Morgan land and begin the construction of a road leading from the highway to the point where the well had been located. Mrs. Morgan advised these men that they were trespassers upon the land and demanded that they cease their work. They disregarded her request and proceeded therewith.

On the next day Morgan and his wife went to the city of Parkersburg and there got in communication with the defendant R. E. Bills, as a result of which, they executed to him a lease for oil and gas development upon this same tract of land. The terms of this lease were agreed upon, according to the testimony of Bills and Morgan, on the 16th, but the lease was not executed until the next day. Bills paid for this lease, according to

the evidence, the sum of \$1, and by a collateral contract gave Morgan a one-sixteenth interest in the operations to be carried on upon the land, agreeing to furnish the money for Morgan's one-sixteenth interest to the extent of drilling in one well, after which time Morgan should pay his share of the expenses of operation. On this same day a notice was prepared by Bills to Heck, requiring him to cease trespassing upon the land, and notifying him that he had no right thereon for the purpose of operating for oil or gas. Morgan brought this notice back with him upon the evening of the 17th, and on the next morning, shortly after 8 o'clock, when the men resumed their work on the construction of the road, he served the same upon the foreman in charge, who immediately called the plaintiff on the telephone and read the notice to him. The plaintiff advised him to pay no attention to it, but to proceed with the work, and this was done. The work upon the construction of the road proceeded continuously until it was completed about the 24th of September, and on the next day Heck began hauling material upon the ground for the purpose of beginning operations.

Likewise, on the 24th of September, Heck instituted this suit for the purpose of setting up the lease, which Morgan and his wife had executed, as a lost instrument; Morgan claiming that he had lost it or destroyed it, and for the purpose of canceling the lease executed by Morgan to Bills as a cloud upon his right to develop the land for oil and gas. On the 23d of September it appears that Bills had some negotiations with the defendant C. T. Smith, which resulted in an assignment of this lease by Bills to Smith; Smith assuming all of Bills' obligations to Morgan under the collateral contract above referred to. At the time the plaintiff brought this suit he was not advised of this assignment of Bills to Smith, and did not make Smith a party defendant. In fact, the assignment to Smith was not placed upon the record until some days after the suit was brought. While the assignment to Smith is dated on the 23d of September, and consists of only a few lines, it was not acknowledged until the 24th, and not recorded until the 26th of September. In addition to assuming Bills' obligations to Morgan; it is claimed by Bills and Smith that Smith paid Bills \$800 for the assignment, and a check is filed dated the 23d of September for this amount, which it is shown was paid on the 27th of that month. Plaintiff then filed an amended bill making Smith a party defendant, and in addition to the relief asked for in the original bill asked that the assignment from Bills to Smith be also canceled and set aside as a cloud upon his title. Bills claims that at the time he took the lease from Morgan he knew nothing about any claim that Heck had to the land, and that Morgan assured him at that time

that there was no lease upon the land, and that he had a clear right to make the lease to him, notwithstanding on the very same day Bills prepared the notice to Heck above referred to. He claims, however, that this notice was prepared after the lease had been executed and delivered. Smith likewise claims that at the time he took the assignment from Bills he had no notice of any claim upon the part of Heck, or anybody else. Bills admits that he was fully advised that Heck was claiming the right to drill this land for oil and gas at the time he made the assignment to Smith, and that while Smith was a partner of his in business and closely associated with him, he withheld the information he had in this regard from Smith.

It is insisted that the plaintiff is not entitled to the relief he asks, for the reason that the paper executed by Morgan and delivered to Morford on the 17th day of March was not effective because the same had not been acknowledged; that it was delivered to Morford upon condition that it would take effect only in the event that a copy thereof was furnished to Morgan, and that, this copy not having been furnished, there was never any delivery of the paper; that even though the paper executed by Morgan was valid as a lease between him and Heck, Bills as a bona fide purchaser without notice of Heck's claim could not be affected thereby, inasmuch as the record did not disclose Heck's interest, and that even though it should be held that Bills purchased with notice of Heck's rights, still the defendant Smith was such innocent purchaser and is protected.

The circuit court entered a decree establishing the plaintiff's lost lease as a valid and binding contract, and from a copy of it which was duly proven fixed the terms, and further canceled the lease made by Morgan to Bills and the assignment by Bills to Smith as constituting clouds upon the plaintiff's rights, and enjoined the defendant Morgan from interfering with Heck in his operations upon the land.

[1] Is there any merit in the contention of the defendant Morgan that the paper was not effective because he had not acknowledged it? As between the parties, there is no necessity for the acknowledgment of a deed. If it is properly signed, sealed, and delivered, it is just as effective to convey the grantor's title as though it had been acknowledged. The purpose of an acknowledgment is to supply the proof necessary to have it admitted to record, except in the case of a married woman, where, by the language of the statute, an acknowledgment is necessary to the validity of the deed. *State v. Proudfoot*, 38 W. Va. 736-745, 18 S. E. 949; *Washington County v. Dunn*, 27 Gr. (Va.) 608; *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484; 1 C. J. 750.

[2-4] The principal contention of the de-

fendant Morgan, however, is that this lease was delivered by him to Morford upon condition that it would be valid only if a copy were furnished him, and that inasmuch as this copy has never been furnished there was never any effective delivery, and when the lease came back into his hands he had a perfect right to destroy it. The evidence does not bear out his contention that this lease was delivered upon any such condition as he now sets up. Morford and Brown swear positively that there was no such condition attached to the delivery. Morford admits, as we have before stated, that he did agree to furnish Morgan a copy, and it is shown that a copy was made for that purpose, but that this was a condition to the validity of the instrument is denied emphatically by both Brown and Morford. Possession of an instrument of this character by the grantee is prima facie evidence that it was delivered to him with the intention that it should convey the grantor's title, and it might be very well said that Morgan has failed to overcome this presumption. Aside from this, however, it is well settled that a deed, or any instrument conveying an interest in real estate, cannot be delivered to the grantee upon condition, or, in other words, delivered in escrow. Such conditional delivery can only be made to a stranger to the transaction. *Dorr v. Midelburg*, 65 W. Va. 778, 65 S. E. 97, 23 L. R. A. (N. S.) 987, and authorities there cited. The delivery in this case, of course, was not made direct to the grantee, but it was made to Morford, his agent. It seems that formerly a conditional delivery could not be made to an agent of the grantee, but the tendency of the modern holdings is that the grantee's general agent may be intrusted with the instrument to be held in escrow. This doctrine has been extended no further, however, than to permit the delivery upon condition to such an agent as owes no duty towards his principal in regard to the particular transaction. In other words, if the conditional delivery is made to the agent who is conducting the particular negotiations on behalf of the principal, it would be entirely inconsistent with the specific duty with which he is charged, and the delivery to him would be, in effect, a delivery to the grantee. 10 R. C. L. title "Escrow," § 13; *J. I. Case Threshing Machine Co. v. Barnes*, 183 Ky. 321, 117 S. W. 418, 19 Ann. Cas. 246, and monographic note at page 250. In this case Morford being the agent of the plaintiff for the very purpose of conducting this transaction, and receiving on behalf of his principal the lease, it would be entirely inconsistent with this duty for him to act in the capacity of agent for both parties to hold the instrument in escrow. The delivery to him was therefore an absolute delivery, even though there may have

been attached thereto the condition to which Morgan testifies.

[5] Nor is there anything in the contention of the defendant Morgan that when the lease executed by him came back into his possession for the purpose of having it acknowledged it deprived the plaintiff of any rights which he might otherwise have had thereunder. If this paper was effective to vest in the plaintiff any interest, he could only be divested thereof by a grant from him or in some other way provided by law. The fact that the grantor came into possession of the instrument for the purpose of acknowledging it would not have the effect to divest the grantee of his title acquired thereunder. *Rootes v. Holliday*, 6 Munf. (Va.) 251.

The defendant Bills, however, claims that he was a purchaser for value in good faith, and without notice of the plaintiff's rights under the lease which had been theretofore executed to him by Morgan, and that therefore his rights under the lease executed to him by Morgan in September, 1919, are superior to the rights of the plaintiff, and this would be correct if the facts justified this conclusion, for under our recording statutes the plaintiff's lease would be void as to a purchaser for value in good faith without notice. Is the defendant Bills such a purchaser? It is contended: First, that he had actual notice of the plaintiff's rights, notwithstanding his denial, and that even if he did not have such actual notice Heck had such possession of the premises at the time of his purchase as to amount to notice; and, second, that even though he had no notice whatever, still he was not a complete purchaser, for the reason that he had not paid the consideration agreed upon between him and Morgan. Bills swears that at the time he took the lease from Morgan he did not know of Heck's claim, and had no information whatever in regard thereto, and Morgan swears that he gave him no such information, but, on the contrary, had told him that there was no adverse claim of any kind to the land. It is significant, however, that on the very day on which this lease was executed and delivered Bills prepared a notice to Heck advising him to cease trespassing upon the land, and further advising him that he had no right to operate the same for oil and gas. This notice clearly implies that the one who prepared it knew that Heck was making some claim of a right to conduct operations upon this land for oil and gas. But Bills says that while this notice was prepared by him on the 17th it was after the delivery of the lease to him, and after that transaction was closed. This may be true, but it is hardly credible. Morgan puts himself in the position of making a clear-cut false and fraudulent representation to Bills, for he admits that he himself knew that

Heck was claiming a right to develop the land for oil and gas at the very time that he made the representation to Bills, and it may be said that the evidence of one who swears that he is willing to commit positive fraud of this kind is not entitled to very much credence when in conflict with the circumstance of the preparation and giving of the notice to Heck.

[6] However, it is unnecessary to determine whether Bills had actual notice of Heck's claim or not. The evidence shows that Heck had taken possession of this land prior to the execution of this lease to Bills; that he was then at work upon it with a force of men building a road leading to the location he had established for an oil well. The surface of the land is a part of the record of which a purchaser must take notice, and it is clear from the evidence that had Bills looked at this land at the time he took his lease he could have come to no other conclusion but that some one was preparing to conduct operations thereon for oil and gas, and it would then have been his duty to make inquiry as to the rights claimed by such party. In *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W. Va. 685, 60 S. E. 890, it was held that one who has knowledge or information of facts sufficient to put a prudent man on inquiry as to the existence of some right or title in conflict with that which he is about to purchase is bound to pursue the same, and to ascertain the extent of such prior right.

[7] There can be no doubt that the conduct of Heck upon this tract of land was sufficient to put any one upon notice that oil operations were about to be carried on upon it. The road which was under construction at the very time of the making of the lease to Bills was consistent only with that purpose. It appears that the tract of land had not been farmed for some time; that it had grown up in sprouts and brush, and that it had a small orchard upon it; that a wagon road over which heavy hauling could be done, such as was being constructed by Heck, was entirely useless for any purpose to which the farm was being devoted by Morgan, and particularly is this true when we consider the point to which the road led. Then, too, oil development was going on in the neighborhood; a well had just come in on an adjoining tract of land, and it was perfectly apparent to any one that the purpose of the work being done by Heck upon this land was to produce oil therefrom. It is, therefore, quite clear that if Bills had looked at the land at the time he took the lease he would have been informed from the appearances that some one else was asserting a right to the oil and gas, and it would have been his duty to have made inquiry and ascertained just what this right or claim was. But Bills

says he did not in fact look at the land, and that he can only be charged with such information as he actually had. Was Bills charged with knowledge of the facts of which he would have been informed had he made an examination of the land? If he is, then he had notice, or is charged with knowledge of such facts as would give him notice of Heck's rights. In *Mills v. McLanahan*, 70 W. Va. 288, 73 S. E. 927, the defense of innocent purchaser was made. Mills was in possession of the land under a title bond which had been executed many years before, and which had been lost, and a subsequent purchaser from Mills' grantor claimed that he was not chargeable with any knowledge as to Mills' rights, but this court held that the law imposed upon such subsequent purchaser the duty to make an investigation, and imputes to him notice of all facts which such an investigation would have disclosed, and of all the rights of those in possession. Many authorities are cited in that case to support that view, and it seems to be the established law of this state. It therefore follows that Bills, being under a duty to take notice of all facts which an investigation upon the land would disclose, is not an innocent purchaser without notice of Heck's rights; the situation being such as to disclose facts which would inform him of those rights.

[8] There is another reason why Bills is not such a purchaser as is protected, and that is that he had not paid the consideration at the time he admittedly was fully informed of the situation. The real consideration which Bills was to pay for this lease was to bear Morgan's share of the expense of drilling the first well thereon. He only gave, according to his own contention, a nominal consideration of \$1 at the time the lease was executed, while the real consideration, assuming that it would cost as much to drill a well on this land as the evidence shows it did on the adjoining land, would be between \$700 and \$800, no part of which had been paid, or has even yet been paid so far as this record discloses. Notice of prior existing rights received by a purchaser of property before he has paid the purchase money is equivalent to notice before the contract of purchase. He is not a complete purchaser until the consideration has been paid. He was in a position, after he was fully informed of the rights of the prior purchaser, to fully protect himself by withholding the consideration which he was to give. *Welch v. King*, 82 W. Va. 253, 95 S. E. 844; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644.

For either of the foregoing reasons Bills is deprived of the defense of innocent purchaser for value without notice. What we have said as to the duty of Bills to ascertain what was being done upon the land, and its effect to deprive him of the defense of innocent purchaser, applies with even greater force to

the defendant Smith. At the time Smith took the assignment from Bills, the road was completed and indicated unmistakably its purpose.

[9] The appellees contend that the plaintiff's bill should be dismissed, for the reason that he attempted to practice a fraud upon the defendant Morgan subsequent to the bringing of this suit. There is evidence that after this suit was brought the plaintiff discovered what he conceived to be a defect in the title of Morgan to the land in controversy, and went to Morgan's vendor, and procured from him upon what are termed fraudulent representations a quitclaim deed for the land, because of which conduct the appellee Morgan now insists the plaintiff should be denied relief. It is quite true that equity will not lend its aid to enforce an unconscionable contract or one procured by fraudulent means. Ordinarily one who comes into equity must come with clean hands, but this maxim extends no further than to deny relief to one who has acted fraudulently or inequitably in regard to the contract involved in litigation. It does not extend to the conduct of a party generally. The matter set up here which it is claimed should defeat the plaintiff's right to maintain this suit has no connection with the contract sought to be enforced. It was conduct subsequent to the making of that contract, and subsequent to the institution of this suit to establish it, and even admitting that the plaintiff's conduct in regard to that transaction was not free from censure, it has no bearing upon the contract involved here, or upon the rights of the parties involved in this litigation. The evil conduct or inequitable practice which is relied upon to defeat the suit must be in connection with the particular matter or transaction in respect to which judicial protection or redress is sought. 10 R. C. L. title "Equity," § 140.

Our conclusion is to affirm the decree complained of; and it is so ordered.

(83 W. Va. 82)

MILLER v. UNITED FUEL GAS CO.
(No. 3661.)

(Supreme Court of Appeals of West Virginia.
March 1, 1921.)

(Syllabus by the Court.)

1. Master and servant §365—Compensation act applies unconditionally only to employees in intrastate commerce.

With respect to an employer engaged in both interstate and intrastate commerce, section 52 of the Workmen's Compensation Act (chapter 15P, Code 1918, Code Supp. 1918, c. 15P, § 52 [sec. 708]) applies the provisions of the act unconditionally only to those of his employees whose work is wholly intrastate and

clearly separable and distinguishable from work in interstate commerce.

2. Master and servant §365—Compensation Act must be accepted by employer and employees engaged in interstate and intrastate commerce.

But where the work done within the state is so closely related to the interstate business of the employer that it cannot clearly be distinguished and separated from it, the act is made to apply only upon the condition that the employer and such employees voluntarily accept its provisions by filing with the commissioner written acceptances approved by him.

3. Master and servant §365—Employer engaged in interstate and intrastate business not deprived of common-law defenses in absence of acceptance of Compensation Act.

Where the employer and his employees have not so elected to submit to the act, the former is not deprived of his common-law defenses.

4. Commerce §16—Master and servant §365—Inspection of interstate pipe line for gas held "interstate commerce," requiring mutual acceptance of Workmen's Compensation Act.

An employee of an interstate carrier of gas, inspecting within the state an integral part of its pipe line transportation system, through which gas continuously passes destined for indiscriminate interstate and intrastate use, in search of a leak known to exist, is engaged in work so closely related to interstate commerce as to be part of it; and, in the absence of a mutual election to submit to the Workmen's Compensation Act (Code 1918, c. 15P [secs. 657-711]), the employer is not deprived of his common-law defenses at the suit of the employee for injuries sustained by him while engaged in such inspection and repair work.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

5. Master and servant §284(1)—Employment in interstate commerce held question for court.

Where, in such case, there is no conflict in the evidence respecting the character of defendant's business and the nature of plaintiff's employment, the question whether the latter was or was not so closely identified with interstate commerce as to be part of it is for the court, not the jury, to determine.

6. Trial §252(20)—Instruction including element of permanency of injury and probability of future loss not sustained by evidence erroneous.

In the absence of evidence reasonably tending to establish permanent injury of the plaintiff, or the probability of future pecuniary loss resulting therefrom, an instruction including such elements among those proper to be considered by the jury in determining its verdict is erroneous.

7. Master and servant §351—Employer failing to accept Compensation Act not liable for injuries not caused by his negligence.

Though an employer within the terms of the Workmen's Compensation Act (Code 1918,

c. 15P [secs. 657-711]) fails to avail himself of the benefit of the statute, he is not liable for an injury sustained by an employee in the course of his employment, in the absence of negligence on the part of the former which is the proximate cause of the injury.

8. New trial ¶70—Verdict based on conjecture should be set aside.

In an action for tort, the plaintiff bears the burden of proof, and a verdict for him, based upon evidence which affords a mere conjecture that liability exists, and leaves the minds of the jurors in equipoise and reasonable doubt, should be set aside upon proper motion. The evidence must generate an actual, rational belief in the existence of the disputed fact.

9. Master and servant ¶101, 102(8)—Reasonable care to furnish reasonably safe place for work sufficient.

An employer has performed his duty to provide a reasonably safe place within or upon which his employees may work, when he has exercised reasonable care and diligence in that regard.

Error to Circuit Court, Roane County.

Proceedings by Otha A. Miller against the United Fuel Gas Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

R. G. Altizer, of Charleston, C. C. Douthitt, of Huntington, and Pendleton, Mathews & Bell, of Spencer, for plaintiff in error.

Thos. P. Ryan, of Spencer, and Chas. E. Hogg, of Point Pleasant, for defendant in error.

LYNCH, J. The purpose of this writ is to review a judgment for plaintiff entered upon a verdict in an action to recover damages for personal injuries resulting from the bursting of defendant's gas pipe line on July 29, 1916. At the time of the accident plaintiff and a fellow employee were engaged in searching for a leak which had developed in the line, to which duty they had been assigned by defendant's superintendent. The line in question was a gathering or feed line, four inches in diameter, designed to collect and confine gas from numerous wells in the vicinity and transport it in succession to another 4-inch line, thence through an 8 or 10 inch line to a compressor station, and by an 18-inch main trunk line to Ravenswood on the Ohio river, where the gas is metered, sold, and delivered to the Ohio Fuel Supply Company, by whom it is transported across the river and sold and distributed to patrons of the latter in Ohio. A minor portion of the gas so gathered and transported is sold en route to various consumers in this state, but the remainder is carried in the line without material break across the state line into Ohio, thereby becoming a commodity of interstate commerce. The two portions, however, that sold within the state and that

without, are commingled in the one transportation system, and no attempt is made to separate them. We have hitherto had occasion to refer to the combined interstate and intrastate character of this portion of defendant's business, and therefore it is unnecessary to enter into further discussion of it. *Roberts v. United Fuel Gas Co.*, 84 W. Va. 368, 99 S. E. 549; *United Fuel Gas Co. v. Hallanan*, 105 S. E. 506, 516, 517.

Plaintiff and W. B. Hughes had ascertained the approximate location of the leak and were engaged in digging along the side of the line, which was buried about 18 inches beneath the surface of the ground, in order to determine the exact source of the leakage and repair the line to stop the flow. Hughes was digging with a pick, and plaintiff was removing the loosened dirt with a shovel, when, from some unaccountable and unexplained cause, the pipe burst, throwing both of them a considerable distance, filling their eyes with dirt, mud, and gravel, and dazing them by the force of the explosion. A physician hastily summoned removed the dirt and other substance from their eyes as best he could and rendered other necessary assistance. Plaintiff was removed to his home, where his eyes were kept bandaged for four days. After two weeks he returned to his work and remained with the company for more than a year, usually engaged in performing the same character of work as before the injury. Since then he has been and now is employed by the Atlantic Refining Company as foreman in charge of its line repair work at an increased daily compensation.

The declaration and its three counts charge defendant with negligence in a threefold aspect: (1) In failing to keep its pipe line in a reasonably safe condition and state of repair, and in permitting too great a volume of gas to remain in the pipe at high pressure; (2) in failing to shut off the gas in the line before directing plaintiff to locate the leak; (3) in failing to lay a line sufficiently strong to carry with reasonable safety the volume of gas transported through it. The declaration also averred the failure of the defendant to comply with the requirements of the Workmen's Compensation Act (Code 1913, c. 15P [secs. 657-711]) by paying into the compensation fund the premiums required by law.

In addition to its demurrer to the declaration and plea of not guilty, defendant tendered and the court permitted it to file three special pleas denying that it was subject to the Workmen's Compensation Act of this state and setting up the common-law defenses of contributory negligence, assumption of risk, and fellow servancy.

Plaintiff's instructions Nos. 1 and 2, given, and defendant's instruction No. 2, refused, raise the question whether the failure of the

latter to elect to contribute to the workmen's compensation fund operated to deny it the protection of the common-law defenses invoked by the special pleas. In effect plaintiff's two instructions informed the jury that if they believed from the evidence that at the time of the injury the defendant was engaged in both interstate and intrastate commerce, and that plaintiff was engaged in work affecting the latter only, and that such work was clearly separable and distinguishable from the defendant's interstate business, then as to the work in which plaintiff was engaged defendant was subject to the Workmen's Compensation Act, and, not having availed itself of the provisions thereof, could not rely upon the common-law defenses.

[1-3] With respect to an employer engaged in both interstate and intrastate commerce, we have held that section 52 of the Workmen's Compensation Act, as it appears in Barnes' 1916 Code, c. 15P (Code Supp. 1918, c. 15P, § 52 [sec. 708]), applies the provisions of the act unconditionally only to those of his employees whose work is wholly intrastate and clearly separable and distinguishable from interstate commerce. *Suttle v. Hope Natural Gas Co.*, 82 W. Va. 729, 97 S. E. 429; *Roberts v. United Fuel Gas Co.*, 84 W. Va. 368, 99 S. E. 549. But where the work done within the state is so closely related to interstate commerce that it cannot clearly be distinguished and separated from it, the act is made to apply only conditionally, that is, when the employer and employees voluntarily accept its provisions by filing with the commissioner written acceptances approved by him; and, where they have not so elected to submit to the act, the employer is not deprived of his common-law defenses. *Barnett v. Coal & Coke Ry. Co.*, 81 W. Va. 251, 94 S. E. 150.

[4, 5] Was the work engaged in by plaintiff at the time of the injury clearly separable from the interstate portion of defendant's business, or were both so closely allied or related as to be inseparable? The gas line was an integral part of defendant's general and extensive pipe line system through which gas passed for indiscriminate interstate and intrastate use. It was already in existence and dedicated to the transportation of gas. Though not a main trunk line, yet it fed and supplied the latter with the article of commerce which both were designed to carry and then did carry, just as the least important spur and lateral railroad lines gather and concentrate the commodities they carry towards the main trunk lines for transportation to their ultimate destination. Plaintiff's work in locating the leak in the line had for its purpose and object the repair and improvement of existing interstate transportation facilities already devoted to the purposes intended to be served by them. The *Suttle* and *Roberts* Cases, cited, are unlike this case in that neither of them relates to

the transportation phase of the gas industry, but rather to the production and preliminary construction features. In the former, plaintiff's decedent was assisting in the erection of a derrick over a gas well preparatory to cleaning it out. In the opinion the court said:

"The production department of the gas industry is clearly separable from the transporting or marketing branch. All work in connection with the production of gas, that is, with bringing it to the surface where it may be confined and reduced to possession, is local in nature and clearly separable and distinguishable from the marketing or interstate portion of the industry." 82 W. Va. p. 738, 97 S. E. 433.

Similarly in the *Roberts* Case, plaintiff was engaged at the time of his injury in excavating a ditch preparatory to laying a pipe line to be used in the interstate and intrastate transportation of gas, but not yet completed or put in use. Therefore the line was not yet stamped with the character of the commerce which it was to carry after completion. Work on it was merely preliminary to the transportation to which later it would be devoted, and hence was wholly intrastate. See, also, *McKee v. Ohio Valley Electric Ry. Co.*, 78 W. Va. 131, 88 S. E. 616.

But when the instrumentality has already been devoted to interstate commerce, and has assumed its place as a link in the chain of such transportation, employees engaged in repairing it or doing other work thereon generally are held to be engaged in work so closely allied to interstate commerce as not to be clearly separable from it. *Pedersen v. Del., L. & W. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *Southern Ry. Co. v. Puckett*, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69; *New York Cent. R. Co. v. Porter*, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536; *Kinzell v. Chi., M. & St. P. Ry. Co.*, 250 U. S. 130, 39 Sup. Ct. 412, 63 L. Ed. 893; *So. Pac. Co. v. Ind. Acc. Com.*, 251 U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. 258; *Erie R. Co. v. Collins*, 253 U. S. 77, 40 Sup. Ct. 450, 64 L. Ed. 790; *Erie R. Co. v. Szary*, 253 U. S. 86, 40 Sup. Ct. 454, 64 L. Ed. 794. In the *Pedersen* Case, cited, it was held that an employee carrying bolts to be used in repairing an interstate railroad was engaged in interstate commerce within the meaning of the federal Employers' Liability Act. The test there laid down and followed in subsequent cases is:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?"

The court further said, at page 152 of 229 U. S., at page 649 of 33 Sup. Ct. (57 L. Ed. 125, Ann. Cas. 1914C, 153):

"True, a track or bridge may be used in both interstate and intrastate commerce, but when

It is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those * * * engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

The cases cited all relate to actions for injuries brought under the federal Employers' Liability Act, but they are especially applicable here on the question whether plaintiff's work was clearly separable and distinguishable from interstate commerce, or so closely identified with it as to be part of it. For reasons already stated we are of opinion that it falls within the latter class, and therefore that defendant, not having elected to accept the provisions of the Workmen's Compensation Act as permitted by section 52, is not debarred from availing itself of the common-law defenses. The act applies unconditionally only to such employment as is clearly separable from interstate commerce.

There is no dispute upon the facts relating to the character of defendant's business and the nature of plaintiff's employment, and therefore the question whether it was or was not so closely identified with interstate commerce as to be part of it was one of law for the court and not one of fact for the jury. Hence plaintiff's instructions Nos. 1 and 2 were improperly given. The giving of similar instructions in the Roberts Case, cited, was held to be harmless error because the jury there correctly decided the question of law, while here they have rendered an erroneous decision. For the same reasons defendant's instruction No. 2 should have been given.

[6] Plaintiff's instruction No. 3 also is erroneous in telling the jury they are at liberty to consider the permanence of plaintiff's injury, and to include "any losses that may occur in the future to the plaintiff" which are proximate results of the alleged negligence. There was no serious attempt to prove permanent injury. Plaintiff and some witnesses testify to a slight deafness and loss of weight, but the evidence on that point is weak and inconclusive. The physician who attended him, introduced as a witness for defendant, did not regard his injury as serious or permanent, and it is significant that plaintiff made no attempt to cross-examine him further than to ask two or three unimportant questions. Plaintiff resumed his work with defendant two weeks after the date of the accident and continued for more than a year in its employ, and now holds a still better position with another company as foreman in charge of its line repair work.

[7] But there is more serious error in the case than we have yet discussed. We are of opinion that plaintiff has failed to establish any negligence on the part of the defendant. Even if the latter had been within the terms of the Workmen's Compensation Act,

failure to comply with its provisions would not render defendant liable in the absence of negligence on its part which operated as the proximate cause of the injury. *Watts v. Ohio Valley Electric Ry. Co.*, 78 W. Va. 144, 88 S. E. 659; *Louis v. Smith-McCormick Construction Co.*, 80 W. Va. 159, 92 S. E. 249; *Wilkin v. H. Koppers Co.*, 84 W. Va. 460, 100 S. E. 300. There is no evidence that the pipe line was improperly constructed or maintained. On the other hand, defendant had constructed it only six months before the accident, and in its construction had used none but entirely new material, obtained from La Belle Iron Works of Toledo, Ohio, the manufacturer, whose test showed a resistance sufficient to withstand a pressure of 1,500 pounds for each square inch of surface. The superintendent who had charge of the work testifies to its proper construction, and no one contradicts him. The explosion did not occur at a coupling, but in the pipe itself, near a point where it was bent to conform to the curve of an embankment over which it ran. But there is nothing to show that the pipe was improperly strained in bending it, or that the work was done carelessly or negligently; indeed, the testimony is to the contrary. The declaration charges failure to shut off the gas pending the search for the leak, but that alone does not constitute negligence, because the usual and customary and perhaps the only way to locate a leak in one of several pipes forming parts of a pipe line system is by means of the escaping gas. Though tested to withstand a pressure of 1,500 pounds, the line on the day of the accident did not carry more than 350 pounds, and there is testimony to the effect that the pressure was even less than that.

[8] In view of the positive testimony clearly disclosing the proper construction of the line out of new pipes so tested, its periodic inspection, the absence of any knowledge on defendant's part of a fatal defect likely to cause such an accident, and the failure of plaintiff to show by proof that it was due to some negligent act or omission to act on the part of defendant, there is nothing to support a finding of liability against it, and the mandatory instruction directing a verdict for defendant should have been given. Plaintiff was engaged in a dangerous work and well knew the risk and hazard attending it. Before he can recover for the injury he must show actionable negligence on the part of defendant. *McCreary v. C. & O. Ry. Co.*, 77 W. Va. 305, 87 S. E. 374. "In an action for tort, the plaintiff bearing the burden of proof, a verdict for him cannot be found on evidence which affords mere conjecture that the liability exists, and leaves the minds of jurors in equipoise and reasonable doubt. The evidence must generate an actual rational belief in the existence of the disputed fact." Point 1, Syl., *Moore v. Heat & Light*

Co., 65 W. Va. 552, 64 S. E. 721. When the employer has exercised reasonable care and diligence in providing a reasonably safe place within which his employees may perform the work assigned to them, he has fulfilled his duty to them in that regard. *Schilling v. H. Koppers Co.*, 83 W. Va. 737, 99 S. E. 75.

[9] In so far as the action of the circuit court in overruling defendant's demurrer to the declaration and each of its three counts relates to the failure of defendant to comply with the Workmen's Compensation Act, and the duty to remove or reduce the gas pressure on the line while it was being repaired, and to exercise a reasonable diligence to provide a reasonably safe place to work, what has been said is perhaps sufficient. The latter requirement, however, is not universal in its application but is subject to modification in some circumstances. It was part of plaintiff's business to repair leaks, and he was proficient in performing that service and had knowledge of its dangerous character. In effect the work assigned to him was to make safe an unsafe portion of an interstate gas pipe line system, and while the rule referred to is not without some degree of applicability, it does not apply to its fullest extent because the employee assumes the ordinary danger and risk incident to such employment. This is one of the exceptions to the general requirements for a safe place and safe instrumentalities. 3 *Labatt's Master & Servant* (2d Ed.) § 924; note, 25 L. R. A. (N. S.) 321. See, also, *Miller v. Berkeley Limestone Co.*, 70 W. Va. 643, 75 S. E. 70. In other respects the declaration seems unobjectionable.

For the reasons stated in this opinion, we reverse the judgment, set aside the verdict, and remand the case for retrial.

(88 W. Va. 147)

WILES et al. v. WALKER et al. (No. 4065.)

(Supreme Court of Appeals of West Virginia.

March 8, 1921. Rehearing Denied

March 29, 1921.)

(*Syllabus by the Court.*)

1. Forcible entry and detainer §6(2)—Where entry peaceable and under color of title, right to possession depends on title.

In an action of forcible entry and detainer, wherein the relation of landlord and tenant does not exist, and the entry of the defendant was peaceable, without violence or threats of violence, express or implied, under claim of right and color of title, the right to possession depends upon the true ownership of the land.

2. Forcible entry and detainer §6(2)—Right to possession may depend on proof of title.

Though an action of forcible entry and detainer relates only to possession and does not settle or adjudicate title, yet, where the entry

of the defendant was peaceable, the result may depend and turn on proof of title as showing the one entitled to the possession.

3. Forcible entry and detainer §4—Mere fact that entry was against plaintiff's will does not make it forcible.

The mere fact that the entry was against the will of the plaintiff does not constitute it a forcible entry, if in other respects it was peaceable.

4. Forcible entry and detainer §29(1)—Plaintiff has burden of proving possessory rights superior to that of defendant.

In such action the plaintiff carries the burden of proof, and cannot prevail, unless, by a preponderance of the evidence, he shows a possessory right superior to that of the defendant.

Error to Circuit Court, Mingo County.

Action by G. R. C. Wiles and others against W. J. Walker and others. Judgment for plaintiffs, and defendants bring error. Reversed and rendered.

Goodykoontz, Scherr & Slaven, of Williamson, for plaintiffs in error.

Lafe B. Chafin and B. Randolph Bias, both of Williamson, for defendants in error.

LYNCH, J. By this action of unlawful entry and detainer, heard by the court sitting in lieu of a jury, plaintiffs sought and obtained a judgment awarding them possession of two lots, Nos. 1 and 2, block G, of Keller addition to the town of Gilbert, from which order defendants prosecute this writ. To sustain their claim to possession of the lots in question, plaintiffs rely upon three deeds: One dated June 20, 1907, by which R. A. Keller, trustee, conveyed the lots to A. J. Campbell; one of January 23, 1913, from A. D. Dickey, clerk of the county court of Mingo county, conveying them to A. A. Gaujot, trustee, pursuant to a tax sale and purchase in 1911 for an alleged delinquency in the payment of taxes assessed against the lots in 1909 in Campbell's name; and the last, dated April 4, 1913, by which Gaujot conveyed the property to plaintiffs. The latter immediately or soon thereafter assumed possession through a tenant. The lots were unimproved, save for a wire fence inclosing them, and were used by the tenant chiefly for garden purposes. Later he sublet to another tenant who used the property "as a lot for his cows, horses and calves—whatever he happened to want to put in there." The possession of the latter, however, seems to have been fitful, and some time during 1917, 1918, or early in 1919, the exact date not being disclosed by the record, defendants entered upon the lots pursuant to a purchase of the property in 1917, removed the wire fence, and readjusted it so as to inclose the lots with adjoining property owned by them, and have since ex-

exercised continuous dominion and control over them. No force, violence, or threats of violence characterized their entry. On this question at least the evidence is clear and positive. Defendant W. J. Walker testifies that no one was in possession when he entered upon the lots, and the subtenant, whose possession plaintiffs rely upon, admits he was away at the time, and does not claim to have had stock or a garden on the property. At any rate, the taking of possession was peaceable, nor at any time since, so far as the record discloses, has unpleasantness developed.

In support of their claim of title, defendants rely upon deeds from A. J. Campbell, in whose name the alleged delinquency of 1909 occurred, to P. G. Hedrick, and from Hedrick to defendants, dated April 7, 1916, and July 9, 1917, respectively. They also introduced two other deeds conveying the identical property, both dated August 4, 1919—one from T. F. Brammer and J. F. Bolen to P. G. Hedrick, "being two of the same lots conveyed to said T. F. Brammer and J. F. Bolen by deed from said P. G. Hedrick and his wife, dated the 11th day of December, 1909"; the other from Hedrick to defendants. But defendants were not permitted to state their purpose in procuring these deeds or show what they sought to establish by them. They also assail the validity of the tax deed of 1913 to Gaujot, which is the foundation stone of plaintiffs' claim of title, and in justification and support of their attack elicited from the deputy clerk of the county court of Mingo county the fact that lots 1 and 2, block G, Keller addition to the town of Gilbert, were not assessed or returned delinquent in the name of A. J. Campbell for the year 1909, and did not appear in the sales list of lots sold in 1911 for prior delinquencies. Because of this apparent irregularity or defect, they charge that the entire proceedings based upon the alleged delinquency of 1909 were null and void. Plaintiffs express a belief that the lots appeared on the land books for that year as Nos. 1 and 2, block 3, instead of block G, but introduce no record proof in support of their statement. On the other hand, defendants show by the deputy clerk of the county court that on the official map of the Keller addition to the town of Gilbert all blocks are lettered, not numbered, and all deeds relating to the lots in question refer to them as in block G. They also show by the same witness that it is only on the official map of the town of Gilbert, which is separate and distinct from the Keller addition thereto, that the blocks are numbered instead of lettered.

[2] The action of forcible entry and detainer is solely possessory in nature. By it the one instituting the proceeding seeks merely to regain possession of land which he claims another is wrongfully withholding

from him. The action does not permit or sanction a binding investigation or finding as to the true title or ownership of the property in dispute. As said in *Hukill v. Guffey*, 37 W. Va. 425, 445, 16 S. E. 544, 550:

"The action of unlawful entry and detainer now bears in some degree the same relation to the action of ejectment, now final, which the act of ejectment, before 1st July, 1850, then not final, bore to the writ of right, which was then abolished. English-speaking people have it ingrained into them that they ought not to be required to lose or give up their land without having, if they see fit, two trials; hence the action of unlawful entry, when not barred (three years), is frequently used as a preliminary skirmish to feel the enemy, before the final battle is brought on by an action of ejectment."

[1] But, though the title to land may not directly be involved, yet indirectly it may be decisive in determining the right to possession. Of course, where a defendant's entry upon land is forcible, rather than peaceful, his conduct is unlawful regardless of the question of his right or title to the property, and one who is thus deprived of possession may recover it in an action of forcible entry and detainer even against the true owner. The law does not permit even the legal owner to assert his rights in such a violent and unlawful manner. *Fisher v. Harman*, 67 W. Va. 619, 68 S. E. 885; *Curtis v. Meadows*, 77 W. Va. 22, 86 S. E. 886. But where, as here, the entry of the defendant was peaceable, without violence or threats of violence, express or implied, under a claim of right, "the right to possession depends upon the true ownership of the land." *Chilton v. White*, 72 W. Va. 545, 78 S. E. 1048; *Feder, Adm'r, v. Hager*, 84 W. Va. 452, 63 S. E. 285; *Adams v. Tilley*, 104 S. E. 601.

[3] The mere fact that the entry was against the will of the plaintiff does not constitute it a forcible entry, if in other respects it was peaceable. *Adams v. Tilley*, cited. It is in a situation such as this, where the entry is peaceable, that the question of title may incidentally be involved. In *Feder, Adm'r, v. Hager*, cited, the court said at page 454 of 64 W. Va., at page 286 of 63 S. E.:

"The right of possession belongs to title. * * * True it is that this action relates only to possession, and determines only the right to possession. It does not settle or adjudicate title. But title may be the proof showing that one is entitled to the possession; in other words, the action may turn on proof of title. In many cases in which this action is invoked the ownership of the land may be immaterial, but not in all."

[4] Without expressing any final opinion upon the question of ownership of the two lots involved in this inquiry, it is sufficient to say that defendants' title is equally as good,

perhaps better, than plaintiffs'. The burden of proof naturally rests with the latter, and they have failed to show by a preponderance of the evidence that their right of possession is superior to that of defendants. Though much proof that doubtless was available and would have thrown light upon the nature of the delinquency proceeding upon which plaintiffs rest their claim was not presented at the trial, the circumstances are such as to create doubt and suspicion with regard to the validity of the tax deed of 1913 and the proceedings upon which it is based. Having failed to show possessory right superior to that of one who has taken peaceable possession under claim of right and color of title, plaintiffs cannot prevail in this action. If, however, they desire further to prosecute their claim to a final conclusion, an adequate remedy exists which affords opportunity for a full development of the questions relating to the respective claims of the parties.

For the reasons stated, our order will reverse the judgment, and enter judgment here for the defendants.

(98 W. Va. 32)

SCOTT v. MERCER GARAGE & AUTO SALES CO. (No. 4123.)

(Supreme Court of Appeals of West Virginia.
March 1, 1921. Rehearing Denied
March 29, 1921.)

(Syllabus by the Court.)

Bailment §18(2)—Lien for repairs is subordinate to purchase-money lien.

The common-law lien of a mechanic for repairs on a chattel in his possession is subordinate to the lien of a former owner of the chattel who in his contract of sale reserved the title as security for unpaid purchase money, duly recorded as provided by section 3 of chapter 74 (sec. 3831) of the Code, unless by the terms of the contract or by the subsequent conduct of the seller he has given express or implied authority to the vendee to keep the property in repair.

Error to Circuit Court, Mercer County.

Detinue by W. A. Scott against the Mercer Garage & Auto Sales Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

Sexton & Roberts, of Bluefield, for plaintiff in error.

Arthur F. Kingdon, of Bluefield, for defendant in error.

MILLER, J. In this action of detinue, begun in the circuit court of Mercer county, and there determined adversely to plaintiff, upon agreed facts submitted to the court in lieu of a jury, the question is now presented for our decision, whether the common-law

lien of the defendant company for repairs upon an automobile, done in December 1916, and for the payment of which it was detaining said machine, is, as the circuit court held, superior and paramount to that of the plaintiff for the purchase money thereof represented by notes, for which in his written contract of sale he retained the title thereto, duly recorded in the clerk's office of the said county, prior to the delivery thereof to the defendant by Mary L. Holley, or her husband, the purchaser thereof, for the purpose of such repairs.

The contract of sale, made a part of the agreement of facts, after describing the parties and reciting the consideration, seven hundred and fifty dollars, one hundred and fifty dollars whereof is acknowledged as paid, and the balance, six hundred dollars, represented by twelve negotiable notes of fifty dollars each, payable one each month with interest, for the period of twelve months, further provides:

"The title to the above mentioned automobile is reserved to the party of the first part until all of said purchase money notes are fully paid."

Another provision of the contract is:

"It is further understood and agreed between the parties hereto that in the event the party of the second part shall fail to discharge any two of said notes as they fall due, and any two or more of said notes shall be due at the same time, then the party of the first part shall have the right, or option, if he so desires, to retake possession of said automobile, in the event the said party of the first part cannot otherwise collect said notes."

The facts agreed show that plaintiff did not know said car was out of the possession of the purchaser and in possession of defendant until some time in 1918, but believed it to be in his possession; that four of the purchase money notes had been paid, but that the remainder being unpaid, suit was brought thereon by plaintiff, judgment taken therefor against maker and endorser in May 1918, for \$410.92 and costs, and every legal remedy available was taken to collect the same, without avail; and that thereafter demand for the possession of the said automobile was made by plaintiff upon defendant, which being refused, this suit was brought to obtain possession thereof.

We recognize the fact that we are presented a clear case of a common-law lien of a repairman in possession of the chattel, holding it as security for labor and material expended upon it. But we also emphasize the fact that plaintiff is the vendor thereof with recorded reservation of title, held as security for the purchase money, giving notice to creditors of and purchasers from the vendee, the mortgagor. This lien was good

at common law without notice, but by section 3 of chapter 74 (sec. 3831) of the Code, such lien for purchase money is lost without recorded notice thereof as therein provided. There is nothing in the equities of the case now before us which should allow the subsequent lien to supplant the prior lien of the vendor. The defendant no doubt acquired a common-law lien on the chattel for the amount of the repairs, but was it not subordinate to that of plaintiff for purchase money? Plaintiff furnished the automobile, practically new, with all the material and labor bestowed upon it to make it a valuable machine, and there is nothing in the provisions of the contract of sale implying authority in the purchaser to incur the property, voluntarily or involuntarily, in such a way as to supersede the prior lien for purchase money. The instrument so reserving title of a chattel partakes of the nature of a mortgage, the vendor being mortgagee, the vendee the mortgagor. As a general rule, say all the authorities, a mortgagor cannot create a lien upon the property to take precedence over his recorded mortgage. Jones on Chattel Mortgages, § 472. This authority says:

"An agreement which will defeat the purpose of the transaction should not be inferred or implied against a mortgagee without very cogent evidence."

Following the general rule referred to we find directly in point the case of *Denison v. Shuler*, 47 Mich. 598, 11 N. W. 402, 41 Am. Rep. 734, opinion by Graves, C. J., holding that a mechanics' lien for repairs is subordinate to a prior duly recorded mortgage thereon for the purchase money. This case involved repairs on a steam engine which was then in the possession of the defendants, the mechanics, and held by them for the repair bill of \$185.86. The court, referring to the fact that the plaintiff had furnished the machine, says:

"The repairs did less. Their expenditure was comparatively small and they acted in making it under circumstances which charged them with notice of the plaintiff's prior lien. Why should their claim be preferred?"

What was said by Chief Justice Marshall, in *Rankin v. Scott*, 12 Wheat. 177, 179, 6 L. Ed. 592, referred to by the Michigan court, is as applicable here as in that case, namely, that a prior lien gives a prior claim, which is entitled to prior satisfaction of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant.

The comparatively recent case of *Shaw v. Webb*, 131 Tenn. 173, 174 S. W. 273, L. R. A. 1915D, 1141, Ann. Cas. 1916A, 626, involved the lien of a repairer of an automobile, first

a common-law lien lost by surrender of possession, but for which the statute also gave him a lien. In that case the court in a well considered opinion, which reviews many of the decisions and analyzes them, held that the lien given by statute was subordinate to the lien of the vendor of the chattel reserved to secure the payment of the purchase money notes, and that if the vendor intended to subordinate his lien to that of the mechanic for repairs, it should be manifested in the contract (in that case in the purchase money notes), in which the title was reserved to secure the payment thereof, else the notes would be deprived of a considerable element of marketability. In *Baughman Automobile Co. v. Emanuel*, 137 Ga. 354, 73 S. E. 511, 38 L. R. A. (N. S.) 97, the common-law lien of the repairer of an automobile was held to be subordinate to the rights of the vendor in his title retained to secure the purchase money. In that case it appears that the lien claimant had notice of the rights of the conditional vendor. Here our recording statute was the legal equivalent, for it gave defendant record or constructive notice binding him.

An examination of the cases apparently in conflict with those cited and others that might be referred to, unless it be those of New Jersey constituting an exception, will show that wherever such common-law lien has been allowed to supersede a lien reserved by the vendor of the chattel, the courts have attempted at least to refer their conclusions to some actual or implied authority of the vendor or mortgagee to have the chattel kept in repair. An illustration is the case of *Hammond v. Danielson*, 126 Mass. 294, involving a mortgage of a hack described as "let for hire," and "now in use." From which authority was implied in the mortgagor to keep the vehicle in repair. And in accordance with this class of cases, it was sought in the present case to imply authority in the vendee to cause the automobile to be repaired, because of the fact that plaintiff knew that the purchaser intended to use the machine on some occasions to carry passengers for hire. No such authority was given in the recorded contract. May he not stand on that, if he has done nothing in the meantime to deprive him of his rights? The facts agreed show nothing justifying any such implied authority.

For the reasons aforesaid, we are of opinion that plaintiff is entitled to recover possession of the property sued for, and that the judgment below must be reversed. But as the facts agreed do not include the value of the property, and the court made no finding thereon, before a final judgment the value of the property must be ascertained as provided by section 6 of chapter 102 (sec. 4403) of the Code.

We, therefore, reverse the judgment and remand the case to the circuit court, with

direction by proper proceedings to ascertain the value of the property and give judgment for the plaintiff for possession thereof, if possession thereof can be had, if not for the value thereof, with costs according to law.

(83 W. Va. 118)

ZINN v. CABOT. (No. 4185.)

(Supreme Court of Appeals of West Virginia.
March 1, 1921.)

(Syllabus by the Court.)

1. Master and servant \S 351—Employer not assenting to Compensation Act only liable for injury resulting from negligence.

An employer whose business comes within the purview of the Workmen's Compensation Act,¹ and who does not take advantage of the immunity afforded thereby, is not liable to an employé injured in his service, unless such injury results from his negligence.

2. Master and servant \S 356—Compensation Act only deprives nonassenting employer of defense of assumed risk from own negligence.

The provisions of the Workmen's Compensation Act denying to employers who do not comply with its terms the common-law defense of assumption of risk does not mean that the employer is liable in damages for every injury received by an employé in his service, but only deprives him of the defense that the employé assumed the risk of injury resulting from the employer's negligence, because such employé knew of such risk and remained in the service with such knowledge.

3. Master and servant \S 295(1)—Instruction on assumption of risk should be limited to risks from employer's negligence.

An instruction in an action for damages for personal injury which tells the jury that the employer in the particular case cannot avail himself of the defense of assumption of risk, without limiting the same to such risks as result from the employer's negligence, is misleading and should not be given.

4. Trial \S 243 — Inconsistent instructions should not be given.

It is error to give inconsistent instructions inasmuch as the jury is left to decide which theory of the law as thus presented is correct, and renders it impossible for the court to determine upon what legal principle the verdict is based.

5. Judgment \S 199(3) — Judgment non obstante veredicto must be based upon pleadings and not upon evidence.

A judgment non obstante veredicto must be based upon the merits of the case as disclosed by the pleadings, and not in any sense upon the evidence adduced upon the trial.

Error to Circuit Court, Roane County.

Action by W. H. Zinn against Godfrey L. Cabot. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Thos. P. Ryan, of Spencer, and Hogg & Hogg, of Point Pleasant, for defendant in error.

Pendleton, Mathews & Bell, of Spencer, for plaintiff in error.

RITZ, P. The defendant by this writ of error seeks reversal of a judgment in favor of the plaintiff for damages for personal injuries received by him while in defendant's employ, upon the ground that the court misdirected the jury, that the verdict is not supported by the evidence, and that the same is excessive.

The defendant had a gas well in Roane county, the casing in which had become broken so as to admit water into the well. To repair this damage a string of smaller casing was inserted in the inside of the casing then in the well down to the point where the same was broken, at which point what is known as a wall packer was to be placed thereon, which would have the effect of supporting the inside casing and also of stopping the leak in the larger casing. The plaintiff was employed by the defendant to assist in doing this work. The casing consisted of sections of iron pipe, and in order to get these in the well an appliance called an elevator was fastened to one end thereof upon which was a collar and the casing raised in a vertical position by the derrick, and then dropped into the well until the upper end thereof was even with the surface of the derrick floor. This section was then held in that position while with another elevator another section was raised and screwed into the collar end of the section thus suspended in the well, after which the elevator used to hold the first section was released, and the sections thus screwed together were dropped down until the top of the second section was level with the derrick floor, and this process was continued alternately using the elevators for securing the string of casing in the well and raising the new section to be attached thereto. At the time of the plaintiff's injury the string of casing had been completed, and had reached the point at which the wall packer was to be placed thereon. In order to attach this wall packer and make it operate, it was necessary to drop what is termed a baller into the casing by means of which a disk was broken releasing the springs in the wall packer, and making it catch on the side of the outside casing. The string of casing at that time projected somewhat above the derrick floor. It was being supported by one of the elevators around a collar at the derrick floor. The other elevator had been used to raise a short piece of casing which extended above the floor, and which was to be removed when the string of casing had been lowered to its permanent position. In order to drop this baller in it became necessary

ry to disengage the elevator attached to the top of the string of casing, for the reason that it obstructed the opening. This elevator was disconnected and propped up with what is called a casing pole. The baller was then dropped in the well and the disk broken, and the plaintiff, under instructions from the foreman, got up on a stool for the purpose of hooking up the elevator, when the same fell and caught his hand between a hook or link and the top of the casing, and severed two of his fingers.

The proof shows beyond contradiction that this work was being done in the usual and ordinary way. It is shown that the ordinary and usual way in which to support the elevator which had been disengaged was to prop it up with a casing pole, and it is shown that the casing pole used on this occasion was of the kind which is ordinarily used at oil and gas wells. It is not shown, nor is there any indication, that there was negligence in the method of doing the work. There is some suggestion in the plaintiff's evidence that the casing pole was greasy, but it is not indicated how this contributed, if it did contribute, to the accident. About all that the plaintiff's evidence shows in this regard is that the casing pole fell and his fingers were caught between a link or hook and the top of the casing. The pole was supported at the bottom against a pile of pipe or some pieces of timber fastened to the floor of the derrick three feet from the base of the casing in the well. As to just how it engaged the elevator at the top does not appear. Whether it fell because it was improperly secured at the bottom or improperly secured at the top is not indicated. As before stated, there is no suggestion in the plaintiff's evidence as to what caused it to fall. The defendant's foreman, who was present and in charge of the work, testifies that when the plaintiff got up on the stool for the purpose of hooking the elevator back, he lost his balance and fell against the pole, and this is the only explanation made in any of the evidence as to the cause of the accident. The plaintiff denies this, however, and says that he did not touch the pole prior to the accident, and did not lose his balance and fall against it.

[1, 2] It appears that the defendant did not avail himself of the benefits of the Workmen's Compensation Act (Code Supp. 1918, c. 15P), and is therefore deprived of certain defenses of which he could have taken advantage prior to the passage of that act. However, even since the passage of that act, one who does not take advantage of it is not liable in damages for every injury sustained by his employes. The basis of such an action is negligence, and, unless some negligence is traced to the employer, there is no cause of action. This negligence may be some defect in the working place, or may be some improper method of doing the work by some of the injured employee's fellow servants, but, un-

less there is some failure upon the part of the employer to do something which he should do for the employee's safety, or the commission of some act by him or his servants which results in the injury, there can be no recovery. It is true the statute deprives the employer who fails to take advantage of the Workmen's Compensation Act, among other defenses, of the defense of assumption of risk, but we have repeatedly held that this did not mean that the employee did not assume some risk. He still assumes the risks arising from his own negligence and ordinarily incident to the employment. The risks which he does not assume are those which come from the master's negligence, of which he has notice, and which prior to the enactment of the Workmen's Compensation Law, because of his knowledge thereof and his remaining in the employment after such knowledge, he was held to have assumed, notwithstanding they were produced by the negligence of the employer. *De Francesco v. Mining Co.*, 76 W. Va. 756, 86 S. E. 777; *Watts v. Railway Co.*, 78 W. Va. 144, 88 S. E. 659; *Louis v. Construction Co.*, 80 W. Va. 159, 92 S. E. 249; *Wilkin v. Koppers Co.*, 84 W. Va. 460, 100 S. E. 300. There being no evidence in this case indicating that there was any negligence upon the part of the defendant which contributed to the injury, the peremptory instruction asked for should have been given.

[3, 4] Inasmuch as the case must go back for a retrial, it is necessary for us to pass upon the instructions given on the motion of the plaintiff. The first instruction given informs the jury that the defendant cannot rely upon the defenses of contributory negligence, assumption of risk, or the negligence of fellow servants. This instruction should not have been given. It is true that under the statute the defendant could not rely upon the defense of assumption of risk, but giving the instruction to the jury in the broad language which was used in this case was equivalent to directing a verdict for the plaintiff. As before stated, under our decisions the employee does assume certain risks, and it is only those risks which result from the master's negligence which are not assumed. This instruction in its literal sense, and as it would ordinarily be understood, would hold the defendant responsible for an injury from any cause, even one caused by the plaintiff's own negligence. It is true the court gave on behalf of the defendant an instruction to the effect that before a recovery could be had they must find that the defendant had been negligent. These two instructions, giving to the language its ordinary meaning, were conflicting. The instruction given in this regard on behalf of the defendant was proper, but we are unable to say whether the jury followed the correct instruction given on motion of the defendant or the too comprehensive instruction given on

the motion of the plaintiff. It is error to give inconsistent instructions for the very good reason that the jury is left to decide which theory of the law as thus presented is correct, and renders it impossible for the court to determine upon what legal principle the verdict is based. *Penix v. Grafton*, 86 W. Va. 278, 103 S. E. 106.

Criticism is made of another instruction given on behalf of the plaintiff to the effect that the jury in ascertaining his damages could consider his physical condition before the accident as compared with his physical condition immediately thereafter; it being argued that the evidence does not show that there was any difference in his physical condition before and after the accident. This criticism is not well taken. The fact appears that two of his fingers were severed from his hand, and this certainly made a difference in his physical condition.

[5] The defendant insists that he is entitled to have a judgment rendered here, notwithstanding the verdict of the jury, and asks that that be done. A judgment non obstante verdicto must be based upon the merits of the case as disclosed by the pleadings, and not in any sense upon the evidence introduced upon a material issue properly joined. Where the pleadings make a case for relief, a judgment will not be rendered in opposition to the jury's verdict, upon the ground that the evidence does not prove the case made by the pleadings. If a party desires the conclusive judgment of the court upon the evidence, he should demur thereto. *Holt v. Elevator Co.*, 78 W. Va. 785, 90 S. E. 333, L. R. A. 1917A, 1194; *Shafer v. Trust Co.*, 82 W. Va. 618, 97 S. E. 290.

For the reasons aforesaid, the judgment of the circuit court is reversed, the verdict of the jury set aside, and a new trial awarded.

(83 W. Va. 135)

MOSS v. MOSS et al. (No. 5968.)

(Supreme Court of Appeals of West Virginia.
March 8, 1921.)

(Syllabus by the Court.)

1. Specific performance §121(2)—Verbal gift of land by father to son must be supported by clear evidence, possession, and improvements.

In order to enforce specific performance of a verbal gift of land by father to son, evidence of the gift must be direct, clear, and unambiguous, sufficient to identify the subject-matter as to location and quantity, and followed by notorious and exclusive possession and substantial improvement of the same. Loose declarations of the father, without more, are not sufficient.

2. Specific performance §121(2)—Evidence insufficient to justify specific enforcement of parol gift of land by father to son.

Where the proof on which depends right to relief by decree for specific performance of

a parol gift of land by a father to his son is indefinite and indecisive, and tends to disclose an intention not to vest title in the son by deed but by a devise in his will, operative after death, and in the meantime to permit the concurrent use and enjoyment of the land by both, and it is so used and enjoyed by them in common afterwards for residential, agricultural, and other like purposes, and the father grants oil and gas leases and pipe line easements, and collects and appropriates the compensation therefor, and pays all taxes assessed against the land, equity will not require the father to convey the land to the son, either by a deed granting a present estate, or by one granting the property subject to a life estate reserved to the father.

3. Specific performance §39—Parol contract for conveyance of land by father to son not enforced in absence of definite agreement acted upon.

Nor will the court grant the relief sought on the basis of a parol contract to the same effect, likewise relied on by the son, and based upon a surrender of a valuable right as consideration therefor, where the same indefiniteness of agreement, want of exclusive possession, and failure to erect valuable improvements, which operated to defeat enforcement of the parol gift, likewise make the acts of the parties insufficient to justify removal of the bar of the statute of frauds to permit enforcement of the verbal contract.

4. Trusts §77—To establish resulting trust, payment of price must have occurred before conveyance.

In order to establish a resulting trust in property, legal title to which is in another, upon the ground of payment of the whole or a part of the purchase money therefor, it generally is prerequisite to show that the consideration was paid, or some obligation therefor assumed, at or before the conveyance of the legal title to the grantee. The subsequent payment or assumption thereof will not, by relation, attach such trust to the original purchase.

Appeal from Circuit Court, Calhoun County.

Suit by James M. Moss against W. M. Moss and another. From the decree, defendants appeal. Reversed and bill dismissed.

Lorentz C. Hamilton, of Grantsville, for appellants.

S. P. Bell and A. G. Mathews, both of Grantsville, for appellee.

LYNOH, J. The bill is to enforce specific performance of an alleged verbal gift by W. M. Moss to his son James M. Moss in June, 1903, of a tract containing about 85 acres of land in Calhoun county. The decree complained of by defendants W. M. Moss and his wife Mary S., plaintiff's stepmother, did not grant the prayer of the bill, but treated the father as holding the title to the land in trust for himself and his son in the propor-

tions of 550/1655 and 1125/1655, respectively, and provided that if the son should, within 30 days from its date, pay the father \$530, he and his wife should within 10 days thereafter convey the title to the son by an apt and proper deed; and that if the son should, within the time limit so fixed, fail to pay the \$530, the father should have the option, within the next ensuing 30-day period, to pay the son \$1,125, whereupon the latter should convey all his right, title, and interest in the land to the father; and in the event that neither father nor son should desire to purchase the interest of the other, the land was to be sold and the proceeds divided between the parties in the proportions named above.

The bill and no other pleading prayed for the relief granted, and no evidence introduced by either party warranted it in that form. In other words, if plaintiff was entitled to the land, the court by its decree should have vindicated that right, and, if not so entitled, should have dismissed the bill. The cause presents but one of the two alternatives and no other. There is therefore but one question to be decided; that is, whether plaintiff by his evidence has made a case warranting the relief he seeks.

Apparently the court had serious doubt whether the evidence was sufficient to support a decree for specific performance, conceding the bill to be unobjectionable on any ground of proper challenge, and that equity has jurisdiction to enforce a parol gift of land; on neither of which propositions is there any room for doubt where the intended beneficiary has entered into possession by virtue of the preconceived gratuity, made substantial improvements, and complied with other requirements indicative of exclusive dominion over the land, with the permission, knowledge, and consent of the benefactor.

Plaintiff did enter upon the land in June, 1903, soon after his marriage, or, to be more exact, continued to reside thereon with his father as he had been doing since the latter acquired the property in 1901, and has thenceforward, he says, retained exclusive possession without let or hindrance from any source, and now retains it as against his father subject to the requirement for a deed of grant therefor, the right to which now depends upon the just determination of this cause. That he has continued to reside thereon during the period stated, excepting about nine months, when for prudential reasons, as he attempts to explain, he resided elsewhere, but in the meantime tilled and used it, seems to be conceded, with this reservation, that the father relies upon the nine months' absence as a virtual abandonment of the premises. Whether the latter can or cannot derive any substantial advantage from the temporary absence from the land for residential purposes, or predicate thereon right to withhold a deed of grant on that account, it is not necessary to say: (1) Be-

cause the son re-established his residence on the land at the end of the nine months' period with the knowledge of the father and without objection by him; and (2) it is not denied that the son retained at least a qualified or constructive control during the interim.

It is the character of plaintiff's possession and not the fact of possession about which there is such a wide and apparently irreconcilable disagreement, and on the determination of which depends the proper adjudication of the respective rights of the parties. In other words, there is no question as to plaintiff's right to occupy the land during the life of his father and stepmother, but this right of occupancy, the father contends, is subject to his right to control and exercise such dominion over the land as he may desire or deem necessary for the use of himself and wife while living, and upon the death of both to become and remain the property of the son.

For residential and tillage purposes plaintiff has occupied the 85 acres continuously from June, 1903, to the date of the institution of this suit in 1917, a period of 14 years. But at no time was his occupancy exclusive or his dominion complete. Both families lived on the tract, part of the time in the same house, until the year 1909 or 1910, when the father moved onto an adjoining 31-acre parcel, where he has since continued to reside. His change of residence to the smaller tract, however, did not effect a discontinuance of his use of the 85 acres, according to his testimony sustained by other proof. Until the controversy reached an acute stage due to an altercation and personal encounter between father and son, each of them farmed and used parts of the larger tract in different ways and for different purposes, each taking to himself the fruits of his labor. Much testimony goes to show that each of them performed labor, expended money to improve the land, as by building fences, sowing grass seed, planting fruit trees, repairing buildings, including the dwelling house and outhouses, digging a well, clearing and grubbing, and used it for the pasture of stock individually owned by them. Plaintiff, it seems, with the assistance of his father, constructed a small log house to be used as a residence for himself and family, a corncrib and smokehouse, but the value of these admittedly is slight. True, plaintiff testified that he expended \$200 of his wife's money in purchasing fencing wire and fruit trees and in clearing part of the tract, and in this she corroborates him. Even granting that they have expended all that they claim to have spent in improvements and upkeep, though the testimony in support thereof, including their own, is by no means definite and positive, the aggregate is slight when considered in connection with the number of years they have

been living on the property. There is some conflict in the testimony with regard to whether the residence occupied by defendants on the 85 acres until 1909 or 1910 was built before or after the date of the alleged gift in 1903, the father contending that it was erected after, and plaintiff before, that date. The same conflict obtains with regard to the two barns built and used by them on the property. But whatever the date, there is no doubt that defendant, not plaintiff, erected them.

As already noted, both families continued to reside on the 85 acres until defendants moved to the 31-acre parcel where their residence now is, and since their departure plaintiff has occupied the home thus left vacant. But the father continued to exercise dominion and control over the larger tract. He leased it for oil and gas purposes, granted a pipe line right of way through it, and to his own use appropriated the rentals for the lease and consideration for the right of way, and paid the taxes assessed against the land. That he paid the taxes the son admits, but accompanies the admission with the explanation that, as the father collected the rentals and compensation for the lease and right of way, he should in return therefor protect the land from the consequences of the delinquency that must have ensued upon their nonpayment, especially since he held the legal title to the 85-acre tract and was chargeable and charged therewith on the landbooks of the county. The testimony as to the facts is grossly conflicting, except that relating to the lease and pipe line easement and the assessment and payment of taxes, as to which there is no dispute.

Judged by the testimony, though in some respects inconsistent, the work and labor performed by the father and son combined did not substantially enhance the value of the land. Some witnesses even express the opinion that it was less valuable after than it was before the labor was performed and money expended upon it. Others also attribute to the son the casual remark that he did not intend to do anything more by way of improving the land than was necessary to support himself and family, because of the uncertainty of his father's intention to vest the title in him.

The most substantial or at least the most reasonable view of the respective rights of the parties is the agreement predicated upon these facts: Some time prior to 1900 the father purchased and paid the full consideration for a tract of 51 acres of land in Roane county, and caused the deed of grant to be made to his wife and two children, plaintiff and his sister, none of whom except defendant Mary S. Moss was at that time 21 years of age. This tract the father and his wife sold and conveyed to a purchaser for \$510 some time prior to the date of the alleged gift to plaintiff in 1903, upon the assurance

to the purchaser that when the minor grantees attained their majority, they also would unite in the execution of a deed to him, as they afterwards did in 1904, with the understanding, as plaintiff claims, that the 85 acres which the father had purchased with part of the consideration derived from the sale of the Roane county land was to take the place of his interest in the latter tract, but, as the father claims, that he would by his will devise the 85 acres to plaintiff and the adjoining 70½ acres to his daughter, the wife of Howard Metz, Mrs. Metz and the plaintiff being his only children and the two tracts his only real estate, except the 31-acre parcel already referred to. Because part of the consideration derived from the sale of the Roane county land was used in the purchase of the 85 acres, plaintiff claims that such appropriation of his one-third share of the proceeds, or \$170, gives him an additional equitable interest in the latter tract. But even if his consent to unite in the deed granting the Roane county land should be sufficient consideration to support defendant's oral promise to give him the 85 acres in return therefor, thereby making it an oral contract to exchange properties instead of a parol gift, yet it has repeatedly been held that payment of consideration alone is not enough to remove the bar of the statute of frauds. *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *Summers v. Hively*, 78 W. Va. 53, 88 S. E. 608; *Gibson v. Stalnaker*, 106 S. E. 243, recently decided, and not yet officially reported. More depends upon the character of the possession and improvements made thereunder than upon the payment of the consideration.

However that may be, there is another potent fact to be considered in connection with the conveyance of the 51 acres. There is testimony sufficient to warrant the inference that the promise made by the father on that occasion, and on other occasions when discussing his intention as to the 85-acre tract, was that he would by will devise the latter tract to plaintiff. If that was the understanding, the promise tends strongly to support the father's view that not until his death was the title to that tract to become vested in plaintiff. That such was the real intention seems to find strong corroboration in the testimony of the plaintiff himself, for he telephoned to the attorney employed by the father to write his will for the sole purpose, as he admits, of ascertaining whether the will so prepared did in fact contain the provision promised by the father, and was assured that the will was favorable to him, the son. The anxiety prompting the inquiry is not explainable upon any hypothesis other than that there was such an agreement or understanding, and that upon that basis plaintiff entered upon the cultivation of the 85-acre tract, and joined in the execution of

the deed for the 51 acres. *Short v. Patton*, 79 W. Va. 179, 90 S. E. 598.

But defendants contend that, even if these facts be not sufficient to show lack of right to require specific execution of the contract relied on by plaintiff, the latter afterwards by deed, acting as intermediary between his father and stepmother, vested the fee-simple title to the 70½ and 85 acre tracts in the latter in 1905, and she later in her husband, W. M. Moss, in February, 1917, through W. M. Price as intermediary, and also that by this act plaintiff recognized the substantial ownership of the 85-acre tract to be in his father. To the participants in this transaction the bill imputes no fraudulent intent, nor is there proof of an intention to defraud, though plaintiff does show by Price that no consideration was paid or promised to him for the part he took in the latter transaction, and by himself that the purpose of the deed to Mrs. Moss was to protect the property of his father from the probable award against him of a judgment for a fine and costs in the prosecution of an indictment for a felony then pending against him. But even if the bill did seek to impeach these transactions as fraudulent, the allegation to that effect would not avail plaintiff, who, so far as disclosed, voluntarily participated in its consummation. For by the unanimous concurrence of judicial decisions and text-writers, a conveyance, however fraudulent the intention, is valid as to the parties who with knowledge of the purpose voluntarily enter into the transaction. *Core v. Cunningham*, 27 W. Va. 206; *Holmes v. Harshberger*, 31 W. Va. 518, 7 S. E. 452; *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704; 12 R. C. L. p. 473. What is said in this connection, though not controlling, merely shows the futility of the indirect challenge to the motives prompting the execution of these deeds. They vest the title where it was on the date of the alleged gift, and in no wise militate against enforced performance of the parol agreement. But it is the divestative fact witnessed by the consummated transaction upon which defendants rely, because, they say, it weighs heavily, if not preclusively, in that it shows the futility of depending upon a gift made two years before. According to their contention, the deed executed in 1905 goes far towards defeating the right to compel the execution of the deed for land so claimed by plaintiff; and he does not pretend that W. M. Moss thereafter reaffirmed his intention to convey the land to him otherwise than by a devise. But the transfer of the title in this manner, being contemporaneous, constitutes but one transaction, and as its ultimate aim was to reinvest the title where it originally was, it can have no such effect as that for which defendants claim.

[1] There is, it is true, some loose, perhaps exaggerated, language attributed to the father by various witnesses, and which, by a

forced construction, may have led some of them to believe in the existence of an intention and purpose on his part to bestow upon his only son title to the tract now claimed by him. But little of this testimony really warrants even the inference of an intention to part with the title before the death of the father and wife, both of whom now are well advanced in years and no longer able to engage in manual labor as doubtless they once did, for it was in this manner that they were enabled to pay for the land they own. The assistance of the son, then a minor, if any he rendered, was such only as was due from him in discharge of his filial duties.

"To establish an equitable title to land in a child, under a parol gift thereof by the parent, it is necessary to prove, by direct, unequivocal and clear evidence, the gift, identification of the subject-matter as to location and quantity, notorious and exclusive possession thereof, and substantial improvement of the same." *Short v. Patton*, 79 W. Va. 179, pt. 1, syl., 90 S. E. 598; *White v. White*, 64 W. Va. 30, 60 S. E. 885; *Meadows v. Meadows*, 60 W. Va. 34, 53 S. E. 718; *Holsberry v. Harris*, 56 W. Va. 320, 49 S. E. 404; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. 87.

Three important elements to be considered in such cases are here clouded in doubt, uncertainty, and ambiguity, and a fourth points directly to the support of defendants' contention. There is direct conflict in the testimony of the respective parties with regard to the father's intent to bestow the gratuity, the son insisting it was a present gift with full rights and enjoyment, the father that legal title was to pass only upon his death, with the right bestowed upon the son to enjoy possession of the tract in the meantime concurrent with the father. The evidence is not as direct, clear, and positive in support of plaintiff's position as the law requires; indeed, the preponderance is adverse to his claim. There is similar conflict with respect to the exclusiveness of plaintiff's possession, and on this issue much testimony to show that the father continued down to the time of the institution of the suit to exercise control over such portions of the tract as he desired. As said in *Holsberry v. Harris*, supra:

"Such possession of a son under an alleged gift must be definite and exclusive, and not concurrent with the father."

Moreover, the improvements made by him are not of such substantial and permanent character as is required in such cases. And, finally, it is conceded that the father has paid all the taxes on the property since the year 1901, when he first acquired it. The case of *Berry v. Berry*, 83 W. Va. 763, 99 S. E. 79, relied on by plaintiff, is clearly distinguishable from this in the exclusiveness of the donee's possession and her substantial

contribution to the valuable improvements made on the property.

[2] From a consideration of all these facts and circumstances, we are of opinion that plaintiff has failed to establish by direct, positive, and unambiguous proof that the gift took the form for which he contends. Much testimony supports the father's position; in fact, the preponderance of the evidence tends to uphold his contention. The care and high quality of proof which must be exercised and required in cases of this character is well illustrated by the experience of the commonwealth of Virginia. The specific enforcement of parol gifts of land became such a prolific source of fraud in that state that a statute was enacted prohibiting the enforcement of such gifts, even when followed by possession thereunder and improvement of the land by the donee or those claiming under him. *Wohlford v. Wohlford*, 121 Va. 699, 93 S. E. 629; *Brooks v. Clintsman*, 124 Va. 736, 98 S. E. 742, 100 S. E. 394.

But plaintiff insists that, even if he is not entitled at this time, under the evidence, to specific performance of the alleged gift, yet, accepting defendants' interpretation of the conversation with respect to the 85-acre tract as postponing plaintiff's right thereto until the death of his father and stepmother, even that right should be protected and safeguarded by a decree requiring them to execute a deed conveying to him the property in question, subject to a life estate reserved for them; this upon the theory that plaintiff's consent to unite in the deed of 1904, conveying his interest in the Roane county 51 acres, was sufficient consideration to support his father's oral promise to give him the 85 acres in lieu thereof. But treating this agreement as a contract for the exchange of properties instead of as a parol gift, we are again confronted by the positive inhibition of the statute of frauds, and the same indefiniteness of agreement, want of valuable improvements, and concurrent possession and control with his father, which operated to defeat enforcement of the parol gift, are equally insufficient to justify removal of the statutory bar from the former. *Gibson v. Stalnaker*, 106 S. E. 243, recently decided.

[3] Plaintiff rests his final claim for relief upon the ground that, because of his execution of the deed of 1904 conveying his one-third interest in the Roane county land, previously sold by his father, the consideration from which was in part used by the latter in paying for the 85 acres acquired in 1901, a resulting or constructive trust has arisen in his favor which may be established by parol proof. His contention as to the admis-

sibility of parol testimony to establish such a trust is undoubtedly sound. *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329.

[4] And it is equally true as a general proposition that where, upon purchase of property, the conveyance of the legal title is taken in the name of one person, while the whole or part of the consideration is given or paid by another, not as a loan to the grantee, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be deemed and treated as trustee for the party from whom the consideration proceeds. *Currence v. Ward*, cited. But there is an equally definite exception or qualification to the operation of the rule, namely, that the consideration must be paid, or some obligation assumed therefor, at or before the sale and conveyance of the legal title to the grantee, and the subsequent payment or assumption thereof will not, by relation, attach such trust to the original purchase. *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46; *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176; *Moore v. Mustoe*, 47 W. Va. 549, 35 S. E. 871, 81 Am. St. Rep. 812; *Watts Brothers & Co. v. Frith*, 79 W. Va. 89, 91 S. E. 402; 1 *Perry on Trusts* (6th Ed.) § 126; 39 *Cyc.* 128; 26 *R. C. L.* p. 1223.

Whatever the date of defendants' sale of the 51 acres in Roane county, it of course did not affect plaintiff's title to or interest in it until 1904, when he and his sister executed a deed conveying their right, title, and interest to the purchaser. His father already had acquired the legal title to the 85 acres 3 years prior to the son's execution of his deed. The fact that the purchaser advanced part or all of the consideration for the 51 acres in reliance upon the father's assurance that his children would execute a deed on coming of age, and that the father applied part of this money to payment of the purchase price of the 85 acres, cannot aid plaintiff, for he yielded nothing of his interest in the Roane county land till 1904. Even granting that his interest therein was a valuable one, owned by him in his own right, though he paid nothing for it his father having voluntarily had the deed made to his wife and two children jointly while the latter were minors, yet until 1904 he had surrendered no part of it, and before he executed the deed his father had completed paying for the 85-acre tract. Hence under all the authorities no resulting trust could or did arise in his behalf.

For these reasons we are of opinion to reverse the decree, dismiss the bill, and award defendants their costs incurred upon this appeal and in the circuit court.

(88 W. Va. 131)

STATE ex rel. CONSTANZO v. KINDELBERGER et al. (No. 4281.)(Supreme Court of Appeals of West Virginia.
March 8, 1921.)*(Syllabus by the Court.)***1. Highways §186—Warrant for operating vehicle of insufficient width of tires held not to charge violation of statute.**

A warrant for the arrest of a person, charging him with operating upon the public roads a vehicle, the weight of which, including the load thereon, is more than 600 pounds per inch width of tire, the total width of the four tires being included in computing the weight thereof, does not charge a violation of law under the provisions of section 126, c. 66, Acts of 1917 (Code Supp. 1918, c. 43, § 126 [sec. 1940—126]), and a motion to quash should prevail.

2. Prohibition §3(4)—Writ will lie where accusation insufficient to charge offense, although appellate court has not passed on question of jurisdiction.

In such case the justice of the peace and the appellate court, if an appeal be awarded from the justice's court, are without jurisdiction, and prohibition will lie at the instance of the accused, although the appellate court has not passed upon the question of jurisdiction, and although the accused has some other adequate remedy.

Application for writ of prohibition by the State, on the relation of Frank Constanzo against John W. Kindelberger, Justice, and others. Writ awarded.

J. M. Ritz, Thos. B. Foulk, and George A. Blackford, all of Wheeling, for relator.

E. T. England, Atty. Gen., Charles Ritchie, Asst. Atty. Gen., Carl G. Bachmann and Austin V. Wood, both of Wheeling, for respondents.

LIVELY, J. Kindelberger, a justice of the peace of Ohio county, on February 12, 1921, issued a warrant for Constanzo, charging him with operating and driving upon the county roads of that county and upon the streets of the city of Wheeling a motor vehicle, the weight of which including the load was more than 600 pounds per inch width of tire, the total width of the four tires being included in computing the weight thereof. At the trial his counsel moved to quash the complaint and warrant, which motion being overruled, defendant refused to plead. The justice entered the plea of not guilty, for him, heard the evidence, found defendant guilty, fined him \$100 and sentenced him to 10 days in jail at hard labor. Defendant gave bond, and appealed to the criminal court of Ohio county, where the case is now pending, and immediately applied to this court for, and obtained, this rule in prohibition against Hon. A. H. Robinson, judge of the criminal court, to show cause why he should not be prohibited from hearing or trying the case.

Constanzo asserts that the warrant does not charge him with the commission of an offense against the laws of this state; that he has committed no offense; and that the justice and criminal court are without jurisdiction for that reason.

The statute under which this warrant was issued, and on which the prosecution is predicated, is section 126 of chapter 66, Acts 1917 (Code Supp. 1918, c. 43, § 126 [sec. 1940—126]), the pertinent portion of which reads:

"No vehicle in excess of ninety inches in width shall be operated upon the highways of this state * * * nor shall any vehicle, including load, exceeding thirty thousand pounds in weight, or on which the weight of the load is more than six hundred pounds per inch width of tire, the total width of the four tires being included in computing the weight thereof, be operated upon the highways of this state unless by special permit from one of the authorities hereinbefore designated, and then only upon highways specially constructed for heavy traffic."

The state asserts that it was the intention of the Legislature in this act to protect the roads and streets from destruction, and that no more than 600 pounds per inch width of tire, including weight of car and load, should be permitted; and that the section quoted should be construed to read:

"Nor shall any vehicle, including load, exceeding 30,000 lbs. in weight * * * or more than 600 lbs. per inch width of tire, the total width of the four tires being included in computing the weight thereof. * * *"

The main reason confidently relied upon by the state for discharging the rule is that prohibition is not the proper remedy. The uses and purposes of prohibition and the class of cases in which the writ will issue have been under discussion so often and so recently in this court and the holdings are so well settled that it would serve no useful purpose to review the cases or reiterate the principles enunciated. In all cases, when the inferior court has not jurisdiction of the subject-matter in controversy, the writ will lie. This is the very language of the statute, and is but declaratory of the common law. Now what is the rule for determining jurisdiction? Does this warrant charge an offense? If it does, then the criminal court will have jurisdiction to try all matters of law and fact arising therein, unless it should exceed its legitimate powers while doing so. If there is no offense charged, then there is no jurisdiction. But it is argued that the criminal court should first determine whether an offense is charged, and whether it will assume jurisdiction, and, if perchance the court should take jurisdiction, refuse to discharge Constanzo, try the case, and find him guilty, then a writ of error would lie, and that procedure would be the proper course, instead of invoking the extraordinary remedy

of prohibition. The answer to this is that prohibition is a writ of right, and Constanzo may elect to pursue it rather than invoke some other remedy. By the writ he is given a quick and efficacious remedy, and if the court does not have jurisdiction, he is saved the costs and delays incidental to a jury trial. There is an exhaustive and illuminating discussion of the remedy in *State v. Godfrey*, 54 W. Va. 54, 46 S. E. 185, where there is a review of all our cases and of the English decisions, with a dissenting opinion by Judge Brannon. Whenever it appears that a court is proceeding in a cause without jurisdiction, prohibition will issue, regardless of the existence of other remedies. *Jennings v. McDougle*, 83 W. Va. 187, 98 S. E. 162; *Hatfield v. Graham*, 73 W. Va. 759, 81 S. E. 533, L. R. A. 1915A, 175, Ann. Cas. 1917C, 1; *Well v. Black*, 76 W. Va. 685, 86 S. E. 666; *State v. Studebaker*, 80 W. Va. 673, 93 S. E. 755. Where the inferior court has not jurisdiction, it may be prohibited from proceeding, though the record does not disclose that the party praying for the petition in any manner asked the inferior court to dismiss the proceedings. *Swinburn v. Smith*, 15 W. Va. 483; *Marsh v. O'Brien*, 82 W. Va. 508, 96 S. E. 795. If a justice of the peace has no jurisdiction, an appeal from his decision confers no jurisdiction on the appellate court. 3 C. J. § 123.

[1] Does the complaint and warrant charge Constanzo with the commission of an offense? This is the vital question here. The statute reads:

"Nor shall any vehicle, including load, exceeding thirty thousand pounds in weight . . . be operated upon the highways of this state unless by special permit," etc.

Constanzo is not charged with this offense, namely that his vehicle, including load, exceeded 30,000 pounds. The only other offense under this section is:

Nor shall any vehicle, "on which the weight of the load is more than six hundred pounds per inch width of tire, the total width of the four tires being included in computing the weight thereof, be operated upon the highways of this state, unless by special permit," etc.

Constanzo is not charged with this offense. It is under this second or separable offense from the first named that he is sought to be prosecuted, and in order to do so he is charged with operating a motor vehicle the weight of which, including the load, is more than 600 pounds per inch width of tire, etc. The weight of the load is not to be added to the weight of the vehicle in order to make the owner liable to prosecution, unless the two weights combined exceed 30,000 pounds. Take the aggregate width of the four tires and multiply it by 600, and it will give the amount of the load which any vehicle may

lawfully carry, provided the weight of the vehicle, plus the load, does not exceed 30,000 pounds. For instance, to illustrate: A truck which has an aggregate of 16 inches of its four tires may be loaded with 9,600 pounds if its weight does not exceed (30,000 pounds minus 9,600 pounds) 20,400 pounds. The state insists that this section should be construed so as to include the weight of the load with the weight of the vehicle, as above set out, the very opposite of what the statute says.

"If a statute is plain, certain, and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless." *Lewis' Sutherland Stat. Con.* § 363.

This is a penal statute, and if its provisions needed construction that most favorable to the accused would be adopted. *Id.* § 524.

It may be that this statute is unwise and was not well considered in its enactment, and will cause unreasonable injury to the roads of the state; but it is not a function of the courts to pass upon the wisdom of the laws.

[2] We are of the opinion that the complaint and warrant under which the petitioner is held do not charge an offense, and therefore the justice of the peace did not have, and the criminal court of Ohio county does not have, jurisdiction.

Writ granted.

(88 W. Va. 167)

SIZEMORE v. ROACH et al. (No. 4121.)

(Supreme Court of Appeals of West Virginia.
March 8, 1921.)

(Syllabus by the Court.)

1. Taxation \S 766—General recording statutes applicable to tax deeds and acknowledgment necessary.

The general recording statutes of this state are applicable to tax deeds, and unless properly acknowledged by the recorder or other officer authorized by law to execute such deeds so as to be properly admitted to record, they will be inoperative to pass the title to the land sold and thereby sought to be conveyed.

2. Acknowledgment \S 20(1)—Recorder, when grantor in tax deed, cannot certify his own acknowledgment.

The grantor in such tax deeds, though the recorder, can not lawfully take and certify his own acknowledgment, and his attempt to do so should be regarded as abortive and unavailing.

3. Evidence \S 370(6) — Deed properly acknowledged and recorded prima facie evidence of admission to record.

A deed properly acknowledged and spread upon the record of deeds is prima facie evidence of its having been admitted to record, although the record shows no other act of the recording officer in admitting the same to record.

4. Appeal and error \S 715(1)—Deed not appearing in certificate of evidence as having been admitted to evidence cannot be supplied by certified copy.

A deed found among the papers of an ejectment suit but not appearing in the certificate of evidence to have been admitted in evidence can not be supplied by a certified copy of such deed found among the papers in the trial court.

Error to Circuit Court, Wyoming County.

Action by J. F. Sizemore against John Roach and others. Judgment of nil caplat, and plaintiff brings error. Affirmed.

Wirt Dunlap, and R. E. Hughes, of Charleston, for plaintiff in error.

J. Albert Toler, of Pineville, for defendants in error.

MILLER, J. In an action of ejectment defendant demurred to the plaintiff's evidence, and the judgment of nil caplat now complained of was pronounced.

The land sued for was in two parcels, parts of a 300-acre tract, and aggregated about 50 acres, situated in Wyoming County. Plaintiff undertook to deraign his title to these tracts through sundry meane conveyances back to the State under a tax deed from James Cook, Recorder, dated November 16, 1870, to Hamilton Ray for the 300 acres; but when plaintiff offered in evidence not the original but the record of the deed spread upon the deed book of the said county, defendant objected, but the objection was overruled and the record of the deed admitted. Though objected to and the objection overruled, the objection is relied on by defendant in support of the judgment complained of.

Two grounds of objection were interposed: First, that the deed recited on its face that Leroy B. Chambers was the purchaser and that on June 27, 1870, he had transferred and assigned his purchase to the said Hamilton Ray for a valuable consideration, but that as the evidence of said assignment, if any, was not shown in evidence and chambers had not joined in the deed to Ray, the deed was incompetent to show title in Ray; second, that the record of the deed did not show it had ever been acknowledged by said Cook, Recorder, so as to be admissible for record, wherefore ineffective to transfer title. The only evidence found on the record of the deed to show its admissibility and effect to transfer title is as follows:

"Wyoming County Recorder's Office, the 26th day of June, 1871:

"A deed, from the Recorder of Wyoming County to Hamilton Ray, dated the 16th day of November, 1870, conveying 300 acres of land in said county, was this day presented in this office, acknowledged for record, stamped and admitted.

"A copy. Teste: James Cook, Recorder."

As to the first objection, if the deed, because of the second objection thereto, was not evidence for want of proper acknowledgment and proper record thereof we need not respond to the first objection, for it can not be allowed as evidence of anything mentioned therein. Sometimes deeds over thirty years old reciting facts such as heirship etc. When relied on with possession become evidence of those facts. *Wilson v. Braden*, 56 W. Va. 372, 375, 49 S. E. 409, 107 Am. St. Rep. 927. But if the record of the deed involved here is not evidence for any purpose, we can not look to it for evidence of the facts recited.

The controlling question then is, was the record of the deed properly admitted? It shows no acknowledgment by the recorder unless his own certificate quoted constituted such acknowledgment. The statute, chapter 31, Code 1868, then in force, did not in specific terms require the deed of the recorder to be acknowledged as a condition of its being admitted to record, but to be effective to transfer the title, section 25 thereof required that the purchaser should have obtained such deed and caused the same to be admitted to record. So that unless this deed was properly admitted to record, the title did not pass, and it was improperly admitted as evidence for any purpose, plaintiff not relying thereon as color of title and possession thereunder. In *Black on Tax Titles*, § 393. It is said:

"It is probable that, in the silence of the statute on the precise point, a tax deed, executed by the proper officer, in order to be prima facie evidence of the title in the grantee, must be proved or acknowledged as provided in the general law concerning conveyances."

[1] In *State v. Harman*, 57 W. Va. 447, 452, 50 S. E. 828, construing the provision of the Code of 1868 involved here, we decided that the general recording statute requiring acknowledgment as a condition of admitting deeds and other writings to record, applied to tax deeds, and that unless acknowledged or proven as required thereby, they can not be recorded, and that if recorded without such acknowledgment or proof, they pass no title. A statute of Missouri, substantially like ours, was construed in the same way in *Steirlin v. Daley*, 37 Mo. 483. And in Virginia it has likewise been held that a tax deed must be acknowledged by the clerk, else it is unavailing. *Leftwich v. City of Richmond*, 100 Va. 164, 40 S. E. 651.

[2] But does the certificate of the recorder amount to an acknowledgment by him? If so construed, it would be the act of the recorder acknowledging his own deed before himself, an abortive act and unavailing. *Davis v. Beazley*, 75 Va. 491; *Leftwich v. City of Richmond*, supra; *Tavener v. Barrett*, 21 W. Va. 656. So we hold that the record of

this deed was not admissible, and though admitted was properly ignored on the demurrer to the evidence.

[3] The next paper relied on by plaintiff and admitted over defendant's objection is the record of what purports to be a deed from Hamilton Ray, signed H. Ray, to Jane Bower, dated September 28, 1871. Objection to the admission of this deed as spread upon the deed book produced by the clerk of the county court was that though purporting to have been acknowledged before James Cook, Recorder, it shows no order by him admitting the same to record. Is such order endorsed on the deed and recorded essential to the validity of the deed so as to make the record evidence of the deed and act of the recorder? Section 7, chapter 73, Code 1868, required the recorder in recording deeds and other writings to record all certificates of privy examinations or acknowledgments, and all plats, schedules and other papers thereto annexed or thereon endorsed; but we find nothing in the then or present statute requiring the recording officer to record along with such instruments his order admitting them to record, though it is no doubt the practice to do so. In *Fouse v. Gilfillan*, 45 W. Va. 213, 227, 32 S. E. 178, it was decided that the certificate of the clerk of the county court admitting to record a certain contract, and identifying it as dated June 25, 1892, the date of the original, but which had been modified September 26, 1892, was a sufficient identification of the whole contract for the purpose of the recordation thereof, as the addendum or modification thereof was what it purported to be, "a modification of the agreement made on June 25, 1892," constituting together the whole of the agreement. In the absence of any statute requiring the record to show the act of the clerk in admitting to record a deed or other instrument, we think that the fact that such instrument is actually on the record is at least prima facie evidence of the admission thereof to record, and that the deed of September 28, 1871, was properly admitted in evidence.

[4] Another serious obstacle in the way of plaintiff's right of recovery and supporting the judgment on the demurrer to his evidence is that he failed to connect himself with the prior deeds and title relied on. The record evidences an intention to do so in the very beginning of the trial, in the testimony of W. P. Cook, clerk of the county court. He was asked, and answered as follows:

"Q. Do you find a deed from Marinda Sizemore to James F. Sizemore? A. Yes, sir. Q. Just read the description of that tract of land?"

Further than this the record is silent as to any such deed. It does not appear that the witness even read the description as requested; and certainly it does not appear that

any such deed was offered or admitted in evidence. On the hearing here plaintiff's counsel undertook to supply the omission by presenting to us what purports to be a copy of such deed, certified by the clerk of the circuit court as a paper found by him among the papers of the cause, but he does not say it was a part of the demurrer and certificate of the evidence.

The foregoing defects in plaintiff's title would be sufficient to sustain the judgment on the demurrer to his evidence, and it ought to be affirmed unless, as plaintiff insists, the court erred in denying his motion, after the court had announced its purpose to sustain the demurrer, for leave to set aside his joinder therein and grant him a new trial. The record shows no motion for leave to take a nonsuit. Besides, it is too late to move a nonsuit after a case has been submitted to the jury. Following the rule of practice recognized in *Frymier v. Lorama Railroad Co.*, 76 W. Va. 96, 99, 85 S. E. 26, we might perhaps, because of the omission of the plaintiff to put in evidence the deed to him from Marinda Sizemore and husband, if that was the only defect in his title, set aside the demurrer to the evidence and award him a new trial. But because of the fatal defect in the record of the deed from James Cook, Recorder, of November 16, 1870, already alluded to, and one which cannot now be cured, it would serve plaintiff no good purpose to grant him a new trial, wherefore he has not brought himself within the rule requiring that good cause be shown for such new trial.

Our conclusion is to affirm the judgment.

(88 W. Va. 187)

WOODBRIIDGE v. WOODBRIDGE et al.
(No. 4008.)

(Supreme Court of Appeals of West Virginia.
March 8, 1921.)

(Syllabus by the Court.)

1. Wills §439—To ascertain intent, whole paper will be considered with circumstances.

The purpose of construction of wills is to ascertain the intention of the testator as expressed in the instrument, and to this end the courts will consider the whole paper together, the apparent purpose sought to be accomplished by the testator, and the means used to that end, as well as any other circumstances disclosed by the will which aid in determining such intention.

2. Wills §450—Language will be considered in sense which will avoid conflict with previous provision.

Where in a will the testator makes use of language which, according to one construction thereof, would be in conflict with a previous provision in the will, but according to another construction, of which the language is equally

susceptible, would be in accord with the former provision, the court will adopt the latter construction, to the end that all of the provisions of the will may be made harmonious, and the language used by the testator given effect.

3. Wills §616(1)—Devise with right to use income and to sell held to vest a life estate.

A will, devising to testatrix's husband all of her estate, to have and to hold so long as he shall live, and giving and granting unto him the right to use and enjoy the income thereof, and, should he deem it proper, to sell the same for his benefit, or to increase the income thereof, properly construed, vests in the husband a life estate in such property, with the power to sell the same and enjoy the income from the proceeds of such sale; the corpus of the property in its original or in any changed form belonging to the remainderman.

Appeal from Circuit Court, Wood County.

Suit by William D. Woodbridge, executor, against William D. Woodbridge, individually, Emma Lyons, and others. Decree for plaintiff, and defendant Emma Lyons appeals. Affirmed in part and reversed in part.

C. M. Hanna and Reese Blizzard, both of Parkersburg, for appellant.

J. W. Vandervort, of Parkersburg, and Brown, Jackson & Knight, of Charleston, for appellee.

RITZ, P. The sole question presented for determination upon this appeal is the proper construction of the third paragraph of the will of Martha Evans Hopkins Woodbridge. This paragraph is as follows:

"Third. I give, devise and bequeath unto my beloved husband William Darling Woodbridge, all of my estate both real and personal, and mixed, of whatever kind and character and wherever the same may be located, he to have and to hold the same so long as he shall live, giving and granting unto him the right to use and enjoy the income thereof, and should he deem it proper to sell the same for his benefit or to increase the income thereof should he, the said William Darling Woodbridge survive me."

Following the above paragraph is a provision that should testatrix's husband not survive her, or should they both die as a result of the same accident, her estate should pass to certain persons named. The testatrix's husband survived her, so that the paragraph above quoted became operative, and the question here involved is, what estate does he take thereunder? his contention being that he takes absolute title to the personal property, and a fee simple in the real estate, while the contention of the heirs at law of the testatrix is that he takes only a life estate in the real and personal property.

[1, 2] It will be observed that the first

part of the paragraph above excerpted clearly and unmistakably gives to the husband of the testatrix a life estate, which he claims is enlarged into a fee by the latter provision conferring upon him the right to sell the same for his benefit, or to increase the income thereof. He contends that the power to sell given by this latter clause is inconsistent with any limitation upon the estate given him, and he must therefore be held to take absolute title to the property, while the heirs of Mrs. Woodbridge contend that this provision is inoperative in the light of the language used in defining the character of the interest devised by the testatrix to her husband. All of our authorities agree that the purpose of all construction of wills is to ascertain the intention of the testator as expressed in the will, and this intention will be gathered from a consideration of all of the provisions of the will, the apparent purpose of the testator, and all of the circumstances surrounding the testator and connected with the object of his bounty, as well as the subject thereof. There are many cases in our books in which wills have been construed, but a perusal of them lends us little, if any, assistance in arriving at the testatrix's intention in this case. In each of the cases there is some characteristic which not only distinguishes them from each other, but distinguishes them from the case we have here, and about the only rule of universal application which we are able to deduce is that the intention of the testator must control, and this intention must be gathered from a consideration of all of the provisions of the will, keeping in mind the apparent purpose sought to be attained by the testator, and giving effect to all the language used in case this can be done; and where some of the language used is so in conflict with other provisions contained in the will as that both cannot stand, that provision will be rejected which seems least in accord with the general object sought to be accomplished by the testator. *Stout v. Clifford*, 70 W. Va. 178, 73 S. E. 316; *Hope Natural Gas Co. v. Shriver*, 75 W. Va. 401, 83 S. E. 1011; *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; *Hinton v. Milburn's Ex'rs*, 23 W. Va. 186.

[3] Is it possible to construe the language used by the testatrix in this paragraph so as to make all of the provisions harmonious? If it is, it is our duty to do so, for we must assume that the testatrix intended, when she used the language she did, that all of it should have some effect. If we find, however, that there are provisions which are so inconsistent with others that both cannot stand, we must then determine which of the provisions accomplishes the primary purpose

sought to be attained by the testatrix, and discard the other.

The contention of testatrix's husband that he takes an absolute estate in all of the property of his deceased wife is inconsistent with every provision in this paragraph except that giving him the power of sale. In the first part of the paragraph the testatrix provides that he shall hold the same so long as he shall live, and have the right to use and enjoy the income thereof, thus not only by one expression limiting his estate to one for life, but by another, which might be termed an equivalent expression, defining the extent of that life estate; that is, the right to use and enjoy the income arising from the property. It is said that the primary intention of the testatrix was to provide for her husband, and this we may grant, but how did the testatrix intend to make this provision, by giving him her property absolutely, or by giving him the income arising therefrom? The will in this case is written entirely by the testatrix, and upon its face it indicates that she was a woman of much more than ordinary intelligence and education, and if she had the intention of giving to her husband the absolute title to her property we cannot conceive for one minute why she ever resorted to the use of the language she did. One of most ordinary intelligence, having such an intention, would simply have said that the purpose was to give the property to the object of her bounty without any limitation.

There are many cases, however, which hold that where an absolute power of sale and disposition is coupled with a provision granting an estate for life, the apparent life estate will be enlarged into a fee upon the ground that the power of disposal of the property is inconsistent with a life estate. And this may be true in those cases where it is plain that the testator intended the power of disposal to be absolute. That intention does not appear here. An absolute power of disposal would carry with it, not only the right to sell and convey, but to use and dispose of the proceeds of the sale. Does the language used by the testatrix grant this power in this case? It will be noted that the power to sell is limited, and can only be exercised by him for his benefit, or to increase the income from the estate. It may be said that these provisions mean the same thing; that disposing of it for his benefit is simply equivalent to disposing of it for the purpose of increasing the income, and that they stand in apposition. This view is given force by the use by the testatrix in this same paragraph of two equivalent expressions to define the life estate with which she desired to invest her husband. She says that she devises the prop-

erty to him so long as he shall live. This would have indicated a life estate, but she goes further and gives and grants the right to enjoy the income thereof, indicating a peculiarity of the testatrix to define or emphasize her expressions by the uses of equivalent expressions immediately following them. Do not all of the expressions contained in this will lead to the irresistible conclusion that in using the language "should he deem it proper to sell the same for his benefit or to increase the income thereof" the testatrix gave the power to her husband to sell the real estate for his benefit, that is, to increase the income, and not to consume or use up the corpus? We find from an examination of other provisions of the will that the testatrix's property consists largely of urban real estate in a growing city. She might well have contemplated that in the ordinary course of progress the value of this real estate would so advance that the returns received from it would be in no wise commensurate with its value, and a life tenant not being in a position to improve it so as to receive the more adequate return, would be denied the advantage of such increased value, while if he had the power to convert the real estate into other property he could make his income commensurate with the value of the property. This seems to us the view the testatrix must have had. We do not think she intended that her husband should have the absolute title to any of this real property. The clause giving him the power to sell does not confer upon him the absolute right of disposal, but the right to change the form of the property if a larger income could be secured thereby. This construction would, of course, vest in the husband of the testatrix an estate for his life in the realty, with the remainder in her heirs, with the power in him to convert the corpus of the real estate into other forms of property, but not to consume it, and it gives effect to every provision without doing violence to any of the language used.

Appellee insists that the courts cannot make a will for a deceased party, but must limit their functions to the construction of a will already made, but he loses sight of the fact that he is insisting upon a construction which admittedly defeats the clear intention of the testatrix as expressed in the will, not once, but twice, by invoking an arbitrary rule which should never be applied so long as the language used can be reconciled. It seems to be established that where a life estate is given in a will and a subsequent unequivocal power of disposition also given, the latter, being inconsistent with the life estate, will prevail and have the effect of converting the life estate into a fee. Such power of disposal must be, however, clear and unequivocal,

as positive as the language creating the life estate, and by disposal is meant not merely power to sell, but the right to consume or use the proceeds in whatever manner the devisee desires. The clear, positive devise of a life estate makes it perfectly apparent that the application of the rule of construction invoked by the appellee would defeat at least one expressed intent of the testatrix, and the only theory upon which this will be done is that there is another repugnant interest just as clearly expressed. If the apparent conflict can be reconciled and effect given to all of the language used, this must be done before resorting to the arbitrary rule which would discard part of the language, and give effect to the remainder.

So far as the personal property is concerned the appellee takes the same absolutely, for under our statute, the testatrix having died without children, he is the sole distributee of the personal estate, and, she not having disposed of the remainder by will, he takes it by operation of law. A life estate going to him under the will and the remainder by operation of law, the two are merged, and give him the absolute property in the personal estate.

It is true, this may be in a sense making testatrix's husband a trustee so far as the remainder in the real estate is concerned, but there is no reason why this cannot be. We are not unmindful of the fact that, when the legal and equitable estates vest in the same party, the less is merged in the greater and ceases to exist, but that condition does not arise here. The estate belonging to the testatrix's husband is entirely distinct from the estate taken by her heirs. He has his life estate in the real estate entirely separate from the remainder, and there is no reason that we perceive why he could not be a trustee so far as the remainder is concerned. He is not the beneficiary of the trust, and it is only in those cases where the beneficiary of the trust is also the trustee that there is a merger of the two estates, as is the case with the personalty in this instance.

We, therefore, reverse the decree of the circuit court so far as it holds testatrix's husband to be the owner of the real estate in fee, and enter a decree here holding that the clause of the will in question vests a life estate in testatrix's husband in the realty, with power to convert the same, or any part of it, into other species of property yielding a larger income, and that if this power is exercised the interest of the parties in such property will be the same as in that of which testatrix died seized, and affirm the decree to the extent that it holds appellee to be the absolute owner of the personalty.

(88 W. Va. 181)

WORRELL v. LUSK. (No. 4136.)

(Supreme Court of Appeals of West Virginia.
March 8, 1921.)

(Syllabus by the Court.)

1. **Receivers** ⇨175—Equity has jurisdiction to determine title to fund placed in hands of general receiver in action at law.

There is jurisdiction in a court of equity to determine the title to a fund placed in the hands of its general receiver, by an order entered in an action at law, to await and abide determination of the ownership thereof by a suit in equity to be brought for that purpose.

2. **Receivers** ⇨178—General receiver holding funds pending determination of ownership in equity an informal party, though not joined.

In such case the general receiver, though not named as a party in the bill, nor served with process, is an informal party to the equity suit.

3. **Eminent domain** ⇨158—Rights to fund in hands of general receiver determinable by rules applicable to specific performance of land contract.

If relief is sought in such a bill, on the ground that the fund is part of the compensation for land taken in a condemnation proceeding, which had been previously purchased by the plaintiff from the formal defendant, under an executory contract, the rights of the parties are determinable by the rules and principles governing specific performance of contracts of sale of real property.

4. **Eminent domain** ⇨153—Purchaser not entitled to specific performance not entitled to compensation paid into court.

If such a purchaser under a contract allowing reasonable time to abstract the title, make surveys, etc., and providing for consummation upon completion of such work, delayed his election to take the property with or without an abatement from the purchase money, for a period of four or five years to the detriment of the vendor, upon discovery of a serious defect in the title to the property, he would not have been entitled to specific performance of the contract, wherefore he is not entitled to a decree for any part of the money paid into court in the condemnation proceeding as compensation for the land taken.

5. **Vendor and purchaser** ⇨144(1)—Condemnation of lands held not performance of land contract.

If in such case the condemnor contracted with the vendee for purchase of the land, before commencement of the eminent domain proceeding, and instituted it against both vendee and vendor, upon discovery of the defect in the title, prosecution of such proceeding by the assignee is not performance of an undertaking on the part of the vendee, as part of his contract, to prosecute a summary proceeding under the statute in the name of the vendor, as guardian of infants then having interests in the land, for authority to convey such interests; nor is the taking of the land by

condemnation performance of the contract by the vendee or such assignee.

Appeal from Circuit Court, Wyoming County.

Suit by Grover C. Worrell against Levi Lusk. Decree for plaintiff, and defendant appeals. Reversed and rendered.

J. Albert Toler, of Pineville, for appellant.
E. W. Worrell, of Pineville, for appellee.

POFFENBARGER, J. [1] The bill in this cause seeks award to the plaintiff of a certain sum of money which at the date of the filing thereof was in the possession of the general receiver of a court by virtue of an order of the court entered in another proceeding, one of condemnation, requiring payment thereof to him and authorizing him to receive it. On a demurrer thereto lack of jurisdiction in equity is urged. Ground of such jurisdiction is clearly manifest. If the plaintiff is entitled to the specific money he seeks, there is no remedy in a court of law by which he can obtain it. His purpose is not recovery of a judgment or personal decree against the defendant. He asserts right, as against the defendant, to certain money not in his possession or control. If he has made proper parties to his bill, his right to prosecute this suit is clear, for the law court does not afford him an adequate remedy nor any at all for recovery of the particular fund in controversy. *Yost v. Wills*, 86 W. Va. 71, 102 S. E. 728.

[2] No necessary party has been omitted, unless the general receiver having the fund in his hands is such. He was not formally made a party, but the bill, treating the fund as being in court, prays for an order directing him to pay it to the plaintiff. From the answer to an amended and supplemental bill which does not show the exact status of the fund, and the evidence, it appears that it was placed in the hands of the general receiver, by an order entered in the condemnation proceeding, to await and abide the result of this suit which had not then been instituted, but was then contemplated and commenced immediately afterward. Hence the fund, though not originating in nor growing out of this suit, has been validly placed to the credit thereof in the hands of the general receiver. Having received the money under an order of the court, to hold until this controversy is settled by a final decree, and being an officer of the court, he is in court for the purposes of this cause and may be deemed to be an informal party thereto.

[3] The fund is part of the compensation paid by the Virginian Railway Company for four lots taken for its purposes, by a condemnation proceeding against the defendant, Lusk, and others, including the plaintiff, who claimed the status of purchaser thereof from Lusk under an executory contract ante-

dating the condemnation suit. At the date of the contract an option in its inception, Lusk and his wife had estates in the lots for their lives, and the former certain shares in remainder by inheritance from deceased children; all of the children having originally owned the remainder in fee. A sale of the property to the Virginian Railway Company was then contemplated, but could not be consummated without judicial proceedings, on account of the infancy of some of the children. In anticipation of such a sale, after procurement of a judicial order authorizing conveyance of the interests of the infants, the plaintiff and defendant entered into the optional contract which gave the plaintiff right to purchase the property within 90 days from the date thereof, August 21, 1913, and further provided that an acceptance by notice in writing within such period should convert the option into a contract. It recited purpose to sell the property to the railway company, bound the plaintiff herein to prosecute the suit for authority to convey the interests of the infants, and provided that he should have for his services such amount as should be obtained from the railway company in excess of \$2,800. Worrell gave notice of his acceptance October 1, 1913, after having conditionally contracted a sale of the lots and some other pieces of property to the railway company at the price of \$5,200. The summary proceeding for sale of the interests of the infants, conducted in the name of Lusk, the defendant here, as guardian, was instituted and prosecuted to the point of readiness for submission to the court. Then, on discovery of a serious defect in the title to the lots, which were part of the property involved in *Frantz v. Lester*, 82 W. Va. 328, 95 S. E. 945, 2 A. L. R. 1558, proceedings were suspended. At an earlier date, it seems, the railway company's acceptance was so modified, or it may have been originally so qualified, that it took one of the pieces of property, other than the Lusk lots, at \$1,000 and fixed the price of the Lusk lots at \$3,500. After discovery of the defect, a condemnation proceeding was commenced to obtain the title to the Lusk lots. This proceeding was continued and carried along until the title of Lusk was validated by the decision in *Frantz v. Lester*, when, by agreement, the compensation was fixed at \$4,500, which sum was paid into court. Then the plaintiff herein demanded \$1,700 thereof, the excess over \$2,800. His demand being resisted by Lusk, the court ordered said sum paid to its general receiver as aforesaid. In the meantime Lusk's wife had died, and, by a partition and conveyances, he had acquired complete title to the four lots.

Finding for the plaintiff on all issues as to the existence of the contract and its terms and conditions, the court entered a decree

in this cause awarding the plaintiff \$700 of the amount in controversy, on the theory of his having contracted a sale of the property to the railway company at the price of \$3,500 and his right to the difference between that sum and \$2,800. Both parties complain of the decree, Lusk by this appeal, and Worrell by a cross-assignment of error based on disallowance of his claim to \$1,000 of the fund.

Although the plaintiff contracted a sale of the lots to the railway company at the price of \$3,500, neither he nor the railway company would pay the money and accept such title as the defendant was then able to convey. This he admits in his testimony, but he insists that the contract binding the defendant to convey good title subsisted pending the proceedings for perfection of title, which was accomplished by the condemnation suit or the decision in *Frantz v. Lester*. Until the latter suit was decided nothing was finally or irrevocably settled. When the title was found to be good, the property went to the railway company, not by virtue of the contract only, nor at the price previously agreed upon, but by virtue of an adjudication based upon a new agreement as to the price.

At the date of the contract no such defect as was later discovered was either known or suspected. What was foreseen amounted to no more than necessity of a simple and short proceeding for passage of the title of the infant owners. For his services in that proceeding the plaintiff was to have the difference between \$2,800 and the sale price. Although the option after acceptance became a contract, it was not a contract unlimited as to time. It allowed only "a reasonable time to abstract title, make surveys," etc. If it can be said to have been closed at all, as made, it was not closed for a period of more than 5½ years. When the abstract was made, neither the plaintiff nor the railway company was willing to consummate the deal by payment of the money. In the meantime the defendant's situation had undergone a detrimental change. He had bought property in another community, expecting to pay for it out of the purchase money of the lots, and, being unable to do so, had been forced to relinquish his bargain. On his return he denied further liability upon the contract and gave notice of his intention not to be further bound by it. At that time there was no tender of any money, and presumptively the plaintiff would not then have paid the pur-

chase price and accepted a deed, for, as stated, he admits unwillingness to accept anything short of a marketable title.

[4] At the date of the commencement of the condemnation proceeding the contract was unenforceable as made, because the defendant's title was deemed to be bad. The defect in it had been adjudged to be fatal. There was only a fighting chance to sustain it. If it had not been validated in *Frantz v. Lester*, it would have been void. And the inability of the defendant to convey good title was not due to any fault of his. He was an innocent holder of a bad title, one the vendee would not accept. Under these circumstances, he could not delay election to take such title as the vendor could convey, with an abatement of purchase money, or to take it without an abatement, for a period of four or five years. He was allowed only a reasonable time for such election, and, it not having been made within such time, specific performance of the contract cannot be enforced. *Neill v. McClung*, 71 W. Va. 458, 76 S. E. 878.

[5] Nor can this result be avoided on the ground of perfection of title by prosecution of the condemnation suit. That was no part of the contract, and was not within the contemplation of the parties at the time of the execution thereof. The service undertaken as consideration for the advantage in the sale was not fully performed, nor was the purpose thereof achieved at all. There was no such judicial sale of the interests of the infants as was contemplated. The excess in price came, not from the services of the plaintiff, but as the result of an adverse proceeding by the railway company and delay of consummation until the title was validated by a proceeding not in contemplation at all. Nor did the purchase money come into the hands of the court by virtue of any purchase by the plaintiff or any sale made by him. The railway company paid it as compensation for land taken in the exercise of the power of eminent domain.

Our conclusion is that the decree complained of will have to be reversed, and the prayer of the defendant's answer for award to him of the sum of money in controversy granted, without prejudice, however, to any right the plaintiff may have to sue for damages for breach of the contract of sale or for compensation for services rendered in the transaction out of which this controversy arose. Costs in this court as well as in the court below will be decreed to the defendant.

(88 W. Va. 124)

STEWART v. SENTER et al. (No. 3960.)(Supreme Court of Appeals of West Virginia.
March 8, 1921.)*(Syllabus by the Court.)*

1. Judgment \Leftrightarrow 286—Judgment against defendant in singular valid against all ascertainable defendants if clearly so intended.

A judgment expressed to be against the "defendant," where it is clear from the context and the other parts of the record that "defendants" is intended, will be considered and treated as a valid judgment against all of the defendants if they can be ascertained without ambiguity from the caption of the judgment, aided by other parts of the record. The omission of the letter "s" from the word defendant in such instance will be treated as a clerical error.

2. Judgment \Leftrightarrow 519—Judgment cannot be declared void in suit to enforce on grounds which might have been asserted in judgment action.

In a chancery suit to enforce the lien of a judgment against real estate of the judgment debtor, the judgment cannot be attacked and declared void upon grounds which might have been successfully asserted in the law court upon the trial, unless the judgment debtor alleges and proves some reason founded in fraud, accident, surprise, or some other adventitious circumstance beyond his control why the defense at law was not made.

3. Judgment \Leftrightarrow 916 — Abstract of judgment alone insufficient to prove judgment if controverted.

An abstract of a judgment exhibited with a bill in equity to enforce the judgment is not sufficient to prove the judgment if controverted, but, if the judgment in full is brought into the case by some other pleading, the necessity of proof thereof is obviated.

Appeal from Circuit Court, Wyoming County.

Suit by Mary Stewart against E. M. Senter and others. Decree for defendants on demurrer, and plaintiff appeals. Reversed and remanded.

F. E. Shannon, of Pineville, for appellant.
E. W. Worrell, of Pineville, for appellees.

LIVELY, J. This appeal brings up for review a decree of the circuit court of Wyoming county entered the 22d day of August, 1919, which sustained a demurrer to and dismissed the plaintiff's bill.

A. M. Stewart died testate in 1910, and shortly afterwards his son, B. Harry E. Stewart, qualified as his executor with E. M. Senter, J. M. Glenn, and G. P. Stewart as sureties on his bond. Afterwards, in 1913, B. Harry E. Stewart died without having settled his accounts as executor of his father's estate, and J. M. Glenn was appointed

administrator de bonis non of A. M. Stewart's estate and administrator of B. Harry E. Stewart's estate. Mary Stewart, the plaintiff, was a daughter and one of the heirs and distributees of A. M. Stewart. She filed her declaration in the circuit court of Wyoming county at April rules, 1918, against J. M. Glenn as administrator of B. Harry E. Stewart, E. M. Senter, J. M. Glenn in his own right, and George P. Stewart, alleging the death of A. M. Stewart, the appointment of B. Harry E. Stewart as his executor with the other defendants as sureties, the subsequent death of B. Harry E. Stewart, and the appointment and qualification of J. M. Glenn as administrator de bonis non of A. M. Stewart. The declaration does not specifically aver that J. M. Glenn was appointed as administrator of B. Harry E. Stewart, but it does so inferentially. A devastavit was charged with consequential damages to the plaintiff of \$1,000. On August 21, 1918, a default judgment was entered against the defendants for \$550.97 and costs, and afterwards, on December 31, 1918, an abstract of the judgment was recorded in the judgment lien docket. An execution was issued and returned nulla bona on October 7, 1918. This suit in equity was instituted and the bill filed at January rules, 1918, against the defendants, J. M. Glenn, E. M. Senter, George P. Stewart, and Georgia Glenn, for the purpose of enforcing this judgment against certain real estate owned by E. M. Senter and J. M. Glenn. Each of the defendants, with the exception of J. M. Glenn, demurred to and answered the bill. They admit the rendition of the judgment (which they charge is invalid), and the issuance and return of the execution. They ask for affirmative relief and charge that the judgment sought to be enforced by the bill is null and void for reasons hereinafter mentioned, and prayed for an injunction against the plaintiff to prevent her from proceeding further in the collection of her purported judgment. To these answers the plaintiff demurred and filed a special replication. Afterwards an amended bill was filed, making J. M. Glenn, as administrator of the estate of B. Harry E. Stewart, a party. On August 22, 1919, the court heard the cause upon the bill and exhibits, separate answers in the nature of a cross-bill, the demurrers to the bill, and the demurrer and replication to the answers, and came to the conclusion that the demurrer to the bill should be sustained, and dismissed the plaintiff's bill, giving as a reason therefor that the judgment sought to be enforced did not in the body of the order contain the names of the defendants.

The appellant insists that the circuit court erred in so holding, and that her judgment is not void for uncertainty. The judgment is as follows:

"The State of West Virginia, Which sues for the Use and Benefit of Mary Stewart, v. J. M. Glenn, as Administrator of B. Harry E. Stewart, deceased, E. M. Senter, J. M. Glenn, in his own right, and George P. Stewart. In Debt. Order. This day came the plaintiff by its attorney, and the defendants, who were duly summoned, being thrice solemnly called, came not. It is therefore considered by the court that the judgment entered in the clerk's office of this court against the said defendants stand confirmed. No jury being required by the plaintiff, the court proceeded, in lieu thereof, to ascertain the amount that the plaintiff is entitled to recover against the defendants in this action, and, having heard and considered the evidence, doth consider that the plaintiff recover, for the use and benefit of the said Mary Stewart, against the defendant, the sum of \$550.97 damages, aggregate amount of principal and interest to this date, with interest on said sum until paid, and its costs by it in its suit in this behalf expended, including \$10 attorney's fee."

There is nothing uncertain about this judgment except the uncertainty suggested by the lower court to the effect that it did not contain the names of the defendants. This was not necessary. It is perhaps better form to name the persons against whom the judgment is rendered in the order or decree. However, other parts of the record may be inspected for the purpose of relieving a judgment of any real or apparent obscurity. *Clay v. Hildebrand*, 34 Kan. 694, 9 Pac. 466; *Fowler v. Doyle*, 16 Iowa, 534; *Fleenor v. Driskill*, 97 Ind. 27; *Walker's Ex'r v. Page*, 21 Grat. (Va.) 636; *Black on Judgments* (2d Ed.) § 123. Numerous authorities hold that a judgment against the "defendant" will be sufficient if the names of the defendants can be ascertained without ambiguity from other parts of the record. *Black on Judgments* (2d Ed.) § 116, and authorities there cited.

[1] It is well settled that a judgment against the "defendant" is not defective for uncertainty where the record discloses that it is in fact a judgment against two defendants. *Roach v. Blakey*, 89 Va. 767, 17 S. E. 228. These decisions are based on reason and sound policy. All of the parties defendant are named in the caption of the judgment order, and the "defendants" were solemnly called, and came not, and the office judgment was confirmed. The court in lieu of a jury, ascertained the amount the plaintiff was entitled to recover from the "defendants," and then the recovery is made against the "defendant." It is apparent from the face of the order that the omission of the letter "s" from the word "defendant" is a clerical error. It is not necessary to look to the other parts of the record to ascertain against whom this judgment was rendered. But if we look to the summons, the declaration, and the execution no doubt can remain.

"Where a judgment gives the style of the cause, at its head, with sufficient definiteness

to show without doubt that the plaintiffs and defendants referred to therein as such are the same individuals that are named and designated as such in the declaration, and throughout the proceedings composing the record in the cause, such judgment is not void for vagueness or indefiniteness if it fails, in its body, to give the names of the plaintiffs and defendants for and against whom it is rendered." 15 R. C. L. p. 597.

Defendants assert that the judgment is null and void: (1) Because the declaration does not show that any specific sum of money went into the hands of B. Harry E. Stewart as executor of A. M. Stewart; (2) because plaintiff did not recover a judgment against J. M. Glenn as administrator of B. Harry E. Stewart before instituting the suit against defendants; (3) because on the trial no evidence was offered showing a devastavit of the estate of A. M. Stewart by his executor, B. Harry E. Stewart. These are all defenses to the action which resulted in the judgment. They come too late after judgment. We cannot open that law proceeding now to hear matters, which, had they been interposed, would possibly have prevented the judgment from being rendered. The law court had jurisdiction of the subject-matter and of the parties. All were served with process, and all stood by and permitted a judgment by default. If there was a defect in the declaration, it is too late to point it out now. If the suit was instituted prematurely, before something else should have been done, some other suit instituted, or some other judgment rendered, that was a matter of defense, and it comes too late in this proceeding. The same is true of the assertion that the judgment was not founded on proper evidence, or that evidence was lacking. No fraud, accident, surprise or extraordinary condition or circumstance is alleged or relied upon to set aside the judgment.

[2] The law is so firmly settled that a judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of errors or irregularities not going to the jurisdiction, that it would be cumbering the reports to cite authorities or reiterate the reasons on which the law is based. It is equally well settled that a judgment is not void, or open to a collateral attack, because it is based upon an erroneous application of legal principles, or insufficient evidence, or the remedy selected was one not properly admitting the relief granted in the judgment or decree. *Insley v. United States*, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163; *Hendrick v. Whittemore*, 105 Mass. 23.

The defendants by answer in the nature of a cross-bill set up these defenses and pray for an injunction against the assertion of the judgment. The demurrer to this portion of

the answers asking for affirmative relief was well taken and should have been sustained.

"In a suit in equity, brought for the purpose of enforcing a judgment lien, which judgment was obtained against the defendant by default, the defendant will not be allowed to make any defense against said judgment which might have been successfully made in a court of law, unless he shows some reason founded on fraud, accident, surprise, or some adventitious circumstance beyond his control why the defense at law was not made." *McNeel's Ex'rs v. Auldridge*, 34 W. Va. 748, 12 S. E. 851.

Where defenses which were available at law are set up in equity as grounds for relief against a judgment they cannot be considered. *Harnsbarger's Adm'r v. Kinney*, 13 Grat. (Va.) 511; *Allen v. Hamilton*, 9 Grat. (Va.) 255. Where defense at law was prevented because of acts or representations of the plaintiff, or the result of fraud, accident, surprise, or other adventitious circumstance beyond the control of the party complaining, equity will give relief. *Shields v. McClung*, 6 W. Va. 79; *Smith v. McLain*, 11 W. Va. 854; *Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487. There is nothing of this character even intimated in the answers.

Appellees insist that the judgment is null and void because they are joined as defendants with J. M. Glenn as administrator of B. Harry E. Stewart, deceased, and that the judgment against J. M. Glenn as administrator, etc., is a personal judgment against Glen, under the authority of *Thompson & Lively v. Mann*, 53 W. Va. 432, 44 S. E. 246, and *Hall v. McGregor*, 65 W. Va. 74, 64 S. E. 736; and hence, as there was no privity of contract between Glenn as an individual and themselves, they are not liable, and the judgment against them is void for that reason. The judgment is not against Glenn as administrator to be levied on the goods and chattels of his decedent, and no doubt is a personal judgment against him. It is possibly erroneous, but it will bind him individually as well as the other defendants. The judgment is against him in his own right, and he cannot now complain, and is not complaining. If there was an improper joinder of parties, that defense should have been made before judgment.

[3] The bill exhibits a transcript of the judgment taken from the judgment lien docket to prove the judgment. This did not prove the judgment. *Dickinson v. Railroad*, 7 W. Va. 390. But the defendant Senter brought into the record the full judgment, as an exhibit, and the court heard the cause on all the papers and proceedings. We think this supplied the necessary proof of judgment.

The decree of August 22, 1919 sustaining the demurrer to the bill is reversed, and the cause remanded.

Reversed and remanded.

STATE v. ARRINGTON. (No. 4150.)

(Supreme Court of Appeals of West Virginia.
March 8, 1921.)

(Syllabus by the Court.)

1. Criminal law §390—Accused may testify as to his feelings as to decedent and his motives.

In a trial for homicide, where one of the issues is self-defense, it is competent for the accused to testify concerning his belief and feelings as to the conduct of the deceased at the time of the killing, and to state the motive or purpose which prompted him to fire the fatal shot.

2. Homicide §190(7) — On issue of self-defense uncommunicated threats against accused held admissible.

Where on a charge of homicide the excuse is self-defense, and the testimony is conflicting as to the aggressor, there being some to show that it was the deceased, his threats against the accused, though not communicated to the latter, are relevant and admissible to show the deceased's attitude of mind shortly prior to the combat.

3. Homicide §193—Evidence that deceased was unarmed admissible on issue of self-defense.

Where self-defense is an issue in a trial for homicide, evidence that the deceased was unarmed at the time of the killing is admissible.

4. Homicide §188(7)—Deceased's good character assumed until attacked by defense.

Until attacked by the defense, the deceased's character for peaceable and quiet conduct is presumed to have been good, and the state may not make it a subject of primary proof.

5. Homicide §188(7) — Uncommunicated threats held to justify admission of evidence of prior good character.

But evidence of uncommunicated threats by the deceased to do bodily harm to the accused constitutes a direct attack upon his reputation for quiet and peaceable conduct, and, in conjunction with other testimony tending to show some aggression on his part, justifies the admission of evidence of prior good character, in order to create a countervailing inference that he was not the aggressor.

Error to Circuit Court, Wyoming County.

Ed. Arrington was convicted of second degree murder, and he brings error. Reversed and remanded.

Grover C. Worrell, of Mullens, J. M. McGrath, of Princeton, and R. E. Hughes, of Charleston, for plaintiff in error.

E. T. England, Atty. Gen., and R. A. Blessing, Asst. Atty. Gen., for the State.

LYNCH, J. From a judgment of 12 years' imprisonment in the penitentiary upon a verdict of a jury for second degree murder, Ed. Arrington, defendant, prays to be released

and the case resubmitted to another jury for retrial. He shot Mike Yek February 9, 1920, at Iroquois, Wyoming county, and from the wound so inflicted Yek died a moment later. Those who witnessed the tragedy, besides deceased, were Albert Foy, Oakley Helmandollar, and defendant, Arrington, each of whom testified in the order named, Foy on behalf of the state, the other two on behalf of the defendant.

Foy's version of the affair is substantially this: He was walking along the street about 8 o'clock in the evening, and had just passed defendant and Helmandollar going in the opposite direction, when Yek approached them, Foy then being not more than 18 feet distant from them. He heard one of the two men say, "Who is that?" to which the other responded, "Some d—n sneak," but was unable to determine which of the two was the questioner and which made the response. Immediately "they commenced to mix up a little, * * * and this fellow Yek run back a little piece; I don't know whether Arrington hit him or not; and he (Yek) had his hand on his hip; I don't know whether he had his hand in his pocket, or whether he was pulling up his pants. * * * He started toward Arrington, and I saw the pistol," and then the shot was fired.

Helmandollar and defendant substantially agree in their statement of what occurred. The former was standing not more than 12 feet from Arrington when Yek approached. According to their story, Yek said to defendant, "Where are you going?" to which the latter replied, "I am going up the road," and Yek responded, "You are a d—d liar," whereupon a conflict occurred. Yek stepped back a few paces, then started towards defendant with his hand in his hip pocket. The latter says he heard some one, he does not know who, say "Look out, Ed!" and "I jerked out my gun and shot."

The first assignment of error goes to the sufficiency of the indictment, but we see no serious defect in it, and defendant has not pointed out any. The next assignment likewise was not discussed by defendant or relied on by him before this court, and we are unable to perceive any possible ground of prejudice to him in permitting Mrs. Yek to state what little she knew of the fatal shooting of her husband, namely, the hour when he left home to go to the store, when next she saw him and his condition at that time, the location of the wound, his age, nationality, occupation, and children. However, proof of the number, names, ages, and condition of the children or their mother can have no relevancy to the issues involved in a trial for homicide.

[1] Assignments 3, 4, 5, and 6 present the question whether the court erred in refusing to permit defendant to testify before the jury

as to his purpose in firing the fatal shot. He was asked, "Now what was your purpose in firing the gun?" The court refused to permit him to answer, except for the purpose of completing the record, and his reply then was, "To save my own life." He was asked further, "Did you have any other purpose in firing the shot?" and after a similar refusal to permit his answer to go to the jury, he replied, on the record, "No." Since malice, express or implied, is an essential element of murder in the first or second degree (State v. Douglass, 28 W. Va. 297; State v. Panetta, 85 W. Va. 212, 101 S. E. 360; State v. Galford, 105 S. E. 237), defendant had the right to disprove it in any legitimate manner. His mental attitude towards deceased at the instant he shot was material to his defense. In a trial for homicide, where one of the issues is self-defense, it is competent for the accused to testify concerning his belief and feelings as to the conduct of the deceased at the time of the killing, and to state the motive or purpose which prompted the fatal shot. These statements should have gone to the jury, to be considered by them in connection with other facts and circumstances in the case, and to receive such weight and credence as in their opinion they merited. State v. Evans, 33 W. Va. 417, 10 S. E. 792; State v. Alderson, 74 W. Va. 732, 82 S. E. 1021; State v. Panetta, cited.

[2] Assignments 7, 8, 9, and 10 involve questions relating to the admissibility of threats by the deceased to do bodily harm to the accused, made in the presence of other persons, but not communicated to him. Evidence of communicated threats tends to throw light upon the mental attitude of the accused towards deceased, while uncommunicated threats serve a reverse purpose, namely, as evidence of the mental attitude of the deceased towards the accused. Where the chief defense of the latter is self-defense, it is of prime importance to determine which of the parties to the combat was the aggressor. If the accused, then undoubtedly such threats would not be admissible, for his aggression would of itself constitute an express refutation of any implication of self-defense that might arise from threats or the accused. But, where the evidence is conflicting as to the aggressor, proof tending to show the state of mind of the deceased at a time not unreasonably remote from the date of the combat is relevant and material in determining whether or not it was he who forced the fighting. Uncommunicated threats, of course, disclose nothing with regard to the accused's state of mind at the time of the homicide, but they possess an evidentiary value, in this, that they show a prior mental condition of deceased which, if continued to the date of the combat, might have prompted him to carry out his design. State v. Evans, 33 W. Va. 417, 10 S. E. 792;

State v. Lutz, 85 W. Va. 330, 101 S. E. 434; Wharton on Homicide (3d Ed.) § 246; 21 Cyc. 893. See, also, State v. Waldron, 71 W. Va. 1, 75 S. E. 558. Prof. Wigmore in his work on Evidence, vol. 1, § 110, says:

"Where on a charge of homicide the excuse is self-defense, and the controversy is whether the deceased was the aggressor, the deceased's threats against the accused are relevant. The deceased's design to do violence upon the defendant is of some value to show that on the occasion in question he did carry out, or attempt to carry out, his design. Moreover, it is the fact of his design, irrespective of its communication to the defendant, that is essential."

Because of the opportunity afforded for abuse of this character of evidence, courts generally have placed certain limitations and restrictions about its introduction, many holding it to be admissible only where there is some other evidence of an aggression by deceased. 1 Wigmore on Evidence, § 111; 1 Michle on Homicide, § 190. We need not now determine whether such a limitation would be proper in every case and under all circumstances, for there is in this case evidence, not much perhaps, but some, that deceased took an active part in the fighting. The state's witness Foy admits that he was advancing upon accused at the instant the latter shot. For these reasons the testimony should have been admitted.

[3] The eleventh assignment is not well taken, because, where self-defense is an issue in a trial for homicide, evidence that the deceased was unarmed at the time of the killing is admissible. 21 Cyc. 955, note 71; 1 Michle on Homicide, § 193(2).

[4, 5] The remaining assignments of error, in so far as they are material upon this review, relate to the admissibility of evidence of the previous good character of the deceased, introduced by the state. Until attacked by the defense, the deceased's character for peaceable and quiet conduct is presumed to have been good, and the state may not make it a subject of primary proof. 1 Wharton's Criminal Evidence (10th Ed.) § 57; 15 R. C. L. Homicide, § 219. There was no evidence admitted at the trial, on behalf of the accused, assailing the character of the deceased; hence the court erred in permitting the prosecution in rebuttal to introduce evidence of his good character. Until it is assailed, the presumption is that it was good, and no proof thereof is necessary. But we have just held that the court improperly

excluded evidence offered by the defense of uncommunicated threats of the deceased to do the prisoner harm, and upon the new trial which we are compelled to award such testimony doubtless will again be offered. Is not that a sufficient attack upon the deceased's character to justify the admission of rebuttal testimony of his good character? We think it is. As already noted, evidence of uncommunicated threats is admissible to show the attitude of mind of the deceased, and to aid the jury in determining who was the aggressor in the fight. Such testimony is a direct attack upon his reputation for quiet and peaceable conduct, and evidence of good character in that regard may be admitted to rebut it and to create a countervailing inference that he was not the aggressor. *Crawley v. State*, 137 Ga. 777, 74 S. E. 537; *Vernon v. State*, 146 Ga. 715, 92 S. E. 76; *State v. Vacos*, 40 Utah, 169, 120 Pac. 497; *Davis v. People*, 114 Ill. 86, 29 N. E. 192; *Russell v. State*, 11 Tex. Cr. 288; *Canon v. State*, 59 Tex. Cr. 398, 128 S. W. 141; *Berry v. State*, 73 Tex. Cr. 203, 163 S. W. 964; *Hussey v. State*, 87 Ala. 121, 6 South. 420; *Weaver v. State*, 83 Ark. 119, 102 S. W. 713; *State v. Feeley*, 194 Mo. 300, 92 S. W. 663, 3 L. R. A. (N. S.) 351, 112 Am. St. Rep. 511; 1 Wharton's Criminal Evidence (10th Ed.) § 57; 21 Cyc. 908; 1 Michle on Homicide, § 163 (2b), p. 683. Again referring to Wigmore on Evidence, vol. 1, § 63, the author says:

"When the issue of self-defense is made in a trial for homicide, and thus a controversy arises whether the deceased was the aggressor, one's persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased's action. * * * In the present use, this additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief."

See, also, *State v. Waldron*, 71 W. Va. 1, 75 S. E. 558. Generally, as Prof. Wigmore suggests, in order to avoid abuse, there ought to be some other appreciable evidence of the deceased's aggression before such character evidence should be admitted; but evidence of the threats introduced by the defense, and other testimony relating to his active part in the fight, are sufficient to justify its admission in this case.

For the reasons stated, we reverse the judgment, set aside the verdict, and award defendant a new trial.

(88 W. Va. 158)

**MORRISON v. SMITH-POCAHONTAS
COAL CO. (No. 4060.)**(Supreme Court of Appeals of West Virginia.
Oct. 26, 1920. On Rehearing,
March 8, 1921.)*(Syllabus by the Court.)*

1. Continuance \S 30—After trial amendment to conform to proof court may properly proceed with trial.

If during the progress of a trial it becomes necessary to amend the declaration so as to make it conform to the proof, as may properly be done pursuant to section 8 of chapter 131 (sec. 4912) of the Code, it is not error for the court to proceed with the trial, notwithstanding objection thereto by the opposite party, unless upon motion made and for good cause shown for a continuance.

2. Master and servant \S 264(6)—Proof held admissible under averments as to instructing inexperienced employee.

Where in a suit by an employee for personal injuries due to the alleged negligence of defendant the primary act of negligence alleged is the failure of defendant to instruct plaintiff, inexperienced and ignorant of the dangers incident to his employment, in relation thereto and how to avoid the same, evidence of all such incidental facts and circumstances as fairly tend to establish the fact of such negligence and the manner in which his injuries were sustained is admissible without specific averment thereof.

3. Master and servant \S 95—Failure to require statutory affidavit as to age not excused by misrepresentations.

Neither the appearance of an employee nor the fact that he or his parent or guardian misrepresented his age will excuse the owner of a coal mine for failure to require the necessary affidavit of the parent or guardian required by section 25 of chapter 15H of the Code of 1918.

4. Appeal and error \S 179(1)—Question not fairly presented or arising from the record is not ground for reversal.

A question not fairly presented or arising upon the record, though made a point of error in this court, will not be considered or regarded as ground for reversal.

5. Master and servant \S 366—Payment of premiums into compensation fund no protection against unlawful employment.

Payment of premiums into the workmen's compensation fund of this state will not protect an employer against the action of an infant unlawfully employed by him in a coal mine. In such case the rights and liabilities of employer and employee are controlled by the common-law principles applicable to master and servant.

On Rehearing.

6. Infants \S 14—Boy over 14 and under 16 may not be employed in mine while schools are in session, though parents domiciled elsewhere.

Notwithstanding the provisions of section 69, chapter 45 of the Code, limiting the right

to attend the free schools and receive instruction therein, in any district or independent district, to those who reside therein with intent to make such district their home, a boy over the age of fourteen and under the age of sixteen years may not be employed in any coal mine in this state while the schools of the district in which such mine is located are in session, although the domicile of his parents is in another district or state.

Error to Circuit Court, Wyoming County.

Action by Banner Morrison, an infant, etc., against the Smith-Pocahontas Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Toler & Moran, of Mullens, for plaintiff in error.

Anderson, Strother, Hughes & Curd, of Welch, for defendant in error.

MILLER, J. The purpose of the present writ is to review and reverse the judgment below in favor of plaintiff for \$8,000.00, for personal injuries sustained while employed in defendant's coal mine.

At the time of plaintiff's injuries, according to the declaration and proof, he was an infant between the ages of fourteen and sixteen. The declaration is in two counts, the first averring as the sole act of negligence the employment of plaintiff by defendant while the public schools of the district in which he lived were actually in session, contrary to the statute in such cases made and provided. The second count avers the failure of defendant to pay into the workmen's compensation fund the premiums prescribed by law, plaintiff's employment contrary to law as averred in the first count, his inexperience and his incapacity because thereof to comprehend the dangers and hazards incident to his employment, and the negligence of defendant to use all reasonable care and caution to instruct him as to the manner in which he should perform his work, and to warn him as to the dangers attending his employment, by reason whereof he sustained the injuries of which he complains.

The record shows no demurrer to the declaration or either count thereof, except that after the jury had been sworn to try the issue joined on defendant's plea of not guilty, and during the trial, when plaintiff was permitted to amend each count so as to make the allegata and probata agree as to the manner in which he sustained his injuries, the defendant demurred generally to the declaration as amended, not to each count thereof, which was overruled, and the trial thereon was proceeded with to verdict and judgment.

[1] The first, second and third points of error relied on are without merit. The first and second relate to the question of variance between the allegata and probata as to the particular manner in which plaintiff sus-

tained his injuries, cured as we have shown by the amendments of the declaration during the trial. The third point relates to the action of the court, after the amendments, in proceeding with the trial over the objection of defendant. Citing and relying on the case of *Travis v. Peabody Insurance Co.*, 28 W. Va. 583. That case has been substantially overruled in the late case of *Koen v. Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098, holding that the question for which that case is cited did not arise therein, and that the point was obiter. The latter case gives proper construction to our statute on the subject, section 8, chapter 131 (sec. 4912) of the Code. This statute permits amendments to pleadings to meet the very case presented here, a variance between averment and proof, and provides that a continuance not a matter of right need not be had unless rendered necessary thereby. In the case at bar defendant made no motion for a continuance, and there was no surprise or cause for a continuance presented.

[2] The fourth point of error is that the declaration as amended during the trial in each count thereof is faulty in not sufficiently averring the manner, time and place in which plaintiff's injuries were sustained, so as to show defendant's negligence. The time and place are averred, also, in the alternative, that plaintiff was mashed or thrown between the cars or between the cars and the rib of the coal. The form of this averment in the alternative was to cover the case as the facts might appear from the evidence when presented to the jury. The primary act of negligence alleged is the employment of plaintiff contrary to law. The manner in which the injuries were sustained, assuming the declaration to be good, is unimportant. In the second count the primary negligence alleged is the failure of defendant to instruct plaintiff, because of his youth and inexperience, how to do the work and avoid injury. Such averment of negligence furnishes the basis or predicate for the evidence of all such incidental facts and circumstances of omission or commission as fairly tend to establish the negligence of the primary act, according to the cases cited by defendant's counsel. *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; *Veith v. Hope Salt & Coal Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

[3] The fifth point of error affirmed by defendant's counsel is that the court erred in refusing to allow it to prove by its superintendent and mine boss that plaintiff's size and appearance and what he said indicated that he was eighteen years of age and an experienced brakeman. The evidence of these witnesses shows that they were in doubt, and questioned the plaintiff and required of him the statutory affidavit of parent or guardian that he was of the age rendering it

lawful for him to be employed in or about a coal mine, and there is some evidence tending to show that they did get some sort of a certificate, not an affidavit, of a brother-in-law of the plaintiff, not his parent or guardian, consenting to his employment, but this certificate was not produced. In *Norman v. Virginia-Pocahontas Coal Co.*, 68 W. Va. 405, 69 S. E. 857, 31 L. R. A. (N. S.) 504, and *Blankenship v. Ethel Coal Co.*, 69 W. Va. 74, 70 S. E. 863, we distinctly held that the fact that such employee or his parent has misrepresented his age does not preclude recovery; so held in construing our statute, sections 24 and 25, chapter 15H of the Code of 1918, which does not excuse an employer from requiring the affidavit because of the appearance or false representation of the employee or his friend as to his age. To be protected the employer is bound to require the proper affidavit of parent or guardian.

A sixth proposition presented by counsel is that the court below committed prejudicial error in permitting one of defendant's expert witnesses to be asked and to answer, on cross-examination, whether if some other expert who did not testify in the case had given it as his opinion that the particular condition of plaintiff was caused by the injury sustained, he would say such opinion was correct or incorrect. Counsel for plaintiff say the question and answer were not objected to. We find with respect to the testimony of Dr. Hunter, one of the experts, there was an objection and an exception, but with respect to the evidence of Dr. Wood, the other expert, there was no objection or exception to the question asked him, nor to his answer thereto, which was favorable to defendant. However, the opinions of the experts not examined by plaintiff were brought out on cross-examination of plaintiff by defendant's counsel, wherefore we can see no error in the rulings of the court of which defendant can complain. The seventh proposition is covered by the sixth, and we make the same reply.

[4, 5] The eighth proposition urged, and the only one argued by defendant's counsel, is that the violation of the statute against employment of minors within the prohibited ages does not constitute actionable negligence unless such violation thereof is the proximate cause of the injury; that an employer as a matter of law is not chargeable with all injuries that result during the unlawful employment, but is liable only for those injuries against which the statute is intended to guard. And the argument is that section 33, chapter 10, Acts 1915 (Code Supp. 1918, c. 15H, § 36 a. xxxiii [sec. 495—33]), prohibiting the employment of boys between the ages of fourteen and sixteen years, was not intended to protect them from personal injuries as was section 32 (sec. 495—32) thereof, inhibiting the employment of boys under the age of fourteen years, but that

its purpose was to provide for their education and protect them therein. Our answer to this proposition is that the question does not seem to fairly arise on the record. A demurrer to the first count would likely have presented the question, but so far as the record discloses there was no demurrer to either count until after the trial began, and then the demurrer after the amendments were made was general and not to each count, and as the second count is concededly good, the demurrer was properly overruled. The question might have been presented by instructions, but though the order giving judgment on the verdict and filing the only bill of exceptions, No. 1, indicates that instructions to the jury were given and refused, no such instructions appear, and the bill of exceptions does not purport to contain or identify any such instructions. Nor does the question arise on the motion for a new trial, for as the second count is good and there was evidence introduced sufficient to support the case made thereby, we can not say the verdict is not well founded on pleadings and proof.

It is true, the defendant proved payment of the proper premiums into the workmen's compensation fund so as to protect against damages sustained by anyone lawfully employed in its mines. But as the jury must have found the plaintiff was unlawfully employed while the schools in his district were in session, defendant was not protected against action by plaintiff by the workmen's compensation fund. The protection given by the statute does not extend to persons unlawfully employed. Section 9, chapter 15P, (sec. 665), of the Code, specifically provides that the act shall not apply to employers of employees whose employment is prohibited by law. And we have recently decided that in cases not falling under the compensation law the common-law rights and liabilities of employer and employee must control in actions of negligence. *Barnett v. Coal & Coke Ry. Co.*, 81 W. Va. 251, 94 S. E. 150.

Wherefore, we must affirm the judgment.

WILLIAMS, J. absent.

On Rehearing.

Two additional propositions are urged for reversal. First, that plaintiff, a boy over fourteen years of age, was not, while and where employed by defendant, residing in the sub-district or independent school district with intent to make such district his home, and was not, within the provisions of section 69 of chapter 45 of the Code 1916, (Code 1913, sec. 2110), entitled to attend the free schools of said district, wherefore his employment by the defendant was not unlawful, and defendant was protected by its compliance with the workmen's compensation law; second, that the evidence shows plaintiff to have been a skilled work hand, acquainted

with the duties of his employment, and that the theory that he was not properly instructed as to the dangers of his employment was unavailing and should have been disregarded by the trial court and by the jury.

[6] The argument adduced in support of the first of these propositions is that section 33 of chapter 10, Acts 1915 (section 25, chapter 15H, Code 1916 [Code Supp. 1918, c. 15H, § 36a xxxiii] sec. 495—33), relating to mines and labor, and sections 69, 72 and 74 of the chapter relating to education (Code 1913, secs. 2110, 2113, 2115), being in pari materia, should be read together, and the former chapter interpreted in the light of the latter. In this view we entirely agree with counsel. Section 33 of said chapter 10, makes it "unlawful for any person, operator, agent or mine foreman, to employ or permit any boy between the ages of fourteen and sixteen years, to work in or about a coal mine at any time in which a free school is in session in the school district where said boy resides." And section 72 of chapter 45 of the Code requires every person having under his control a child between the ages of eight and fifteen years to cause him to attend some free school for a period of twenty-four weeks yearly, beginning with the opening of the school term, and makes it a misdemeanor and imposes a penalty for failure to do so; and section 74 of that chapter makes it an offense punishable in like manner for any person to induce any such child to unlawfully absent himself from school, or to harbor or employ him, when the school in the district in which the child lives is in session.

Defendant relies on the evidence that plaintiff's father resided in Virginia, and that when on the witness stand plaintiff said his home was in Virginia, and that after being hurt in defendant's coal mine he said he wanted to go home. He did so testify, but he also testified that he had been working in West Virginia in a coal mine before being employed by defendant, and during his employment by defendant that he at least had a temporary residence with a relative, Rokie, in the school district where he was employed, and who undertook to make out a certificate which was shown or delivered to defendant, giving his consent to the boy's employment, but not sworn to by him. Plaintiff was employed by defendant during the months of November and December, 1917. It is contended by defendant's counsel that such residence in the State did not give plaintiff the status of one residing within the school district with intent to make such district his home, within the meaning of section 69 of said chapter 45 of the Code, entitling him to attend the free schools thereof, wherefore his employment could not have been unlawful as contemplated by the provisions of the mining statute referred to. On the other hand counsel for plaintiff insist that these mining laws inhibiting the employment of

boys between the ages of fourteen and sixteen years have their safety as well as their education in view, and that the provisions of the chapter on education and those of the mining statutes can not be construed as strictly in pari materia. Our opinion, however, is that as they relate to boys between the ages of fourteen and sixteen years, the purpose is education, not safety; for when over fourteen years of age, if the schools are not in session, boys may be lawfully employed in or about coal mines, and be subject to the laws pertaining to master and servant the same as adult employees.

The question is therefore squarely presented. What construction should be given to the words of said section 69 of chapter 45, "residing in a sub-district or independent district with intent to make such district their home"? It will be observed that the statute does not say "permanent home." Counsel for defendant, however, contend that the statute uses the word "home" in the sense of "domicil," and that the domicil of an infant is that of his parent or guardian, and that he is incapable of choosing a domicil other than that of his parent or guardian. For some purposes this may be true. For example, for the purpose of determining the rights of administration of his estate, or of inheritance. *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896; or in the case of a pauper, in determining the place of his residence or domicil for the purpose of his support. *Town of Salem v. Town of Lyme*, 29 Conn. 74; or for the purpose of determining the proper forum in divorce proceedings, *Blumenthal v. Tannenholz*, 31 N. J. Eq. 194; or in bankruptcy proceedings. In the matter of *John M. Wrigley*, 8 Wend. (N. Y.) 134.

But when the question is one relating to the education of the youth of the land, no narrow construction of the statute ought to be indulged in. In *Yale v. West Middle School District*, 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161, it was decided that a child living with a domiciled resident and tax payer of a school district as a member of his family with the expectation on the part of all parties interested that this relationship will continue permanently, although she has never been formally adopted and may not have a domicil in the technical sense of that term in the district, has a residence in the district for school purposes and can not be compelled

to pay tuition as a non-resident. In *State ex rel School District No. 1 of Waukesha v. Thayer*, 74 Wis. 48, 41 N. W. 1014, it was held that a minor may have for school purposes a residence other than that of his parents. And in that case it was decided that where the mother deserted by her husband and unable to support their minor children, found a home for the child in Waukesha, where he worked and boarded and had no other home, was a resident of Waukesha for school purposes, although the mother herself was employed as a school teacher in Milwaukee and boarded there.

And so we hold that although the domicil of the plaintiff in this case for some purposes may have been that of his parents in Virginia, nevertheless as he left his home in Virginia, with or without their consent, and was allowed to labor and appropriate his earnings, and was liable to become a citizen and resident of this State, the State thereby became interested in his education and good citizenship. In the light of these facts we should not give the statute such a narrow construction as to relieve him or his employer from the compulsory provisions of the statute. A narrow construction thereof might permit the persons thereby prohibited, to employ boys from adjoining school districts or adjoining counties of the State, if perchance the schools in such counties or districts did not happen to be in session at the particular time, which would be bad policy and lead to evasions of the law and render it abortive.

As to the second proposition relied on, relating to failure to instruct, it is conceded that plaintiff was not instructed. We can not say from the evidence that he was so skilled or acquainted with the dangers to which his employment subjected him as not to call for instruction, or that these dangers were so open and apparent that instructions were not necessary. The record shows that the jury were instructed, but not what the instructions were. Presumptively they were properly instructed on the duty of an employer in the premises, and that they found against the defendant on the conflicting evidence relating to the necessity to instruct.

For the reasons formerly given and now adhered to, as well as for the additional reasons now presented, we adhere to our former opinion to affirm the judgment.

(181 N. C. 137)

PUSEY v. ATLANTIC COAST LINE R. CO.
(No. 218.)

(Supreme Court of North Carolina. March 23, 1921.)

1. Trial \S 260(1)—Requests covered properly refused.

There is no error in refusing requested instructions which are covered by the charge given.

2. Negligence \S 93(1)—Occupant of automobile chargeable with negligence of driver where joint enterprise exists.

Where the driver and occupant of an automobile are engaged in a joint enterprise, the occupant is chargeable with the negligence of the driver.

3. Negligence \S 93(1)—Driver's negligence held not imputable to guest.

Where the occupant of an automobile was merely a guest and had no control over the car which was owned by the driver, the occupant cannot be charged with the negligence of the driver on any theory of joint enterprise.

4. Trial \S 252(1)—Instructions must be applicable to evidence.

There is no error in refusing requested instructions which are not applicable to the evidence.

5. Trial \S 253(9)—Instruction ignoring fact of knowledge of occupant as to speed of driver properly refused.

In action for death of occupant of automobile who was thrown out when car struck the rails of newly built track having no planks between, an instruction imposing duty on occupant to remonstrate with driver as to his speed, although he might not have known that driver was exceeding speed limit, was properly refused.

6. Railroads \S 303(1)—Instruction on safety of highway crossing held correct.

In action for death of occupant of automobile who was thrown out when car struck the rails of newly built track having no planks between, it was not error to instruct that, unless defendant maintained its tracks at crossing in a manner as safe as it would have been if railroad had not been built across the highway, then the neglect of duty would be negligence.

7. Railroads \S 337(1)—Instruction on proximate cause of injury to guest of negligent automobile driver held correct.

In an action for death of an occupant of an automobile who was thrown out when car struck the rails of newly built track without planks between the rails, an instruction that, if negligence of railroad was the proximate cause of injury, then jury must find defendant negligent, notwithstanding negligence on part of driver, and if the negligence of both the driver and the railroad, both acting together, both concurring, both contributing to the result, that plaintiff was entitled to recover of either, was correct.

Appeal from Superior Court, Sampson County; Connor, Judge.

Action by J. H. Pusey, administrator, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. No error.

This is a civil action to recover damages for wrongful death alleged to have been caused by the negligence of the defendant.

Randall Pusey, plaintiff's intestate, together with Henry Vann and Festus Turlington, were going from Falcon to Fayetteville, riding in a Ford runabout, Vann being the owner and driver of the car. The public road upon which the plaintiff's intestate was traveling crosses the Atlantic Coast Line Railroad just above Wade station in Cumberland county at an acute angle. At the time of the injury complained of, August 29, 1914, the defendant company was constructing a new track, parallel to its original track, and about eight feet distant therefrom, the new track having been practically completed at the crossing referred to, except that the dirt had not been packed in guard planks laid down over the cross-ties as is always done when such crossings are completed.

The young men approached this crossing from the west side, passed over the old track, but when the wheels struck the rails of the new track they skidded, and the car was thrown something like 15 feet across the track to the point indicated on the plat, the front end of the car was reversed, and the three occupants thrown out, young Pusey being instantly killed.

The evidence was conflicting as to the rate of speed of the automobile at the time of the injury. Henry Vann, the driver of the car, testified that when he got on the track he was running from 6 to 10 miles per hour. He also admitted that he had been drinking cider, and other witnesses testified to the same effect.

The evidence showed that many automobiles had passed over the crossing on the day in question, that there was a camp meeting going on at Falcon, and that the cars going to and coming from Fayetteville had to pass over this crossing.

There were three issues submitted to the jury: First, as to the negligence of the defendant; second, as to the contributory negligence of the plaintiff's intestate; and, third, as to damages.

The jury answered the first issue "Yes," the second issue "No," and the third issue "\$10,000."

The only exceptions in the record are based upon the charge of the judge to the jury, and his refusal to give certain instructions as prayed for by the defendant as follows:

"(1) The defendant contends that a passenger in an automobile, which is being driven by another at a dangerous rate of speed, may be

chargeable with negligence if he remains in the car and does not remonstrate with the driver, and that, if the jury should have found from the greater weight of the evidence in this case that Henry Vann was driving the car at a dangerous rate of speed, and that Pusey remained in the car and made no effort to stop him, and that such conduct on the part of Vann, acquiesced in by Pusey, contributed to the injury complained of, then the jury should have answered the second issue 'Yes,' and his honor erred in refusing to so charge.

"(2) That his honor should have given the second prayer for instructions, to wit: 'If the jury shall find from the greater weight of the testimony that young Pusey was going to Fayetteville with Turlington and Vann on a pleasure trip, and that they were all engaged in a joint enterprise, either of business or pleasure, and if the jury shall further find by the greater weight of the evidence that Pusey trusted the management of the car to Vann, and that Vann drove the car at a dangerous rate of speed, or entered a dangerous zone or crossing at a rate of speed in excess of what would be prudent under the circumstances, and if the jury shall further find that the injury would not have occurred but for said conduct on the part of Vann, then I charge you that Pusey would be guilty of contributory negligence, and it would be your duty to answer the second issue "Yes."'

"(3) That it was error to refuse to charge as requested as follows: 'I charge you that it is negligence on the part of a passenger if he commits his safety to an intoxicated driver of an automobile; and if the jury shall find from the greater weight of the evidence that Henry Vann was intoxicated or under the influence of intoxicating liquors, and that this fact was known to young Pusey, and that Pusey continued his journey to Fayetteville under such circumstances, and if the jury shall find from the greater weight of the evidence that the injury complained of was caused by the intoxicated condition of Vann or if said intoxicated condition contributed to said injury, then the deceased was guilty of contributory negligence, and it would be your duty to answer the second issue "Yes."'

"(4) That it was error to refuse to charge the jury that, if they should find from the greater weight of the evidence that Henry Vann, the driver of the car, entered upon the crossing of the defendant at a greater rate of speed than six miles per hour, in violation of chapter 181 of the Public Laws of 1909, then Vann would be guilty of a violation of the criminal law; and if the jury should further find that Randall Pusey, at the time of the accident, was engaged with Vann in a joint enterprise, that is to say, that they were going to Fayetteville for recreation, and that Pusey did not remonstrate with Vann, or undertake to control the speed of the car, that Pusey would also be guilty of a misdemeanor in that he aided and abetted Vann in the violation of the criminal statute, and if the jury shall further find that but for such act and conduct on the part of Pusey the injury would not have occurred, then it would be the duty of the jury to answer the second issue 'Yes.' His honor refused to give said instruction, and defendant excepted.

"(5) That it was error to charge the jury as follows: 'The court charges you that from the evidence in this case, and the defendant so admits, that the crossing in question was across a public highway extending from Dunn to Fayetteville, and unless the defendant company built and maintained its tracks at said crossing in a manner as safe and convenient to the public as it would have been if said railroad had not been built across said highway, then such neglect of duty would constitute negligence,' and defendant excepted.

"(6) That it was error to charge the jury that, if they found that the negligence of the railroad company was the proximate cause of the injury, then they should answer the first issue 'Yes,' notwithstanding the fact that there was also negligence on the part of the driver; and he also charged them that, if they found that the negligence of both the driver and the railroad company, both acting together, both concurring, both contributing to the result, caused the death of Mr. Pusey, then both the driver and the railroad company would be liable, and it mattered not which one the plaintiff sued; that he was entitled to recover of either, and in that event they would answer the first issue 'Yes,' and defendant excepted."

Grady & Graham, of Clinton, for appellant.
Fowler & Crumpler, of Clinton, Manning, Kitchin & Gavin, of Sanford, and Butler & Herring and Kerr & Herring, all of Clinton, for appellee.

ALLEN, J. [1] The charge states clearly the contentions of the parties and covers the first and third exceptions by specific instructions.

[2, 3] The courts recognize the doctrine included in the second prayer for instruction, but, as is said in *Withey v. Fowler Co.*, 164 Iowa, 377, 145 N. W. 923:

"It is somewhat difficult to state a comprehensive definition of what constitutes a joint enterprise as applied to this class of cases, but it is perhaps sufficiently accurate for present purposes to say that, to impute a driver's negligence to another occupant of his carriage, the relation between them must be shown to be something more than that of host and guest, and the mere fact that both have engaged in the drive because of the mutual pleasure to be so derived does not materially alter the situation."

The rule seems to be:

"That the occupant of the automobile must be in a position to assume the control or control in some manner the means of locomotion. *Lawrence v. Sioux City*, 172 Iowa, 320, 154 N. W. 494. And it has been held that the fact the driver and the occupant were mutually engaged in a pleasure ride did not create a joint enterprise. *Withey v. Fowler Co.*, 164 Iowa, 377, 145 N. W. 923; *Beard v. Klusmeier*, 158 Ky. 153, 164 S. W. 319, 50 L. R. A. (N. S.) 1100, *Ann. Cas.* 1915D, 342."

In *Hunt v. Railroad*, 170 N. C. 442, 87 S. E. 210, this principle was adopted, the court saying:

"Furthermore, it is held by the great weight of authority that negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this State. See a learned opinion on the subject by Associate Justice Douglas in *Duval v. Railroad*, 134 N. C. 331, citing *Crampton v. Ivie*, 126 N. C. 894, both of these decisions being approved in the more recent case of *Baker v. Railroad*, 144 N. C. 37-44."

See, also, *Bagwell v. Railroad*, 167 N. C. 611; *McMillan v. Railroad*, 172 N. C. 853.

In this case there is no evidence that Pusey had any control over the car, and therefore none that he was engaged in a joint enterprise with Vann, and, on the contrary, all the evidence is that Vann was the owner and driver of the car; that Pusey was a guest riding for the pleasure of the trip, and had no control over the car and nothing to do with driving it.

The prayer therefore had no evidence to support it and could not have been given.

[4] The fourth prayer for instruction is objectionable in several respects. It required the submission to the jury of the question of Vann and Pusey being engaged in a joint enterprise when there was no evidence to support it, and it contains the direction to the jury that going to Fayetteville for recreation is a joint enterprise, which, as we have seen, is not in accord with the authorities.

[5] It also imposed the duty on Pusey to remonstrate, although he might not have known that Vann was exceeding the speed limit.

[6, 7] The fifth exception is to a part of the charge, which is substantially copied from *Raper v. Railroad*, 126 N. C. 563, 36 S. E. 115, approved in *Tate v. Railroad*, 168 N. C. 523, 84 S. E. 808, and the sixth to a charge which is fully sustained by *Bagwell v. Railroad*, 167 N. C. 616, 83 S. E. 814.

After careful consideration of the record and briefs, we conclude that the judgment ought to be affirmed.

No error.

STACY, J., took no part in the decision of this case.

(181 N. C. 117)

HOWELL v. PATE. (No. 110.)

(Supreme Court of North Carolina. March 23, 1921.)

1. New trial §58—Granted for uncertainty as to amount of damages.

In an action for breach of a contract for the sale of land, where plaintiff had paid \$500 to bind the bargain and the jury found plaintiff's damages for defendant's breach \$500, without indicating whether that included the

return of the payment, so that the verdict was uncertain, a new trial will be granted.

2. Vendor and purchaser §351(3)—Measure of damages for vendor's breach stated.

The measure of damages for a breach by a vendor of his contract to sell real property is the difference between the contract price and the market value of land at the time of the breach, plus any part of the purchase price which has been paid with interest.

3. Frauds, statute of §131(2)—Vendor and purchaser §3(4)—Agreement held not mere option, so that time for payment could be extended by parol.

A written agreement to make a deed for land when the purchaser paid the balance of the purchase price, he now paying \$500 to bind said trade, is a contract for the sale of the land binding on and enforceable against both parties, and not merely an option to the purchaser, and therefore the time for payment of the balance of the purchase price could, under the statute, be extended by parol.

Allen, J., dissenting in part.

Appeal from Superior Court, Wayne County; Devin, Judge.

Action by John D. Howell against J. H. Pate for damages for breach of a contract for the sale of land. From a judgment giving plaintiff only a part of the amount claimed, both parties appeal. New trial granted on plaintiff's appeal, and no error on defendant's appeal.

Civil action for damages, tried upon an alleged breach of the following contract:

"Goldsboro, N. C., Oct. 6, 1919.

"I agree to make John D. Howell a deed for the 27 acres of land that I bought from Willie B. Pate, when he pays me on Jan. 1, 1920, the balance of purchase price, \$6500.00, he now paying me \$500.00 to bind said trade.

"J. H. Pate.

"Witness: John D. Howell."

It appears from the pleadings that the \$6,500 stipulated in the contract to be paid on January 1, 1920, was not tendered until the 6th day of January, 1920. But in this connection it is alleged that on the 6th day of October, 1919, after the execution of the contract, and again later, the defendant orally agreed to extend the time of payment for a period of two weeks. Defendant moved for judgment on the pleadings. Motion overruled and exception.

Upon issues joined, the jury rendered the following verdict:

"(1) Was the plaintiff prevented from paying the purchase money for the Pate land on January 1, 1920, by reason of the agreements and representations of the defendant as alleged in the complaint? Answer: Yes.

"(2) What damage if any is the plaintiff entitled to recover of the defendant for failure to convey said land? Answer: \$500.00."

Plaintiff tendered judgment for \$500 on the verdict and for \$500 with interest from October 6, 1919, to cover the initial payment on the contract, which was admitted in the pleadings to have been made and not refunded. His honor declined to sign judgment tendered by plaintiff, and entered judgment on the verdict for \$500 and costs. Both plaintiff and defendant excepted and appealed.

Kenneth C. Royall, of Goldsboro, for plaintiff.

Langston, Allen & Taylor, of Goldsboro, for defendant.

Plaintiff's Appeal.

STACY, J. [1] Upon the entire record, considering the evidence, the charge of the court, and the verdict, it is not sufficiently clear for us to say whether or not the partial payment of \$500, made at the time of the execution of the contract, was considered and taken into account by the jury in answering the issue of damages. By reason of this uncertainty, we have decided to send the case back for a new trial.

[2] It has been held with us, in a number of cases, that a verdict may be given significance and correctly interpreted by reference to the pleadings, the evidence, and the charge of the court. *Reynolds v. Express Co.*, 172 N. C. 487, 90 S. E. 510, Ann. Cas. 1918C, 1071; *Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866; *State v. Murphy*, 157 N. C. 615, 72 S. E. 1075. Thus it would appear that a new trial should be awarded when, upon a proper perusal and examination, the true intent and meaning of the verdict is found to be doubtful, uncertain, and ambiguous. *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 377.

"The proper measure of damages for the breach by a vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest." *Hale on Damages*, p. 384; *Nichols v. Freeman*, 33 N. C. 99; *Le Roy v. Jacobsky*, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977; *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218.

Defendant's Appeal.

[3] Defendant moved for judgment on the pleadings, which was overruled; and this is

the only point raised on his appeal. Defendant took the position that the paper writing, above set out, was an option, and that the oral agreement to extend the time of payment for a period of two weeks was such a covenant as is required to be put in writing, under the statute of fraud. Holding, as we do, that the instrument which forms the basis of this action is a contract to convey land, and not an option, it follows that his honor's ruling on defendant's motion was correct.

The agreement contains the necessary elements of an executory contract, to wit, mutuality of obligation and remedy. *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; *Davis v. Martin*, 146 N. C. 281, 59 S. E. 700. As said in *Davis' Case*:

"There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case the mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it, and therefore time is not of the essence of the contract; but where the contract is merely an option, generally without consideration, of course, time is of the essence."

The true character of the instrument is manifest from its recital of \$500 "to bind said trade," evidently meaning a part of the purchase money, as the \$6,500 is called "the balance of purchase price."

On plaintiff's appeal, new trial.

On defendant's appeal, no error.

ALLEN, J. (dissenting). No error is pointed out in the opinion of the court, and I see no uncertainty in the verdict. The amount of damages awarded by the jury is easily understood when considered in connection with the evidence as it appears that the contract price for 27 acres of land was \$7,000, and the opinions of the witnesses as to the value of the land at the time of the breach ranged from \$200 to \$400 per acre.

I think it is clear that the jury concluded that it would be a fair and just settlement for the defendant to return to the plaintiff the amount he had paid, and that this ought to be a settlement of the controversy.

(181 N. C. 481)

STATE v. RHODES. (No. 209.)

(Supreme Court of North Carolina. March 16, 1921.)

Witnesses §414(2)—Statements by prosecuting witness next day admissible to corroborate testimony.

Where the prosecuting witness had testified that defendant and another assaulted him and took from his person a sum of money, testimony by three witnesses that on the following morning the prosecuting witness told them of the occurrence, stating that defendant and the other had robbed him, was competent for the purpose of corroboration; the defense being alibi.

Appeal from Superior Court, Lenoir County; Connor, Judge.

Blanch Rhodes was convicted of larceny from the person, and he appeals. No error.

T. C. Wooten, of Kinston, for appellant.

Attorney General Manning and Assistant Attorney General Nash, for the State.

PER CURIAM. Upon trial in the superior court, the prosecuting witness, Jerry Pettaway, testified that Fred Stiles and the defendant, Blanch Rhodes, assaulted him on the night of October 14, 1920, knocked him down, and took from his person the sum of \$22 in money. In corroboration of this evidence, the state offered three witnesses, who testified that on the following morning the prosecuting witness told them of the occurrence, stating that Stiles and the defendant had robbed him. This evidence was admitted only for the purpose of corroboration, and in this view it was clearly competent. This is the only exception in the record.

The defendant Rhodes went upon the stand and testified that he was at home at the time of the alleged robbery; and there was other evidence tending to support his alibi. The case presents a simple question of identification, and, upon the evidence, the jury found against the defendant.

We have carefully examined the record and find no reason for disturbing the results of the trial.

No error.

(181 N. C. 148)

BOONE et al. v. SYKES et al. (No. 250.)

(Supreme Court of North Carolina. March 30, 1921.)

I. Deeds §203—Evidence of grantor's physical incapacity admissible.

In action to set aside deed because of grantor's insufficient mental capacity, evidence of an injury to grantor by a fall resulting in a fractured hip about a year before the deed was competent, in view of evidence that the grantor was over 80, of weak mind, and that her

mental and physical condition grew worse from the time of the fall until her death.

2. Evidence §502 — Examination of opinion witness in reply to cross-examination proper.

Where, in action to set aside a deed because of grantor's mental incapacity, a witness for plaintiff was asked on cross-examination his opinion as to the grantor's sanity, assuming certain facts as true, plaintiff was properly permitted in reply to ask the witness for his opinion if the facts were otherwise.

3. Deeds §203—Evidence as to grantor's recollection proper.

In action to set aside deed because of grantor's insufficient mental capacity, evidence that, while the grantor did not at first recall signing another deed, but when her memory was refreshed "she remembered it and seemed satisfied," was competent on the issue of her mental capacity at the time of executing the deed in suit, a few months after the incident testified to.

4. Evidence §502—Cross-examination as to value of land held competent.

In action to set aside deed because of grantor's insufficient mental capacity, where in support of defendant's contention that the consideration named in the deed was adequate a witness had testified the land was "poor sorry land," his testimony on cross-examination that in 1919 the land raised "a good crop, about 6 acres, of tobacco, worth about \$1,000," and "the crops this year are about as good as they were last year," was admissible to contradict or test him.

Appeal from Superior Court, Franklin County; Kerr, Judge.

Action by S. R. Boone and others against Eugene Sykes and another. From judgment for plaintiffs, defendants appeal. No error.

This is an action to set aside a deed made by Mrs. Cornelia M. Boone to her daughter, Mrs. Eugene Sykes, upon the ground that the grantor did not have sufficient mental capacity to execute a deed. The jury returned a verdict in favor of the plaintiffs, and the defendants excepted, and appealed from the judgment rendered on the verdict, assigning the following errors:

"(1) To the admission of the evidence in regard to a fall which happened in 1916 more than a year prior to the execution of the deed here in question, on the grounds that the admission of such evidence tended to confuse the issues in the minds of the jury, and led them to think that grantor's mind was affected by said fall.

"(2) To the admission of an imaginary conclusion based upon an imaginary statement which had no evidence to sustain it. The witness previously admitted that he heard the other Mr. Edwards testify that Mrs. Boone told him Mr. Collie was riding up and down the road trying to sell the land, and there is no evidence that Mrs. Boone did not make this statement, or that Collie was not trying to sell said land.

"(3) To the admission of evidence in regard

to the mind of the deceased grantor based on a conversation between witness and deceased grantor eight months after the execution and delivery of the deed, on the grounds that the condition of the grantor's mind at this time had nothing to do with the condition of the same at the time of executing and delivering deed, and that the admission of such testimony tended strongly to influence the jury in sustaining the contention of the plaintiff that she was mentally incapable when she signed and delivered the deed.

"(4) To the admission of the testimony relative to the value of the 1919 crop on the land in question, on the ground that such testimony is irrelevant in any aspect of the case, and especially so for the reason that the value of the crops in no wise showed the value of the lands because the crops depended upon fertilizer, improvements put on the lands by the defendant, their skill as farmers, and also upon the ever varying law of supply and demand."

Wm. H. & Thos. W. Ruffin and Ben T. Holden, all of Louisburg, for appellants.

W. M. Person and W. H. Yarborough, Jr., both of Louisburg, for appellees.

ALLEN, J. [1] The deed, which plaintiffs attack, bears date December 31, 1917, and the first exception is to permitting a witness who had testified to an injury to the grantor, resulting in a fractured hip, to fix the time of the fall as early in 1916. We see nothing in this prejudicial to the defendants, and it was competent in view of the evidence of the plaintiffs tending to prove that the grantor was more than 80 years of age, of weak mind, and that her mental and physical condition gradually grew worse from the time of the fall until her death.

[2] The second assignment does not comply with the rule, requiring the appellant to at least set forth in the assignment of error the evidence objected to, but upon examination of the record it appears that a witness for plaintiff was asked on cross-examination his opinion of the sanity of the grantor, assuming certain facts to be true, and plaintiff was permitted in reply to ask for his opinion if the facts were otherwise, which was necessary to give the jury a proper estimate of the testimony of the witness.

[3] The evidence objected to and covered by the third assignment is as follows:

"She sent for me six or eight months afterwards to come, and I went to see her, and she said I signed some papers before you, they tell me and I do not recollect it, and I want to know what sort of papers they were. I told her it was a deed for 26 acres of land, and it was to Mrs. Geneva Sykes, but she did not seem to know or recollect about it, and said she was bothered about it. I explained it to her, and tried to refresh her memory, and then she remembered it and seemed satisfied. This was some time in August."

This evidence was very favorable to the defendant, because, while she (the grantor) at first said she did not recollect signing the deed, when her memory was refreshed "she remembered it and seemed satisfied," thus confirming the deed eight months after its execution, but if hurtful to the defendant it was competent to be considered on the question of the mental capacity of the grantor at the time of the execution of the deed, as it was in evidence that the grantor was old and gradually growing weaker in mind and body.

[4] The evidence of the value of the crops on the land in 1919 was brought out on the cross-examination of a witness for the defendant, who had testified "some of the land was worth \$15 or \$20 an acre, but it was poor sorry land, big gullies and washes, so that you could bury a horse anywhere you wanted to," and was properly admitted for the purpose of contradicting or testing this witness.

The witness testified when asked the value of the crops in 1919:

"I declare I do not know how much crop was raised on it, but a good crop, about 6 acres of tobacco, worth about \$1,000. The crops this year are about as good as they were last year."

If, as was thus shown, the crops raised on the land in 1918 and 1919 or 1919 and 1920 were good, the jury might well doubt the statement of the witness on his examination in chief that on December 31, 1917, when the deed was executed, "it was poor sorry land, big gullies and washes, so that you could bury a horse anywhere you wanted to," evidence offered by the defendant to show that the consideration named in the deed was adequate.

We find no error in the trial.

No error.

(181 N. C. 488)

HART v. WOODMEN OF THE WORLD.
(No. 290.)

(Supreme Court of North Carolina. March 30, 1921.)

1. Insurance \S 755(3)—Acceptance of original premium after notice of hazardous occupation precluded forfeiture of benefit certificate.

Where the jury found that the holder of a benefit certificate gave to the clerk of his camp, as required by his certificate, notice of engaging in a hazardous occupation, and the corporation thereafter collected and retained the premiums paid at the original rate, it waived its right to forfeit the certificate for nonpayment of the additional premium required from those engaged in hazardous occupations.

2. Insurance \S 755(2)—Notice to the clerk of camp as required is notice to a fraternal benefit association.

Notice of engaging in a hazardous occupation, given to the clerk of the local camp as required by the by-laws of a fraternal benefit association, is notice to the association, so that its retention of the premiums paid without increase for such occupation was waiver by its own acts of its right to forfeit for nonpayment of the additional premium, and it cannot rely on a provision of its by-laws denying to any officer the right to waive any provision thereof.

Appeal from Superior Court, New Hanover County; Daniels, Judge.

Action by Catherine H. Hart against the Woodmen of the World. Judgment for the plaintiff, and the defendant appeals. No error.

This was a civil action to recover on a contract of insurance issued by the defendant on the life of Lee Roy Hart for the benefit of his mother, plaintiff herein.

The defendant's constitution and by-laws contain the following stipulations:

(1) "If a member engage in any of the (hazardous) occupations mentioned in this section he shall within 30 days notify the clerk of his camp of such change of occupation, and while so engaged in such occupation shall pay on each assessment 30 cents for each \$1,000 of his beneficiary certificate in addition to the regular rate. Any such member failing to notify the clerk and to make such payments as above provided shall stand suspended, and his beneficiary certificate be null and void."

(2) "No officer, employé, or agent * * * shall have the power, right, or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary, or waive any of the provisions of the constitution and by-laws," etc.

It was admitted that after the insured had received his beneficiary certificate he changed his occupation and became a brakeman on a freight train, which is denominated in the

defendant's by-laws as hazardous. The insured continued in this work for a period of more than a year and until his death, during which time he paid the regular premiums on his certificate, but did not pay the additional 30 cents due by reason of the change in his employment.

Upon issues joined, the jury returned the following verdict:

"First. Did the plaintiff's intestate fail to give notice to the defendant within 30 days of the change of his occupation? Answer: No.

"Second. Was the plaintiff's intestate able and willing to pay the increased premium required for such changed occupation? Answer: Yes."

Judgment on the verdict in favor of the plaintiff for the amount of the certificate, less 30 cents per month for the time plaintiff's intestate was employed in the said hazardous work. Defendant excepted and appealed.

Jos. W. Little and Geo. H. Howell, both of Wilmington, for appellant.

E. K. Bryan, of Wilmington, for appellee.

PER CURIAM. The following reasons are assigned by his honor in support of the judgment entered in the superior court:

"It further appearing to the court that after the plaintiff's intestate changed his occupation he made to the defendant as many as 12 or more monthly payments of dues and assessments, and that the same was transmitted to the defendant by the clerk of the local camp, as required by the by-laws, and that after the death of the plaintiff's intestate proofs of death and loss were duly made out and transmitted to the defendant, as required by the said policy of insurance, constitution, and by-laws, and after the receipt of the same the defendant denied liability and refused to pay to the plaintiff, the beneficiary in the policy, the amount thereof, and that the defendant has failed and refused to return to the plaintiff's intestate, or his personal representative, the premiums, dues, and assessments levied on account of said policy, and in filing its answer herein made no offer to return the same, but has kept the said premiums, dues, and assessments which were paid to it for the purpose of keeping in force the insurance contract sued on, and the court being of the opinion, on such facts, that the plaintiff is entitled to recover of the defendant, it is therefore ordered," etc.

[1] The defendant takes the position that none of the provisions of its constitution and by-laws could be waived by any officer or agent, and that the failure of the insured to pay the additional 30 cents per month, while engaged in the hazardous work, rendered his certificate null and void. We do not think this position open to the defendant on the record. The insured was required to notify the clerk of his camp within 30 days of his change of occupation, which was done, ac-

ording to the verdict of the jury. With knowledge of the changed and hazardous employment of the insured, the defendant continued to accept the dues and assessments at the old rate. This was not an unauthorized act of an officer or an agent, but the defendant's own election deliberately made. Such was a waiver of its right to insist upon a forfeiture of the policy. *Bergeron v. Insurance Co.*, 111 N. C. 45, 15 S. E. 883.

It has been held with us, in a number of cases, that where an applicant knowingly misrepresents a material fact, and the company, with full knowledge of the circumstances and falsity of the statement, issues a policy, receives the premiums, and recognizes and continues to recognize the applicant as holding a contract of insurance, it ordinarily will be estopped from insisting on a forfeiture of the policy that otherwise might ensue. *Robinson v. Brotherhood*, 170 N. C. 545, 87 S. E. 537; *Grabbs v. Insurance Co.*, 125 N. C. 389, 34 S. E. 503.

[2] It is not necessary to discuss the principle, announced in numerous decisions, that notice to the agent is notice to the company; for in the instant case the insured, when he changed his occupation, was only required to notify the clerk of his camp, which he did, and this was notice to the defendant. *Fishplate v. Fidelity Co.*, 140 N. C. 589, 53 S. E. 354. See, also, *Carden v. Sons & Daughters of Liberty*, 179 N. C. 399, 102 S. E. 610.

After a careful examination of the defendant's exceptions and assignments of error, we are convinced that the case was tried according to law and precedent.

No error.

(181 N. C. 485)

NEWMAN v. MASONIC MUT. LIFE INS. CO.
(No. 221.)

(Supreme Court of North Carolina. March 23, 1921.)

Insurance — 186(2)—Recovery under life policy held proper where insured died during grace period for payment of last premium.

Where a 10-year renewable life insurance policy with premiums payable quarterly provided for 30 days' grace for payment of premiums, the policy expiring by its terms December 31st, the last premium being due on that date, and insured died on January 23d, insurer sending proof of death together with a statement that, as insured had 30 days' grace in which to pay the premium, the policy was in full force, a recovery on the policy was proper.

Appeal from Superior Court, Sampson County; Connor, Judge.

Action by Sarah E. Newman against the Masonic Mutual Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action on a policy of insurance. The facts appear in the judgment rendered in the superior court, which is as follows:

"This cause coming on for trial before his honor, George W. Connor, and a trial of the issues by jury being expressly waived by counsel of both sides, who agreed that the court should find the facts and enter judgment, etc., and upon consideration of the entire evidence submitted the court finds the following facts:

"(1) That on December 15, 1906, M. J. Newman applied to defendant company for policy of insurance, the form of policy being a 10-year renewable policy, with premiums payable quarterly.

"(2) That pursuant to said application policy numbered 6640 was duly issued on December 3, 1906, payable to plaintiff, Sarah E. Newman, upon proper proof of the death of her husband, the insured, provided the policy was in force at the time of his death.

"(3) By the terms of said policy it was expressly stipulated that 30 days' grace would be given for payment of any premiums after the first without interest, and the policy should be null and void immediately after the time of grace, allowed for payment of any premium, had expired.

"(4) By the terms of said policy it was further stipulated that the same might be exchanged (without re-examination and without written application to the association at any time before its expiration when no premium was due and unpaid) for any other form of policy written by said association. (Whereby the association's liability shall not be increased, or premium rate lowered.) The new policy to run from the date of the surrender of this policy, at the rate of premium then chargeable by the association, on policies of that date, at the then age of the insured.

"(5) That by the terms of said policy it was expressly stipulated that the privilege was given for renewing said policy without re-examination for successive periods of 10 years each, before the expiration of each period, the premiums for new periods to be increased with the increased age of the member according to table of rates stated and printed upon the policy, and to be payable on the dates mentioned therein.

"(6) That said M. J. Newman paid all the premiums on said policy up to and including the quarterly premium due October 1, 1916, and said policy by its terms would have expired on December 31, 1916.

"(7) That on December 4, 1916, defendant company wrote a letter to said Newman, calling his attention to the fact that his policy would expire December 3, 1916, and if he renewed it for another period of 10 years the quarterly premium due December 31, 1916, would be \$23.44, in which letter the said company directed his attention to his rights to exchange this policy to a whole life policy, setting forth the advantages to the insured of the exchange.

"(8) That on December 13, 1916, the defendant company again wrote Newman a letter, acknowledging its receipt of its letter of the 12th of December, 1916, setting forth in full the terms and provisions in accordance with which he might take a whole life policy, and by said letter advised the insured further as fol-

lows: 'You of course have until January 30th, 1917, to pay the premium due December 31st, 1916.'

"(9) That on December 15, 1916, the defendant company forwarded to insured a notice by postal card, advising him that the premium on his policy of \$23.44 would be due December 31, 1916, and this premium would keep his policy in force till April 1, 1917, and that said notice was duly received by said Newman.

"(10) That on January 3, 1917, the insured, M. J. Newman, wrote defendant company advising it that he was unable to avail himself of his privilege of exchanging his 10-year renewal policy for a whole life policy.

"(11) That on January 3, 1917, the defendant company wrote said M. J. Newman a letter advising him that no reply had been received from him to its letter of December 13, 1916, relative to the exchange and conversion of the 10-year policy into a whole life policy, and further advising him that it had mailed him on December 15, 1916, its regular postal card notice for the quarterly premium sum of \$23.44, due December, 1916, under his 10-year term policy, and further advising him that if he desired to make the change it would adjust his premium accordingly.

"(12) That on January 23, 1917, the insured died, was buried the 24th of January, 1917, and on the 25th of January, 1917, the plaintiff through his attorney, Henry E. Faison, Esq., duly mailed notice of insured's death to the defendant company at Washington, D. C., and requested its blanks upon which proofs of his death could be made.

"(13) That replying thereto on January 26th, the said company wrote the said attorney for plaintiff, acknowledging receipt of the proofs of death of M. J. Newman, requesting the same to be filled up and returned, and further stating, 'That this association does not take advantage of technicalities in settlement of policies.'

"(14) That said blanks were duly filled out and returned to the company on January 27, 1917, and on February 3d, following, the defendant company advised said attorney that the proofs of death had been duly received, but declined to pay the plaintiff anything on the policy.

"And upon the foregoing facts, the court being of the opinion that the policy was valid and in force at the death of the insured, M. J. Newman, adjudges that the defendant company is liable to the plaintiff herein and hereby rendering judgment in her behalf that she recover of the defendant company the sum of \$2,000, less the sum of \$23.44 and interest on said balance of \$1,976.56 from February 3, 1917, till paid, and the costs of this action to be taxed by the clerk. Geo. W. Connor, Judge."

From this judgment the defendant company appealed to the Supreme Court.

Winston & Matthews, of Windsor, and J. P. Schick, of Washington, D. C., for appellant.

Henry E. Faison, of Clinton, and James S. Manning, of Raleigh, for appellee.

PER CURIAM. The facts found are sufficient to support the judgment, which seems

to be in accord with the views of the defendant before this action was commenced, as its secretary and general manager wrote the attorney for the plaintiff on January 28, 1917:

"Mr. Newman's premium was due on December 31st, and he had thirty days' grace in which to pay it. The policy was therefore in full force and effect when he died. We are therefore inclosing you the proofs of death."

Affirmed.

(181 N. C. 73)

**SCOTLAND NECK COTTON MILLS v.
SHAW COTTON MILLS, Inc.
(No. 103.)**

(Supreme Court of North Carolina. March 16, 1921.)

1. Sales §176(1)—Breach of contract to deliver yarn may be waived.

Though a breach of contract to deliver yarn occurred, giving buyer right to sue for damages, the breach might be waived by extending time for performance.

2. Sales §182(1)—Time of breach of contract held question of fact.

Though there was evidence that a breach of contract to deliver yarn occurred in June, 1919, the time of breach is a question of fact for the jury; there also being evidence that the parties treated the contract as in force in March, 1920.

3. Sales §418(2)—Evidence of market value of yarn at a date later than first breach of contract held admissible.

In an action for breach of contract to deliver yarn, in which there was evidence that the parties treated the contract in force in March, 1920, though first breach occurred in June, 1919, evidence of the market value of the yarn in March, 1920, was admissible.

4. Trial §295(4)—Charge to be construed as a whole.

A charge is not erroneous which, when considered as a whole, merely stated the contentions of the parties, though isolated statements might be held to be expressions of opinion.

5. Sales §418(2)—Measure of damages for failure to deliver yarn held difference between market price and contract price.

In an action for breach of contract to deliver blue yarn at 81 cents per pound, in which there was evidence that contract was breached in March, 1920, and the market price at that time was 66 cents—68 cents, per pound, an instruction that measure of damages would be difference between contract price and market price of blue yarn at time of breach held not erroneous.

Appeal from Superior Court, Halifax County; Lyon, Judge.

Action by the Scotland Neck Cotton Mills against the Shaw Cotton Mills, Incorporated.

Judgment for plaintiff, and defendant appeals. No error.

The court instructed on the measure of damages that—

"If you find from the evidence * * * that the contract was not broken and that it continued in existence up to March 10, 1920, and you further find that the market price of blue yarn was 66 cents, 67 cents, or 68 cents, * * * plaintiff would be entitled to recover the difference between whatever amount you find the market price of blue yarn was on that date and the contract price."

The contract price was 31 cents per pound.

This is an action to recover damages for breach of a contract, under which the defendant agreed to deliver to the plaintiff 30,000 pounds of blue yarn at the price of 31 cents per pound.

The defendant admitted the execution of the contract and its breach, and the principal controversy was as to the time of the breach, the defendant contending that the breach occurred in June, 1919, and the plaintiff that the breach was on the 10th of March, 1920.

On the trial of the action the plaintiff was permitted to offer evidence showing the market value of blue yarns on the 10th of March, 1920, and the defendant excepted upon the ground that all the evidence showed that the breach was in June, 1919. The market price of yarn increased from June, 1919, to March 10, 1920.

There are other exceptions taken by the defendant to the charge.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Ashby W. Dunn, of Scotland Neck, and Daniel & Daniel, for appellant.

E. L. Travis, of Halifax, A. P. Kitchin, of Scotland Neck, and Geo. C. Green, of Weldon, for appellee.

ALLEN, J. [1-3] There was undoubtedly a breach of the contract by the defendant in June, 1919, in that it failed to deliver the yarns according to its agreement, and the plaintiff then had the right to sue to recover damages, but it could also waive the breach

and could extend the time for the performance of the contract, and an examination of the correspondence in the record leads us to the conclusion that there is evidence that both parties treated the contract in force and were expecting performance up to the 10th of March, 1920, and, if so, the time of the breach was a question of fact to be determined by the jury.

On the 10th of March the defendant wrote the plaintiff, "I find it impossible to resume shipments on your order and an adjustment of the matter will have to be made on other lines," indicating that up to that time parties dealt with the contract as still in force.

The letter goes on to state the different efforts made by the defendant to perform the contract, and then says, "We are so badly behind with orders that should have been delivered last fall that it is impossible to figure when we can produce any yarn in excess of our own requirements," and again, "If the mill could have run you would have gotten your yarn before January 1st," from which it may reasonably be inferred that the parties had not regarded the contract at an end before that time.

It follows, therefore, as there was evidence that the time of the breach was on the 10th of March, 1920, that evidence of the market value at that date was competent and properly received.

The other exceptions relied on by the defendant are to the statements of the contentions of the parties.

[4] We have examined these with care, and while there are statements which, standing alone, might be held to be expressions of opinion, when the charge is considered as a whole, it is manifest that the judge presiding was only stating the contentions of the parties, and, as it appears to us, this was done impartially and with due regard to the rights of both parties.

[5] The rule for the measure of damages laid down for the guidance of the jury is the one approved in *Hosiery Co. v. Cotton Mills*, 140 N. C. 454, 53 S. E. 140.

We have carefully considered all of the exceptions, and find nothing that will warrant a reversal of the judgment.

No error.

(181 N. C. 483)

BARDEN v. AMERICAN RY. EXPRESS CO.
(No. 220.)

(Supreme Court of North Carolina. March 23, 1921.)

1. Carriers \S 228(5)—Loss or damage in transit makes out prima facie case of negligence.

Loss of or injury to animals while in the possession of a carrier or under its control makes out a prima facie case in favor of shipper.

2. Carriers \S 228(1)—Presumption of negligence where stock lost or injured not rebutted by shipper's contract to care for and feed stock.

The presumption of negligence of carrier arising from proof of injury to or loss of stock while in carrier's control is not overcome or rebutted because of an agreement to give plaintiff free transportation, and that he would feed and care for the stock, where damage was not caused by failure of plaintiff to perform his agreement.

Appeal from Superior Court, Duplin County; Connor, Judge.

Action by J. J. Barden, Jr., against the American Railway Express Company. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover the value of one gray mare and one mule.

On November 13, 1917, the plaintiff purchased a carload of stock in East St. Louis, Mo., consisting of 21 mules and 8 horses, to be shipped to Warsaw, N. C. The stock were loaded on the car about 7 p. m., and left at 8 p. m. the same day; none of the stock were lame or sick, and they all appeared to be in good condition. The plaintiff entered into the written contract set out in the record, and was furnished a free pass to accompany the stock as far as Washington, D. C., and agreed on his part to look after the stock, care for, feed, and water them. Plaintiff left on the same train with stock, which reached Harrisburg, Pa., about 5 a. m. November 15th. The stock were unloaded and fed at Harrisburg, and the mule was lame when driven off the car at Harrisburg, and the horses were in good condition.

Plaintiff then left Harrisburg with the stock, went on to Washington, D. C., and on to Richmond, Va., and he saw the stock at Richmond. At Richmond plaintiff bought a ticket, took a berth, and went to bed, and the stock reached Warsaw on the morning of the 17th, one day after the arrival of the plaintiff, although the agent of the defendant told the plaintiff at Richmond the car of stock would go on same train with him, and when unloaded the mule was still lame, and after reaching plaintiff's stable a wire nail was found in his foot. The gray mare

appeared to be paralyzed, when stock was unloaded, hurt on the back, and died in a day or two. The mule got better and was sold.

The evidence of the plaintiff tended to prove that the injury to the mare was caused by something falling on her back, and that the nail in the foot of the mule was in the car when the shipment began.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Stevens & Beasley, of Kenansville, for appellant.

Gavin & Blanton, of Kenansville, for appellee.

PER CURIAM. All of the exceptions of the defendant raise the same question, and that is whether there was sufficient evidence to be submitted to the jury.

[1, 2] The defendant does not deny the proposition that proof of loss or damage while in its possession or under its control makes out a prima facie case in favor of the plaintiff, but it contends that this principle has no application because of the agreement to give the plaintiff free transportation, and that he would feed and care for the stock.

There is authority for this position, although it is held by some of the courts that such a stipulation in a bill of lading is void because it is a contract to relieve the carrier of its common-law duty. (See *Railroad v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; *Heller v. Railroad*, 109 Mich. 53, 66 N. W. 687, 163 Am. St. Rep. 554; *Stiles v. Railroad*, 129 Ky. 175, 110 S. W. 820, 13 L. R. A. [N. S.] 86, 130 Am. St. Rep. 461, note), but however this may be, it cannot prevail, and cannot rebut the presumption arising from injuries and damage sustained while in the possession of the defendant, except where the damage is caused by the failure of the plaintiff to perform his agreement, and in this case there is no evidence of such failure.

Again, the free transportation did not extend beyond Washington City, and up to that point did not require the plaintiff to ride in the car with the stock, and although the defendant's agent promised to do so it did not carry the stock on the same train with the plaintiff from Richmond to Warsaw, and during this part of the shipment and for more than 24 hours the defendant had complete control and custody of the car of stock in the absence of the plaintiff.

Also the nature of the injuries furnished circumstantial evidence that the defendant did not furnish a reasonably safe car, and that this was the cause of the injury, and, if so, the defendant was negligent.

No error.

(181 N. C. 79)

WHICHARD et al. v. WHITEHURST et al.
(No. 171.)

(Supreme Court of North Carolina. March 18, 1921.)

1. Deeds ⇨124(1)—Before 1879 words of inheritance were necessary to conveyance of fee.

Prior to Laws 1879, c. 148, now C. S. § 991, the word "heirs" was generally necessary in conveyances to the creation of a fee-simple estate, with the exception of devises and equitable estates, as to which it was held an estate of inheritance would pass without such word if such was the clear intent of the parties.

2. Deeds ⇨124(2) — Conveyance to woman and nearest blood relative held intended to convey fee.

A deed conveying property to a named woman and her nearest blood relations forever for the recited consideration of natural love and affection for the grantee, who was grantor's daughter, and as her full share of grantor's property, was intended to convey the fee to grantee, and not to convey merely a life estate to her with remainder to her nearest blood relation.

3. Deeds ⇨124(2)—Construed to give effect to intent to convey fee without words of inheritance.

The decisions of the courts have extended and broadened the application of the principle that the intention of the grantor is to be considered in the interpretation of the deed in accord with the spirit of C. S. § 991, so as to give effect to an intention manifested by the whole instrument to convey a fee, though no words of inheritance were used in the deed.

4. Deeds ⇨124(2) — Corrected by inserting words of inheritance to effectuate intent.

Where a deed executed prior to enactment of C. S. § 991, was manifestly intended to convey a fee-simple estate and was a substitute for a devise, but failed to use the word "heirs" therein, the court, in a cause submitted on case agreed, in the exercise of its equitable powers, can consider the suit as one to correct the instrument by inserting therein the word "heirs," and so carry into effect the evident intent of the parties.

Stacy and Allen, JJ., dissenting.

Appeal from Superior Court, Pitt County; Devin, Judge.

Suit by Z. V. Whichard and others against C. J. Whitehurst and others, submitted on an agreed statement of facts. From a judgment holding plaintiffs entitled to an undivided six-tenths interest only in the land, plaintiffs appeal. Reversed.

This case was submitted under C. S. § 961, upon the following "facts agreed":

In 1871 John F. Whichard and his wife conveyed to their daughter the land in controversy, duly described, "unto said Anne E. Page and her nearest blood relation forever."

At the date of said deed, said Anne E. Page had living one son named Billy Page, who died before reaching his majority and left no children, but since the date of said deed there has been born to her five children who were living when Billy died.

In 1910 said Anne E. Page conveyed said land to the wife of one of her sons in fee simple, who subsequently conveyed the same, with the joinder of her husband, to the plaintiffs. This proceeding was instituted for the purpose of selling the land for partition and was bought by the the defendants, who now decline to accept a deed from the commissioner and pay for the land solely upon the ground that they cannot obtain fee-simple title to the same. The court held that the plaintiffs were entitled to an undivided one-half interest in the land by reason of the deed from Anne E. Page and to a one-tenth undivided interest by reason of the deed from C. F. Page and wife, but that the other four defendants, children of Anne Page, are the owners in fee simple of an undivided four-tenths, as tenants in common, interest in said lands, from which judgment the plaintiffs appealed.

S. J. Everett, of Greenville, for appellants.

Skinner & Whedbee, of Greenville, for appellees.

CLARK, C. J. [1] Prior to the act of 1879, now C. S. § 991, the word "heirs" was generally held necessary to the creation of a fee-simple estate in conveyances, but there is an exception as to devises and equitable estates as to which it was held that an estate of inheritance would generally pass without the word "heirs" if such was the clear intent of the parties. *Holmes v. Holmes*, 86 N. C. 205-207, cited by Hoke, J.; *Smith v. Proctor*, 139 N. C. 319, 51 S. E. 889, 2 L. R. A. (N. S.) 172. This conveyance is in the nature of a devise, or rather is a substitute for it and is so expressed.

[2] This is not a conveyance to Anne E. Page for life only and then to her nearest blood relation, but the conveyance is to "Anne E. Page and her nearest blood relation forever." In *Cullens v. Cullens*, 161 N. C. 344, 77 S. E. 228, L. R. A. 1917B, 74, it is stated that it is settled in this state that, when a conveyance of land is made to a woman "and her children," the grantee named and her children living at the date of the deed are tenants in common, but we think that upon the face of this deed the intent was not to convey the land to Anne E. Page and her living son, Billy Page, as tenants in common, but that the true intent was to convey the land to her in fee simple. In *Beacom v. Amos*, 161 N. C. 368, 77 S. E. 411, it is said:

"The law will not allow the plain intention to be defeated by any omission to use technical words to express it, if equivalent terms are employed for the purpose."

This conveyance recites in the first paragraph that it is made "to Anne El Page, daughter," by the grantors, saying in the second paragraph that the consideration is "natural love and affection for her"; and the fourth paragraph recites that "this and the other property given to our said daughter is a full and equitable share of all our property and we do hereby declare that in case we die intestate she shall never inherit anything else from our estate." There is no indication that it was intended that the "nearest blood relation" was intended to be a beneficiary of any interest in said conveyance, the consideration of which was "love and affection to the daughter," and, together with other property given her, was "her full and equitable share" of all the property of the grantors, and upon that ground they disinherit her from inheriting any other part of their estate if they should die intestate.

[3] As far back as *Armfield v. Walker*, 27 N. C. 583, it was held that—

"If a deed, for a valuable consideration, give land to another and his heirs, it is a good deed on delivery to pass the estate in fee, notwithstanding it be very informally framed (Co. Lit. 7[a]; Kent's Com. 461), and it is a rule of law that, if two constructions can be placed upon a deed or any part of it, that shall be given to it which is most beneficial to the grantee."

The decisions since have extended and broadened the application of the principle that the intention of the grantor is to be considered in the interpretation of a deed. *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172; *Fulbright v. Yoder*, 113 N. C. 456, 18 S. E. 713; *Winborne v. Downing*, 105 N. C. 20, 10 S. E. 888; *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308; *Hicks v. Bullock*, 96 N. C. 164, 1 S. E. 629; *Ricks v. Pulliam*, 94 N. C. 225; *Bunn v. Wells*, 94 N. C. 67. Indeed, the latest decisions hold that the intention now is to be gathered from the whole deed without dissecting it into parts as at common law. *Gulford County v. Porter*, 167 N. C. 366, 83 S. E. 564; *Triplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514.

In *Fulbright v. Yoder*, 113 N. C. 456, 18 S. E. 713, it is held, citing *Holmes v. Holmes*, 86 N. C. 205, that—

"Although words of inheritance are omitted in a deed, yet, if the real intention of the grantor appear to be to confer a fee, that effect will be given to the limitation."

In that case the deed was made in 1860, and, like this, was made to a son, and the court held that—

While this construction "is not supported by text-writers or the previous decisions of this court, yet it is believed to be founded upon more equitable principles in arriving at the real intention of the grantor. It is also in accord with the spirit of recent legislation,

Code, § 1280 [now C. S. 991], which declares the limitations without the use of the word 'heirs' shall be construed as limitations in fee, unless a contrary intention plainly appears."

This case has been cited often since, among others in *Helms v. Austin*, 116 N. C. 753, 21 S. E. 556, and *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172.

Among other cases, *Moore v. Quince*, 109 N. C. 92, 13 S. E. 872, and *Rackley v. Chestnutt*, 110 N. C. 262, 14 S. E. 750, hold that, where the instrument upon its face contains sufficient evidence of a manifest purpose of the grantor to convey an estate in fee, it will be so construed. Formerly the court, in its efforts to effectuate the grantor's intent, had resort to equitable principles, or lay hold upon expressions in other parts of the deed containing the sacramental words "heirs" and transposed it into the conveying clause, and would go through the formality of requiring an amendment or correction of the deed. The later decisions, as above set forth, conforming to the evident intention of the parties and the legislative construction dispensing with the word "heirs," have resorted to the direct process of construing the conveyance to mean in fee when such intention clearly appears. In this case, in addition to what is already said, the intention of the grantor to convey a fee simple to the daughter is apparent from the reading of the whole deed, for not only the grantor uses the words "her equitable share," "her," "she," but adds the word "forever," which evidently intended to convey the property in fee to her. There is no limitation of a life estate or any intention indicated to convey any interest therein to her son.

In a very illuminative opinion in *Beacom v. Amos*, 161 N. C. 365, 77 S. E. 407, citing numerous cases, *Walker, J.*, thus quotes from *Gudger v. White*, 141 N. C. 507, 54 S. E. 386, as a correct statement of the modern rule for the construction of deeds:

"We are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument, 'after looking,' as the phrase is, 'at the four corners of it.'"

And again:

"Words shall always operate according to the intention of the parties, if by law they may, and, if they cannot operate in one form, they shall operate in that which by law shall effectuate the

intention. This is the more just and rational mode of expounding a deed, for, if the intention cannot be ascertained, the rigorous rule is resorted to, from the necessity of taking the deed most strongly against the grantor."

[4] Ordinarily in a deed of this kind of date prior to 1879, even when containing on its face sufficient evidence of an intent by the grantor to convey the fee, a suit to correct the instrument is required; but this cause being submitted on case agreed, or when all the facts affecting the rights of the parties are set forth, and there being plenary evidence on the face of the instrument itself that a fee-simple estate was intended, the court, in the exercise of its equitable powers, is fully justified in treating this as a suit to correct the instrument by inserting the word "heirs," and so carry into effect the evident intent of the parties. *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308.

Construing the conveyance, therefore, according to its meaning and intent as appears upon the face of the instrument, we think the conveyance was to her, the daughter, in fee simple, though inartificially expressed.

The grantee so understood it and made the conveyance in fee simple to the wife of one of her sons who has since joined in the conveyance to the plaintiffs in this action. All of the children of Anne Page for over 30 years have acquiesced in the sole possession by their mother, and for 10 years in the conveyance by her.

We think upon the facts agreed that judgment should have declared that the plaintiffs were owners in fee simple, and that the purchasers should pay the purchase money.

Reversed.

STACY, J., dissenting (ALLEN, J., concurring in dissent). The deed submitted for construction in this proceeding was made in 1871. In the granting clause these words appear, "unto the said Anne E. Page and her nearest blood relation forever," and the habendum contains the following language:

"To have and to hold said tract of land and premises with all the appurtenances thereto belonging to her, the said Anne E. Page and her nearest blood relation."

- At the time of the execution and delivery of said deed Anne E. Page had only one son living, Billy Page, who was her nearest blood relation. The word "heirs" appears nowhere in the conveyance, either in connection with the names of the grantors or the grantees. It is omitted entirely from the instrument.

In the majority opinion it is conceded that prior to the enactment of chapter 148, Public Laws of 1879, in real property conveyances the use of the word "heirs" in connection with the name of the grantee was necessary to convey a fee-simple estate, except in devises and trusts or equitable estates, where it clearly appeared that a fee simple was in-

tended. As stated by Mr. Justice Hoke in *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172:

"It is true that prior to the act of 1879 the word 'heirs' was generally held necessary to the creation of a fee-simple estate in deeds conveying the legal title. It was not so in devises nor in equitable estates, where it was generally held that an estate of inheritance would pass without the word 'heirs' if such was the clear intent of the parties"—citing *Holmes v. Holmes*, 86 N. C. 205.

The case at bar, however, comes under neither of these exceptions. The instrument is not a devise, nor do we think it can be held as a substitute for one. It fails in many respects to meet the requirements of a valid will. It is a deed only, and we are asked to construe it as such. It does not purport to create or convey a trust estate, and no equitable relief is sought. The pleadings present only a construction of the deed as a question of law. The parties have thus elected to stand upon their rights, and the case should be decided accordingly.

It has been held with us in a long line of decisions that, as a mere construction of the legal title on the face of the instrument, in deeds bearing date prior to the statute of 1879, the use of the word "heirs" in some way descriptive of the grantee's interest was necessary, and always required, for the creation of a fee-simple estate. *Boggan v. Somers*, 152 N. C. 390, 67 S. E. 965; *Real Estate Co. v. Bland*, 152 N. C. 225, 67 S. E. 483. And where the word "heirs" or words of inheritance are entirely omitted from the deed, only a life estate passes by such conveyance. *Cullens v. Cullens*, 161 N. C. 344, 77 S. E. 223, L. R. A. 1917B, 74; *Batchelor v. Whitaker*, 88 N. C. 350. "There is no principle of law better established than that the word 'heirs' is absolutely necessary in a deed [executed prior to 1879] to convey a fee-simple estate." *Stell v. Barham*, 87 N. C. 62. The omission of the word "heirs," or words of inheritance, from a deed, if executed before the act of 1879, will have the effect of vesting only a life estate in the bargainee. *Anderson v. Logan*, 105 N. C. 266, 11 S. E. 361; *Boggan v. Somers*, supra.

It should be remembered that the aid of equity is not invoked in this case. There is no allegation that the word "heirs" or words of inheritance were omitted by mistake, inadvertence, etc., which would bring the case under the doctrine announced in *Fulbright v. Yoder*, 113 N. C. 456, 18 S. E. 713, *Rackley v. Chestnutt*, 110 N. C. 262, 14 S. E. 750, *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308, *Rutledge v. Smith*, 45 N. C. 283, *Armfield v. Walker*, 27 N. C. 583, *Real Estate Co. v. Bland*, supra, and other cases to like import. Nor is there any question of a trust or equitable estate involved, as in the cases of *Moore v. Quince*, 109 N. C. 89, 13 S. E. 872, *Holmes*

v. Holmes, 86 N. C. 205, supra, and Smith v. Proctor, supra.

But conceding, for the moment, that the instrument clearly shows an intention on the part of the grantors to convey a fee-simple estate, and that upon proper allegations the deed should be reformed or corrected, how can we say that Anne E. Page is to take a fee simple, and Billy Page, her nearest blood relation living at the time of the execution of the deed, is to take no interest at all? It was held in Cullens v. Cullens, supra, that a deed executed prior to 1879 to "Sarah A. Cullens and her children" conveyed only a life estate, but that the woman and her three children living at the time took as tenants in common and that the children were entitled to share with the mother in the estate—citing Campbell v. Everhart, 139 N. C. 511, 52 S. E. 201, Heath v. Heath, 114 N. C. 547, 19 S. E. 155, Gay v. Baker, 58 N. C. 344, 68 Am. Dec. 229, and Dupree v. Dupree, 45 N. C. 164, 59 Am. Dec. 590.

For the foregoing reasons, and on account of the numerous decisions in our reports contra, we are unable to agree with the conclusion reached in this case by a majority of the court

(181 N. C. 91)

THOMAS v. HOUSTON et al. (No. 219.)

(Supreme Court of North Carolina. March 16, 1921.)

1. Gifts §53—Elements of "gift causa mortis" stated.

To constitute a "gift causa mortis," not only is an intentional transfer and actual or constructive delivery necessary, but it must be made in view of impending dissolution or in contemplation of death from a present illness or some immediate peril.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift Causa Mortis.]

2. Gifts §66(2)—Husband held not to have made gift causa mortis of money deposited in his name and that of his wife.

Where a husband, at a time when he was up and about his business, deposited money in a bank on a certificate of deposit payable to the order of himself or his wife, stating that he wanted to deposit it so that in case he died his wife could get it, and placed the certificate of deposit in his wife's trunk where his other valuable papers were kept, there was no gift causa mortis accompanied by actual or constructive delivery.

3. Gifts §19(1)—There may be possession without delivery but not delivery without possession.

Possession of the subject of an alleged gift may be had where no delivery has been made, but there can be no valid delivery unless possession actual or constructive accompanies it.

4. Gifts §18(1)—Intent and delivery essential to gift inter vivos.

To constitute a gift inter vivos there must not only be a donative intent, but delivery is an indispensable requisite.

5. Gifts §11—Gift inter vivos cannot take effect in the future.

A gift inter vivos cannot be made to take effect in the future, as this would amount only to a promise or agreement to make a gift.

6. Gifts §55—"Gifts inter vivos" and "causa mortis" distinguished.

The chief distinguishing characteristics between a "gift inter vivos" and one "causa mortis" are that the former is absolute and takes effect in present, while the other is revocable and takes effect in futuro.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift Inter Vivos.]

7. Gifts §49(5)—Evidence held not to show intention to give or deliver deposit.

Evidence showing that a husband deposited money in a bank on a certificate of deposit, payable to himself and his wife, stating that he wanted to leave it so his wife could get it if he died, and that he placed the certificate of deposit in his wife's trunk where his other valuable papers were kept, was insufficient to show either an intention to make a gift inter vivos or a delivery of the certificate of deposit.

8. Wills §566—Certificate of deposit held not to pass as "moneys on hand."

A will containing a bequest of all moneys on hand at the testator's death held to indicate a purpose not to include a certificate of deposit as "money on hand."

9. Wills §487(3)—Testator's declaration as to intent held inadmissible on question of construction.

In construing a will, the testimony of a witness that the testator told him prior to the execution of the will what he wanted done with money in a bank was incompetent.

Appeal from Superior Court, Duplin County; Connor, Judge.

Action by H. S. Thomas, executor of R. C. Houston, against Hattie Houston and others. From a judgment for plaintiff, the defendant named appeals. Affirmed.

Civil Action brought to determine the ownership of \$1,500 deposited in the Bank of Beulaville by plaintiff's testator on February 26, 1917, taking from the bank a certificate of deposit in words and figures as follows, to wit:

"Beulaville, N. C., Feb. 26, 1917.

"This is to certify that R. C. Houston has deposited with the Bank of Beulaville fifteen hundred dollars, payable in current funds to the order of himself or wife Hattie Houston on return of this certificate properly indorsed with interest at 4 per cent. per annum if left 3 months.

"No interest after one year unless renewed.
"[Signed] A. L. Cavanaugh, Cashier."

The cashier of the bank testified that at the time of this deposit the deceased stated:

"He wanted to deposit it on interest so that in case he died, leaving the money in the bank, his wife, Hattie Houston, could get it."

There was also evidence tending to show that R. C. Houston, the deceased, on the date of issuance of said certificate of deposit, placed the same in his wife's trunk where his deeds, notes, and other valuable papers were kept.

The deceased also left a will, from which it appears no specific disposition was made of this certificate of deposit as such, and the residuary legatees, save the appellant, contend that this item would pass under the residuary clause.

Excluding formal parts, the will was as follows:

Second. I give and devise to my beloved wife, Hattie Houston, the tract of land on which I now reside, containing 86½ acres, for her natural life in satisfaction of her dower and thirds in all my lands also her share of team horse or mule one cart and one buggy, together with harness, also my entire household and kitchen furniture of every description except one large chest and its contents all my entire stocks of hogs, poultry, cattle, and also my entire growing crops, and provisions that I may have on hand at my death. Also all moneys that I may have on hand at my death.

Third. I give and devise to my granddaughter, Kitsy Elizebeth Jones and her heirs in fee simple the remainder of my entire tract of land of one hundred and seventy three acres also one large chest and its contents together with my photograph.

Fourth. I give and bequeath to George Baker, my great-nephew, at the death of my present wife Hattie Houston, the tract of land willed to her by me during her natural life.

Fifth. My will and desire is that all residue of my estate if any after taking out the devises and legacies above mentioned shall be sold and the debts owing to me collected, and if there should be any surplus over and above the payment of debts, expenses and legacies, that such surplus shall be equally divided between my wife, Hattie Houston, Kitsy Elizebeth Jones, George Baker, and Charlie Hulbert and wife.

Sixth. I hereby constitute and appoint my trusty friend, H. S. Thomas, lawful executor to all intents and purposes to execute this my last will and testament according to the true intent and meaning of the same and part and clause thereof hereby revoking and declaring void all other wills and testaments by me heretofore made.

His honor, being of opinion that the evidence was insufficient to establish a gift to Hattie Houston, instructed the jury to answer the issue of ownership in favor of the plaintiff. From the verdict thus rendered and judgment thereon, the defendant Hattie Houston excepted and appealed.

Gavin & Blanton, of Kenansville, for appellant.

H. D. Williams, of Kenansville, for appellee.

STACY, J. [1] The appellant in her brief takes the position that under the evidence offered, his honor should have submitted to the jury the question as to whether the certificate of deposit would pass to her as a gift causa mortis. We do not think this position tenable. To constitute a "gift causa mortis," not only is an intentional transfer and actual or constructive delivery necessary, but it must be made in view of impending dissolution, or in contemplation of death from a present illness or some immediate peril. 12 R. C. L. 962; Patterson v. Trust Co., 157 N. C. 13, 72 S. E. 629; Newman v. Bost, 122 N. C. 524, 29 S. E. 848; and Wilson v. Featherstone, 122 N. C. 750, 30 S. E. 325. As very tersely and succinctly stated in McCord v. McCord, 77 Mo. 166, 46 Am. Rep. 9:

"To constitute such a gift, it must be made in the last illness of the donor or in contemplation and expectation of death. There must be a delivery of the subject by the donor, and it is 'defeasible by reclamation, the contingency of survivorship, or deliverance from peril.' 2 Kent, Com. 444. * * * It must be a delivery as a gift, and such a delivery, as in case of a gift inter vivos would invest the donee with the title to the subject of the gift."

[2, 3] In the instant case, there is no evidence of any intentional gift accompanied by an actual or constructive delivery during the last illness of the deceased. He was up and about his business at the time the money was placed in bank; and there is no evidence that anything transpired between him and his wife, with respect to this certificate of deposit, subsequent to the date of its issuance, which would amount to a valid transfer. It does not appear that any delivery was ever made to the appellant. It is true the certificate was placed in her trunk where her husband kept his deeds and other valuable papers, but there is no evidence of any intention to thus deliver it to her. Under the circumstances, it is not even clear that it was in her possession. Even if it were, delivery and possession are two different things. "Possession" may be had where no delivery has been made; but there can be no valid "delivery" unless possession, actual or constructive, accompanies it. Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208.

Around every other disposition of the property of the dead the Legislature has thrown safeguards, and wisely so. Around this mode (donatio mortis causa) the requirement of actual or constructive delivery is the only substantial protection which the law affords, and the courts should not weaken this salu-

tary requirement and wise precaution by permitting the substitution of convenient and easily proven devices. *Keepers v. Fidelity Co.*, 56 N. J. Law, 302, 28 Atl. 585, 23 L. R. A. 184, 44 Am. St. Rep. 397.

[4, 5] On the other hand, we do not think the evidence sufficient to warrant a finding of a gift *inter vivos*. Not only must there be a donative intent, but delivery is an indispensable requisite to such a gift under our law. *Gross v. Smith*, 132 N. C. 604, 44 S. E. 111. It cannot be made to take effect in the future. *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Askew v. Matthews*, 175 N. C. 187, 95 S. E. 163. This would amount only to a promise or an agreement to make a gift. *Spencer v. Vance*, 57 Mo. 429.

"To constitute a valid gift *inter vivos*, there must be an intention to give and a delivery to the donee, or to some one for him, of the property given. An intention of the donor to give is not alone sufficient. The intention must be executed by a complete and unconditional delivery. Neither will a delivery be sufficient, unless made with an intention to give. The transaction must show a completely executed transfer to the donee of the present right of property and the possession. The donee must become the owner of the property given." *Harris Banking Co. v. Miller*, 190 Mo. 640, 89 S. W. 629, 1 L. R. A. (N. S.) 790.

It has been held that a deposit under an agreement which preserves to the depositor the right to deal with the deposit for his own benefit, but which provides that upon his death any balance standing to his credit shall be paid to the donee, though accompanied by a delivery of the deposit book to the donee, does not constitute a valid gift *inter vivos*. *Stevenson v. Earl*, 65 N. J. Eq. 721, 55 Atl. 1091, 108 Am. St. Rep. 790, 1 Ann. Cas. 49. A gift is incomplete if the donor "retains the dominion, if there remains to him a *locus penitentiae*, * * * there cannot be a perfect and legal donation." *Murray v. Cannon*, 41 Md. 466. See also *Schippers v. Kempkes*, (N. J. Err. & App.) 67 Atl. 74, 12 L. R. A. (N. S.), 355 and note.

[6] The chief distinguishing characteristics between a gift *inter vivos* and one *causa mortis* are that the former is absolute and takes effect in *presenti*, while the latter is revocable and takes effect in *futuro*.

[7] Upon the record, there is no evidence

tending to show any surrender, during the lifetime of the deceased, of his dominion or control over the deposit in question. Without such surrender and actual or constructive delivery to the donee, a parol gift, in law, is but a promise to give, which, being without consideration, is not obligatory. *Picot v. Sanderson*, 12 N. C. 309. "A transfer of the property is required, and 'an intention to give is not a gift.'" *Adams v. Hayes*, 24 N. C. 361.

Furthermore, there is no evidence to support the conclusion that the deceased, during his lifetime, had promised his wife that she might have the money which he had placed in bank. The only competent testimony tending to show what disposition R. C. Houston wished to make of this particular deposit, in the event he died leaving it in the bank, comes from the cashier of the bank of Beula-ville, and the record is silent as to whether such desire was ever communicated to appellant during the lifetime of her husband. Hence there is not sufficient evidence to show an intention to make the gift and a delivery of the thing given. Without both of these prerequisites, there can be no gift *inter vivos* or *causa mortis*. *Newman v. Bost*, supra; *Medlock v. Powell*, 96 N. C. 499, 2 S. E. 149.

[8, 9] There are some decisions in our own reports and elsewhere to the effect that a certificate of deposit or money in bank will pass by will under the designation of "money on hand," where it clearly appears that such was the intention of the testator; but in the instant case, a contrary purpose is quite apparent. All the facts and circumstances lead to a different conclusion. The testimony of the witness Potter that the testator had told him, prior to the execution of his will, what he wanted done with the money in bank, was incompetent and should have been excluded. Wills are made by testators, not by witnesses.

From the foregoing, it follows that his honor was correct in charging the jury to answer the issue, with respect to the ownership of the certificate of deposit, in favor of the executor.

After a careful examination of the entire record and the defendants' exceptions and assignments of error, we think the ruling as indicated should be sustained.

No error.

(115 S. C. 480)

SMITH et al. v. BANKHEAD. (No. 10587.)

(Supreme Court of South Carolina. March 16, 1921.)

1. Partition §109(1)—Purchaser acquires unsevered crops, though due as rent before sale.

Where land was sold in a partition suit without any reservation, and the deed conveyed "all and singular the rights, * * * rents, issues, and profits," crops still attached to the freehold when the sale was made and when the purchasers complied with their bid passed to the purchasers, though the land was rented, and the rent was payable in cotton and corn, and was due before the sale.

2. Partition §109(1)—Failure of purchasers to exhibit deed held not to affect right to crops.

Where a tenant of land sold at partition sale had attorned to the purchasers, at the request of the agent of the former owners, and the purchasers were in possession when such agent attempted to gather crops due as rent, the failure of the purchasers to exhibit their deed did not defeat their action to recover possession of the crops.

Appeal from Common Pleas Circuit Court, of York County; Thos. S. Sease, Judge.

Action by J. D. Smith and another against J. H. Bankhead, Agent. From a judgment for defendant, plaintiffs appeal. Reversed.

W. W. Lewis and John A. Marion, both of York, for appellants.

J. S. Brice and John R. Hart, both of York, for respondent.

FRASER, J. The defendant, J. H. Bankhead, was entitled to an undivided interest in the land described in the complaint and other lands. The defendant acted as agent for his cotenants and rented this tract to Ed. Good, a negro. An action for partition was brought, to which the defendant was a party, and this tract was sold under an order of the court, and was bought by the plaintiffs herein at that sale. At the request of Mr. Bankhead, the plaintiffs re-rented the land for the following year to Ed. Good, on the day following the sale. The sale was made on the 4th of November. The plaintiffs paid the money on the 9th of November, took their deed, and filed it for record on that day. The report of sale was confirmed on the 25th day of November. On the 19th of November, 10 days after the deed was delivered, Mr. Bankhead undertook to gather the crop, and the plaintiffs brought this ac-

tion for the possession of the crops so gathered. The case was referred to a special referee, who found that the rent was due before the sale, and the defendant was entitled to the crop. The circuit judge affirmed this finding.

The rent was payable in cotton and corn. The record does not show that there was any reservation of anything in the order of sale, in the deed, or by notice at the sale. Much has been said in argument about the time at which the rent was due and the failure of the plaintiffs to exhibit the deed to the land, and they were treated as crucial points in the case.

[1] I. It makes no difference when the rent was due. The crops in dispute were still attached to the freehold when the sale was made and when the plaintiffs complied with their bid. The sale of the land carried with it all that was attached to the land, houses, fences, trees, cotton stalks, with their unpicked cotton, and corn stalks and unsevered corn. So far as the parties to that action were concerned, all were included in the sale. The deed that has been confirmed contains the following:

"Together with all and singular the rights, members, hereditaments, and appurtenances whatsoever to the said premises belonging, or in any wise appertaining, and the reversions and remainders, rents, issues, and profits thereof, and also all the estate, right, title, and interest, dower, possession, property, benefit, claim, and demand whatsoever, both at law and in equity of the said plaintiffs and defendants, and all of the parties to the said suit, and of all other persons rightfully claiming or to claim the same, or any part thereof, by, from, or under them, or either of them."

It thus appears that the rents were expressly conveyed. The defendant was a party to the case under which the sale was made.

[2] II. The failure of the plaintiffs to exhibit their deed is equally ineffective. If there had been a dispute about the possession, then the failure of the plaintiff to produce the evidence of their title might have been a factor in the case. There was no such issue here. The tenant of the defendant had already, at the request of the defendant, attorned to the plaintiffs, and the plaintiffs were already in possession. The defendant is estopped from claiming any interest in the land or rents.

The judgment is reversed.

GARY, C. J., and WAITTS and COTH-RAN, JJ., concur.

(115 S. C. 469)

BELLINGER, Probate Judge, v. UNITED STATES FIDELITY & GUARANTY CO.
(No. 10,586.)

(Supreme Court of South Carolina. March 16, 1921.)

1. Insane persons \S 45—Surety on committee's bond not discharged by failure to require accountings.

The surety on the bond of the committee of a lunatic, conditioned that the committee shall faithfully execute his duties and yearly account to the judge of probate, is not released by the failure of the probate judge to require annual returns by the committee, as it was the duty of the surety to see that this duty of the committee was performed.

2. Insane persons \S 45—Allegation of surety that it was not bound by decree properly stricken, if bound prima facie.

In an action on the bond of the committee of a lunatic, an allegation of the surety that it was not bound by a judgment against the committee was properly stricken, if it was bound either conclusively or prima facie.

3. Insane persons \S 45—Decree against committee only prima facie binding on surety.

A decree of the probate court, finding the amount due from the committee of a lunatic, on an accounting by him to which his surety is not a party, is only prima facie binding on the surety.

4. Insane persons \S 45—Surety's answer, not stating grounds of attack on settlement, properly stricken.

The surety on the bond of a lunatic's committee has only a limited right to impeach the final decree settling the accounts of the committee, and hence, in an action on the bond, an allegation of the surety that it was not bound by the decree, without stating the grounds of its attack on the decree, was properly stricken.

5. Insane persons \S 45—Children of lunatic are strangers to estate.

Children of a lunatic petitioning for their substitution as sureties for the committee in order to save premiums were strangers to the estate, and might have been treated by the probate judge as intermeddlers.

6. Insane persons \S 45—Probate court cannot release committee's surety on execution of substituted bond.

The probate court has no power, either under its general power of control over the estates of lunatics or under Civ. Code 1912, § 3613, authorizing such court, on the application of sureties on administration and guardianship bonds, to make such order or decree for the relief of the surety as may not impair or affect the right of the parties interested, to discharge the surety of a lunatic's committee upon the execution of a substituted bond.

7. Constitutional law \S 70(3)—Propriety of law discriminating between sureties of different classes held a question for the Legislature.

Whether the probate court should be authorized to discharge sureties on administra-

tion and guardianship bonds, and not sureties on other bonds, is a question for the Legislature, and not a judicial question.

8. Appeal and error \S 248, 839(1)—Questions not passed on below or covered by exceptions not considered.

Questions, argued but not passed on by the circuit judge, or covered by exceptions, will not be considered on appeal.

Appeal from Common Pleas Circuit Court of Richland County; Edward McIver, Judge.

Action by G. Duncan Bellinger, as Judge of Probate, against the United States Fidelity & Guaranty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert Moorman, of Columbia, for appellant.

Tompkins, Barnett & McDonald, of Columbia, for respondent.

COTHRAN, J. Action against the defendant as surety upon the bond of Walter J. Simons, committee of R. J. Palmer, a lunatic. The trial was before Hon. Edward McIver, presiding judge at spring term, 1920, without a jury, upon the pleadings and an agreed statement of facts. He rendered judgment in favor of the plaintiff for \$1,105.18 May 27, 1920, from which the defendant appeals.

In 1908 R. J. Palmer was adjudged a lunatic. Walter J. Simons was appointed his committee, and on February 4, 1908, qualified by furnishing a bond to the probate judge in the sum of \$5,000, conditioned in the usual form, with the defendant as surety. The committee took charge of the estate, and administered it until March 11, 1913, at which time an order was passed by the probate court, discharging R. J. Palmer from the custody of the court, and requiring the committee to make a final accounting. This accounting was had, and resulted in a judgment by the probate court in favor of R. J. Palmer against Walter J. Simons, the committee, for \$759.61, dated January 18, 1915. The surety company was not a party to this proceeding.

Prior to this time, that is, on February 2, 1910, while the lunatic was confined in the state hospital, three of his children petitioned the probate court to allow them to be substituted as sureties on the bond in the place of the defendant surety company, that the annual premium of \$25 paid to the surety company might be saved to the estate. On February 10, 1910, the probate judge signed an order to that effect, and that upon the execution of a new bond signed by said petitioners the defendant "be released and discharged from any and all further liability under the bond heretofore filed in this action." The proposed bond was duly executed.

During the entire period of his incumbency

the committee made no returns of the estate transactions until April 22, 1913, after the legal status of the lunatic had been restored, or purported to be, and then only an unitemized return for the five years. This return was objected to by Palmer, and on September 22, 1913, the committee filed what appears to have been duly itemized returns for five years. Upon rendition of the judgment for \$759.61 on January 18, 1915, execution was issued against Walter J. Simons, the committee, which was returned nulla bona, and this action followed on May 17, 1918. The circuit judge charged the defendant with the amount of the probate court decree of January 18, 1915, plus interest and costs, amounting to \$1,230.18, less five-year bond premiums, \$125, and rendered judgment for \$1,105.18.

The questions that arise in this appeal are as follows:

(1) Does the failure of the probate judge to require annual returns by the committee of a lunatic to secure the faithful performance of whose duties the bond was given to the probate judge discharge the surety?

(2) Is the surety upon the bond of a committee of a lunatic bound by the decree of the probate court ascertaining the amount due by the committee in a proceeding to which the surety was not a party?

(3) Is an order of the probate judge, purporting to discharge the surety of the committee of a lunatic, upon the execution of a substituted bond, effective for that purpose?

The two questions first stated above were raised in paragraphs 4 and 5 of the defendant's answer, but on motion before Judge Moore, prior to the trial before Judge McIver (upon a date not appearing in the "case") these paragraphs were stricken from the answer. Question No. 3 was decided by Judge McIver against the defendant.

[1] *The First Question.* The condition of the bond was that—

The committee "shall and do well and faithfully execute the duties of committee and also yearly and every year account to the said judge of probate * * * for all such sum or sums of money * * * which he * * * may have received * * * and in other respects behave and demean himself honestly and faithfully touching said committeeeship."

One of the duties imposed upon the committee by law, and specifically undertaken by him in the bond, was to make annual returns. The surety was bound to see that this duty was performed; he so undertook. It would be an anomalous conclusion to release the surety from his entire obligation upon the ground that the principal had not forced the obligor to perform a specifically assumed duty for which the surety was equally bound. For his own protection it was the duty of the surety to see that this duty was performed; the court was open to him

for that purpose; it does not lie in his mouth to say that he should be discharged because the probate judge did not compel the performance of a duty which he himself had neglected to compel.

The Second Question. The probate judge by regular proceeding called the committee to account, took testimony, examined the itemized returns and vouchers, and arrived at the judicial conclusion that the committee was indebted to the estate in the sum of \$759.61. Judgment was accordingly rendered. The surety was not a party to that proceeding and now claims that it is not bound by the adjudication and claims the right to a readjustment of the committee's accounting.

[2] It will be noted that the defendant does not attempt to assail the probate decree for want of jurisdiction, fraud, or collusion; nor does it attempt to surcharge or falsify the accounting. The allegation simply is that "it is not bound" by the decree. This is the allegation stricken out by Judge Moore's order. If the defendant is bound either conclusively or prima facie, it is clear that it can take nothing by this appeal. Judge Moore's order is not set out in the record for appeal, and we have no means of knowing whether he ruled that the surety was bound conclusively or prima facie. It matters not which, for, if it was bound in either way, the defendant's allegation that it was "not bound" cannot be sustained.

[3] It appears to the writer, and expressing his individual views of the matter, that the logical conclusion should be that the surety upon a committee's bond, in an action at law upon the bond, is concluded by the decree of the probate court, duly rendered upon a final settlement and accounting by his principal, as to the amount of the principal's liability, notwithstanding the fact that the surety was not a party to the accounting; that such a decree is a final judgment which may be enrolled in the clerk's office and upon which execution may issue; that such record establishes the committee's failure to respond to the judgment. A breach of his bond is conclusively shown. Certainly he is concluded and the surety is bound to the full extent to which his principal is bound. He cannot attack collaterally a decree made against the committee for whose fidelity to his trust he has bound himself. *Stovall v. Banks*, 10 Wall. 583, 19 L. Ed. 1036. See *Rose's Notes*, 170, where numerous authorities are cited.

The remedy of the surety should be an appeal from the decree or a direct attack upon it in the probate court, unless want of jurisdiction appears upon the face of the record.

But whether or not it is due to the difference in the legal effect of a decree of the present probate court and that of the old court of ordinary (compare *Ordinary v.*

Mortimer, 7 Rich. 176, with sections 73, 74, 75, Code of Civil Procedure), it is settled by a practically unbroken line of cases in this state that such a decree is only *prima facie* binding upon the surety. *Cureton v. Shelton*, 3 McCord, 413; *Joyner v. Cooper*, 2 Bailey, 199; *Ordinary of Charleston District v. Condy*, 2 Hill, 813; *Ordinary v. Carlile*, McMul. 100; *Norton v. Wallace*, 1 Rich. 507; *Davant v. Webb*, 2 Rich. 379; *Norton v. Wallace*, 2 Rich. 460; *Taylor v. Taylor*, 2 Rich. Eq. 123; *Stewart v. McCully*, 5 Rich. 80; *State v. Cason*, 11 S. C. 392; *Crane v. Moses*, 13 S. C. 561; *Fellers v. Davis*, 22 S. C. 425; *Kennedy v. Adickes*, 37 S. C. 176, 15 S. E. 922.

[4] Even in these cases the right of the surety to impeach the final decree of settlement is limited, as will appear upon the examination, to certain objections which must be set forth in the pleading of the surety, "in an action on a guardianship or administration bond against a surety, errors in the decree against the principal, unless set out by the surety in his pleadings, cannot be proved." *Davant v. Webb*, 2 Rich. 379; *Norton v. Wallace*, 1 Rich. 507.

The appellant's attorney admits in his printed argument that the probate court decree was at least *prima facie* evidence against the defendant. This admission, coupled with the failure to set forth in his pleadings the grounds of the attack upon the decree of which he assumes that the defendant was deprived by the order of Judge Moore, renders untenable the position that the defendant was not bound by the decree; he was bound presumptively, until he pleaded and established grounds of attack made legitimate under the foregoing authorities. Judge Moore's order may be sustained upon either ground; that the decree was *prima facie* binding upon the surety, or that the specific grounds of attack were not pleaded.

The Third Question. The circuit judge and the respondent take the position that the surety's relief is determined by the provisions of section 3613, 1 Code of Laws, and that, the course therein prescribed not having been pursued, the order is a nullity. The appellant's position is that the probate court, under the general powers of control over the estate of lunatics, was authorized to sign the order. We do not think that either position can be sustained.

[5] The position for the substitution of the three adult children of the lunatic as sureties upon the bond of the committee in the stead of the guaranty company was filed in the name of those children. They could not, except in a prospective sense, have had the slightest legal interest in the lunatic's estate. They were strangers to the estate, as much so as if they had not been related to him, and may well have been considered by the probate judge as intermeddlers. But

in view of the complacency and evident approval of the guaranty company in relation to the substitution, and its reliance in this proceeding upon the order as a release of it from all liability, we may assume that it was taken with the knowledge and consent of the guaranty company, and will treat the matter as if the order had been taken upon the petition of the surety.

"The motion need not be made by the surety; it is sufficient if made with his knowledge, and consent by the guardian." *Black v. Merritt*, 13 Ky. Law Rep. 367.

[6] The statute (section 3613) does not provide the machinery for the discharge of a surety; it authorizes, after examination, the making of "such order or decree, for the relief of the petitioner, as may not impair or affect the rights of the parties interested in the estate."

The obligation of the principal, for which the surety stands bound, begins before he receives a dollar of the estate, for it is his duty to collect the assets; it continues through his administration of his office, and ends only after he shall have made a full and honest accounting and distributed the net assets to those entitled to them. It is to the interest of the beneficiaries of the estate that these obligations be fulfilled, obligations of the principal and of the surety. Any action therefore which touches these obligations necessarily "impairs," certainly "affects," that interest.

The statute is one of exceptional privilege extended to sureties upon administration bonds and (by reference, section 3764) to sureties upon guardianship bonds. All that the surety has to do is to file his petition, alleging that he conceives himself to be in danger of being injured by his suretyship, and to claim the privilege guaranteed to him as a right by this statute, whereupon it is made the duty of the probate judge to make a decree for his relief, limited only by the condition that the rights of the parties interested in the estate may not be impaired or affected; the surety's apprehension of injury, not the fact of danger, is made the test. *McKay v. Donald*, 8 Rich. 331.

This court, upon review of many conflicting decisions and dicta, has settled upon a construction of this statute in the case of *Hall v. Hall*, 45 S. C. at page 178, 22 S. E. at page 822, as follows:

"First. When the surety on a guardian's bond files a petition to be discharged from liability, and the court grants an order for such discharge, and a new bond is executed, but no new letters of guardianship are issued, the surety is liable for all the property of the ward in the hands of the guardian at the time of the discharge. 2d. Such surety * * * is not liable for the property of the ward that may come into the hands of the guardian after the surety has been discharged."

This construction adds another feature of exceptional privilege to these classes of sureties; it relieves the surety from a substantial portion of the obligation which he assumed when he signed the bond, which was intended to secure the continuing obligation of the principal until his final and legal release. And however much the writer of this opinion may approve of the reasoning and conclusion of Chancellor Harper in the case of *Field v. Pelot*, McMul. Eq. 369, that there can be no discharge from future liabilities of the principal except by revocation of his authority, and that both sets of sureties are liable for all defalcations of the principal, both before and after discharge, the substituted sureties being primarily liable, the authority of *Hall v. Hall*, should not now be questioned; it certainly should not, however, be extended to sureties of other classes to whom this exceptional privilege has not been accorded by statute.

We apprehend that the court of equity with its ample powers could not grant to a surety the relief which this statute accords to him; certainly a court of limited power could not, independently of the statute. He, therefore, who claims the benefit of a statute of exceptional privilege, must bring himself within the terms of that statute. We have been pointed to no statute, and have found none which accords to the sureties upon any other class of bonds than administration and guardianship bonds and the privilege of section 3613.

[7] It may be difficult to explain why this exceptional privilege should be accorded to certain classes of sureties and not to others, practically of the same fiduciary character; there appears no reason for the distinction. That is a matter, however, that may appeal to the legislative sense of justice; it is not a judicial question.

We lay little stress upon the suggestion that the petition was filed, not by the surety, but by the children of the lunatic. If the surety had had the right to file the petition, and it was filed by others, though the application was made upon a different ground from that prescribed in the statute, we apprehend that the surety would not be deprived of the status established by a proceeding which it has evidently ratified and the benefit of which it claims in this proceeding.

It may be remarked that the order purports to discharge the surety from all liability, past as well as future. The utmost that could be claimed under this special statute would be a release from the future defalcations of the principal. For the reasons stated we conclude that the order of the probate court, purporting to discharge the surety, was a nullity.

The relative rights and liabilities of the

defendant and the signers of the substituted bond have not been considered.

[8] The appellant has raised several questions in the printed argument which have not been considered for the reason that they are not properly before us, not having been passed upon by the circuit judge or covered by exceptions.

The respondent has pressed with great force the objection that the exceptions do not conform to the rules of this court, in that they fail to point out specific errors. We have not sustained the objection from an anxiety to decide these very interesting questions upon their merits.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, C. J., and FRASER, J., concur.
WATTS, J., concurs in the result.

(115 S. C. 452)

JUMPER v. QUEEN MAB LUMBER CO.
(No. 10582.)

(Supreme Court of South Carolina. March 12, 1921.)

1. Reformation of Instruments §20—Fraud or concealment unnecessary if mistake is mutual.

Equity can reform a contract for mutual mistake of the parties in reference to the facts upon which it is based or in the omission or insertion of some material stipulation in the written contract, even when there is no element of misrepresentations or concealment, though, if the mistake was unilateral, it must have been induced by misrepresentation, concealment, or imposition.

2. Appeal and error §901, 1009(4)—Findings in equity sustained unless appellant shows them contrary to evidence.

The findings of fact by the circuit judge on an equitable issue will be sustained, unless the appellant shows that they are against the preponderance of the evidence; the burden of such showing being on him.

3. Reformation of Instruments §45(6)—Evidence held to show mutual mistake as to terms of contract signed.

Evidence that the vendor owned only the timber rights in a certain tract, which the purchaser knew, held to sustain the trial judge's finding of mutual mistake in a contract for the conveyance of the title to the tract which was prepared with another contract for the sale of a tract the title to which the vendor owned.

4. Logs and logging §2—Vendor and purchaser §31—Mutual mistake without fraud not ground for rescission.

A mutual mistake, whereby the written contract provided for conveyance of the title to a tract of land, instead of the conveyance of merely the timber rights therein as agreed upon by the parties, does not entitle the vendor

to rescind the contract, though it does entitle him to have it reformed to conform to the oral agreement.

5. Reformation of Instruments ¶16—Correction of written agreement to correspond with understanding not relief against mutual mistake.

The relief granted by equity in reforming a written contract to conform to the actual agreement of the parties is not, strictly speaking, relief on the ground of mutual mistake, but is a distinct branch of equity jurisprudence.

6. Reformation of Instruments ¶25—Negotiation does not defeat right to have written agreement conform to understanding.

The right of a party to a written contract to have it reformed so as to conform to the real agreement of the parties is not defeated by his negligence, in failing to discover the discord between the written contract and the agreement, since the other party was equally negligent, or, if he discovered the discord and kept silent to reap the benefit thereof, is without standing in equity.

7. Appeal and error ¶1073(1)—Consent order as to fund held to entitle defendant to affirmance of decree rescinding instead of reforming contract.

In an action for breach of a contract for the sale of land where defendant established his right to reform the contract to provide only for sale of the timber, but the court erroneously decreed a rescission of the contract, and it appeared that the timber rights had been sold under a consent order and the proceeds deposited to await the outcome of the suit, so that defendant was entitled to the fund which represented the subject-matter of the controversy, whether the contract was reformed and specifically enforced or was rescinded, the decree awarding the fund to him will be affirmed, regardless of error as to rescission.

Appeal from Common Pleas Circuit Court of Georgetown County; T. J. Mauldin, Judge.

Action by W. J. Jumper against the Queen Mab Lumber Company. From a decree for defendant, plaintiff appeals. Affirmed.

The decree of the circuit judge was as follows:

This case was instituted in the court of common pleas for Aiken county, but, on motion, Hon. H. F. Rice, by order dated August 19, 1919, charged the venue to Georgetown county, and the entire record therein was transferred to that county.

The complaint alleged that the defendant, on October 17, 1917, agreed to sell in fee, for \$5,000, to the plaintiff, a tract of land in Aiken county, containing 498.8 acres; that the contract was broken by the defendant; and that the plaintiff was entitled to the sum of \$4,960 the difference in the alleged value of the land and the contract price. The defendant answered, admitting the formal execution of the alleged contract, but alleging that the same was executed in error and mistake, both parties intending to contract only as to certain timber and timber rights on said land, this being the

true agreement, and both parties well knowing that the defendant did not own the fee; that if the contract be reformed so as to express the true intention of the parties, and so as to cover the timber and timber rights owned by the defendant on the said tract of land, that it was ready and willing to carry out the same on its part. There were other defenses, but the conclusion I have reached renders a consideration of them unnecessary.

A consent order was passed by me at the November, 1919, term of court for Georgetown county, whereby a jury trial was waived, the cause transferred to Calendar No. 2, and referred to Arthur R. Young, Esq., of Charleston, S. C., as special referee, to take testimony on all issues, legal and equitable, arising therein; and to report the testimony so taken to me as presiding judge, and that if said report should not be filed in time for a hearing at said term the cause should be marked "Heard" and argument should take place at such time and place as might be subsequently agreed on. This order further provided that by reason of the short period of time remaining under the timber deed within which to cut and remove the timber that the said timber be sold at such price as might be agreed on by counsel, or fixed as reasonable by the court, and the proceeds deposited at interest to await the final determination of the court and its further orders—said sale to be without prejudice to the rights of either party to the cause, the proceeds of sale standing in lieu and stead of the timber and timber rights aforesaid.

Subsequently, on petition of the defendant, I passed an order, dated April 17, 1920, authorizing the defendant to accept an offer of \$5,000 cash, made by Farr-Barnes Lumber Company to it, and to convey the said timber and timber rights to the said Farr-Barnes Lumber Company and deposit the proceeds of sale at interest according to the provisions of said order, in the event that the plaintiff did not, within 10 days from the service of a copy of said order on his attorney, avail himself of certain options which I allowed him and which are fully set forth in said order.

The defendant subsequently reported that a copy of the said order was duly served on the attorney for the plaintiff, that the options therein contained were not exercised by the plaintiff, and that pursuant to the requirements of the said order it conveyed the said timber and timber rights to the said Farr-Barnes Lumber Company and deposited the purchase price of \$5,000 in the savings department of the Bank of Summerville, at interest, to the credit of this case, and subject to, and to await the final determination of, the court and its further orders in this cause.

The report of the special referee not coming in before the adjournment of the court as aforesaid, the case was marked "Heard." The special referee took all testimony offered on behalf of both parties, reported the same to me, and the cause has been fully argued before me.

I have carefully considered the testimony and the authorities bearing on the questions involved. The testimony clearly and fully shows, and so as to leave no doubt in my mind, that the alleged contract involved in this case was

executed in mutual mistake, neither party intending that it should cover the fee, and that their minds have never met on such a proposition; but, on the contrary, that the parties intended only to contract as to the timber and timber rights on the said tract of land. The alleged contract should, therefore, be rescinded and set aside and the parties left in the same status they were in before the execution of the same.

The defendant, however, offers to perform the contract, if it be reformed so as to cover the timber and timber rights only. While I am satisfied of my power to rescind the alleged contract for the reasons given, I am not so sure that the cases would support me in reforming the contract, and in requiring the plaintiff to perform the same as so reformed, nor if I had the power would I care to so exercise it in this case.

The \$50 paid to the defendant by the plaintiff when the alleged contract was executed should be returned by the defendant to the plaintiff, but as it has been fully established that the plaintiff prosecuted this case well knowing that the contract he relied on was not enforceable, he should be charged with the costs.

It is therefore ordered, adjudged, and decreed that within 20 days from the date of this order, the defendant do pay to the plaintiff the sum of \$50.

It is further ordered, adjudged, and decreed that the Bank of Summerville, upon presentation to it of a certified copy of this order, do pay over to the defendant, Queen Mab Lumber Company, the fund of \$5,000, with any interest earned thereon, now held on deposit by it to the credit of this cause.

It is further ordered, adjudged, and decreed that the plaintiff do pay the costs and disbursements (i. e., costs paid) of this case.

T. J. Mauldin, Circuit Judge.

John F. Williams, of Aiken, for appellant.
Legare Walker, of Summerville, for respondent.

COTHRAN, J. Action at law for \$4,960 damages on account of alleged breach by defendant of a written contract for the sale of land, dated October 17, 1917. The defendant admits the execution of the contract, but alleges that it owned only the timber rights on the land; that prior to the formal execution of the contract, which was but the written evidence of their agreement, the plaintiff and the defendant had agreed upon a purchase and sale of the timber rights on the land at \$5,000, the plaintiff being aware of the fact that the title to the land was in another; but that owing to the fact that at the same time another transaction between the parties involved a contract for the conveyance of the title to another tract, and the attorney who drew both sets of papers, not being fully advised by the parties, drew the contract in question in like form, the defendant alleges mutual mistake and asks for a reformation of the contract, and that when so reformed the plaintiff be required to comply.

The case was referred to a special referee

simply to take the testimony and report same, and upon the testimony so reported, was tried before Judge Mauldin, a jury trial having been duly waived.

The circuit judge filed a decree which will be reported, finding that "the alleged contract involved in this case was executed in mutual mistake, neither party intending that it should cover the fee, and that their minds have never met on such a proposition; but, on the contrary, that the parties intended only to contract as to the timber and timber rights on the said tract of land," and ordered the contract to be rescinded and the parties restored to their status quo.

The plaintiff appeals and relies upon these propositions:

(1) That there can be no relief from a mutual mistake in the absence of misrepresentation or concealment of fact.

(2) That there is no testimony to sustain the finding of fact of mutual mistake, for two reasons: (a) The burden was upon the defendant to maintain such plea, and the overwhelming weight of the evidence is opposed to such finding; (b) there was no sufficient evidence to show misrepresentation or concealment upon the plaintiff's part.

(3) That rescission of a contract should not be decreed in the absence of misrepresentation or concealment, where it appears that it was entered into by competent parties, at arm's length, when they read or should have read the same.

[1] 1. The appellant's position that there can be no relief from a mutual mistake, unless there enter into the mistake an element of misrepresentation or concealment, cannot be sustained for this reason: A contract may be reformed or rescinded, as the justice of the case may require, upon the ground of mistake, under these circumstances: (1) Where the mistake is mutual and is in reference to the facts, or supposed facts, upon which the contract is based; (2) where the mistake is mutual and consists in the omission or insertion of some material element affecting the subject-matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it; (3) where the mistake is not mutual, but unilateral, and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition in any form of the party opposed in interest to the reformation or rescission, without negligence on the part of the party claiming the right; (4) where the mistake is not mutual, but unilateral, and is accompanied by very strong and extraordinary circumstances, showing imbecility or something which would make it a great wrong to enforce the agreement, sustained by competent testimony of the clearest kind. *Kennerty v. Etiwan Co.*, 21 S. C. 226, 53 Am. Rep. 669; *Forrester v. Moon*, 100 S. C. 157, 84 S. E. 532.

It thus appears that both the first and sec-

ond conditions, instances of mutual mistake, are independent of the elements of misrepresentation and concealment.

[2, 3] 2. The appellant's contentions that there is no testimony to sustain the finding of fact by the circuit judge of a mutual mistake, and that the overwhelming weight of the testimony is against such finding, cannot be sustained. The demand of the defendant for affirmative relief, in the reformation of the contract, presents an equitable issue. The findings of facts by the circuit judge will be sustained unless the appellant may show that they are against the preponderance of the evidence, the burden of which is upon him. He has not only failed to sustain this burden, but, after careful review of the testimony, we are entirely satisfied with the conclusions of the circuit judge. The defendant owned only the timber rights on the land, and we begin with the natural assumption that they would not intend to sell something they did not own. We are satisfied from the evidence that, when the defendant bought the timber rights in 1906, the plaintiff was informed of the limitations of their holding; that in 1916 conditions had not changed; that in March, 1917, the plaintiff and Farr, president of the defendant company, were in negotiation about the timber on both this tract and another, no reference being made to the fee-simple title to the land; that in May, 1917, Farr wrote to the plaintiff to know whether or not the deal was off "for the purchase of the Peeples and Courtney tracts of timber," about which they had been negotiating in March, the Courtney tract being the one now in question; that in July, 1917, the plaintiff was at Farr's office in Columbia and opened negotiations for the purchase of the Mears tract which the defendant owned in fee; he admits that Farr proposed that if he would buy the Courtney timber at \$5,000 he would sell him the Mears tract for \$35,000; that in October, 1917, they again met in Columbia to close both deals, for the Mears tract in fee, and for the timber rights in the Courtney tract, the plaintiff yielding commissions of 10 per cent. on the Courtney deal in order to secure the Mears tract.

We are satisfied that neither party had any other thought than that, so far as the Courtney tract was concerned, the one was selling and the other buying only what the plaintiff knew the defendant possessed, the timber rights. After they met in Farr's office in Columbia and agreed upon both deals, an attorney was called in to prepare the contracts. The papers relating to the Mears deal were given to the attorney and the plat of the Courtney land. From a lack of information which should have been communicated to the attorney by either the plaintiff or Farr or both, or from a misunderstanding of directions, the attorney prepared the two contracts as if a sale of both tracts of land, and not the Mears tract and the timber rights

of the Courtney tract, was intended. The contracts in that form were signed up, apparently not having been read over by either party. The \$50 cash payment was made by the plaintiff, and each party received a copy of the contract. The remainder of the purchase price of the Courtney deal, \$4,950, was due November 17th. On the 12th, the defendant drew upon the plaintiff for this amount, payable on the 17th, attached a deed conveying the timber rights, and forwarded it through the banks for collection. Upon notification the plaintiff stated that he had given a third party an option upon the deal and the draft should have been drawn upon him. He does not appear to have called for an inspection of the deed, although he had had the contract in his possession for a month. Prior to that time Farr had discovered the mistake and called the plaintiff's attention to it; the plaintiff stating to him that he understood what he was buying, that is, only the timber rights, that he knew a mistake had been made, and that there would be no trouble. The plaintiff denies this statement, but it is corroborated by Mrs. Fairry, a stenographer for Farr at the time, and we are satisfied of its truth.

[4] 3. The appellant further contends that the circuit judge erred in decreeing a rescission of the contract, not upon the ground that there was no evidence of a mutual mistake, but no evidence of misrepresentation or concealment, and in this we think he is correct. The circuit court has misconceived the legal result of his findings of fact. He does not find that there was any fraud, misrepresentation, concealment, imposition, or other conduct on the part of the plaintiff which are the usual grounds for rescinding a contract. While we apprehend that such an instance of mutual mistake might be established as would avoid the contract ab initio, as when it related to the facts or supposed facts upon which it was based, and thus justify a decree of rescission, we do not think that the mutual mistake established in this case is of such character. The theory of the defendant, supported as we think by the evidence, is that there was a valid contract between them and the plaintiff for the sale and purchase of the timber rights, but that the written contract, the evidence of their agreement, does not express the terms of that agreement, but by mistake contains terms contrary to the common intention of the parties; that for that reason they are entitled to have the contract accordingly reformed, and to have it specifically enforced when thus reformed. The circuit judge was in error in decreeing a rescission of the contract as the following authorities show:

"To entitle the plaintiff to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he sought to have established, and that this intention was frustrated, either from some

fraud, accident, or mutual mistake of the parties." *Jackson v. Andrews*, 59 N. Y. 244; *Kilmer v. Smith*, 77 N. Y. 226, 33 Am. Rep. 613.

"Where an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfill the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the antecedent agreement of the parties." *Ivinson v. Hutton*, 98 U. S. 79, 25 L. Ed. 68.

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. * * * Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred." *Moffett v. Rochester*, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108.

"The courts will interfere where * * * the minds of the parties, * * * in the case of a written contract * * * did not meet on the terms expressed in the writing, but did meet on other terms not there appearing." 1 Story, Eq. Jur. (14th Ed.) pp. 181, 204 (notes).

"It follows that the mistake which it (the court of equity) may correct in such writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the drafting of the writing as makes it convey the intent or meaning of neither party to the contract." 1 Story, Eq. Jur. (14th Ed.) § 162.

"The phrase 'mutual mistake,' as used in equity, means a mistake common to all the parties to a written contract or instrument, and it usually relates to a mistake concerning the contents or the legal effect of the contract or instrument. A mutual mistake which will afford ground for relief from a contract by reforming it, means a mistake reciprocal and common to both parties when each alike labors under the misconception in respect to the terms of the written instrument." 1 Story, Eq. Jur. (14th Ed.) § 162.

"Where an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfill the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the agreement of the parties." 1 Story, Eq. Jur. (14th Ed.) § 159.

"If through mistake or accident the instrument has been incorrectly framed, or if the transaction is vitiated by illegality or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded." 1 Story, Eq. Jur. (14th Ed.) § 159.

4. The appellant further contends that rescission of the contract should not have been decreed for the reason that it was entered into by competent parties, at arm's length, and that they read or should have read it

before execution. Though scarcely raising the issue of negligence on the part of the defendant, we will consider the exception as fairly raising that issue. We have held above that rescission of the contract should not have been decreed, and will therefore consider this objection as applicable to the defendant's demand for a reformation of the contract.

[5] We are of the opinion that much of the confusion incident to this question would be dissipated, if it should be recognized as a distinct branch of equity jurisprudence to reform a written contract where it unquestionably appears that, contrary to the intention of both parties, it does not express the prior oral agreement of the parties in a material particular, irrespective of the cause of such discord. Where this discord appears, some one has blundered; if the paper was prepared by an attorney or scrivener, he has either not been sufficiently informed of the agreement of the parties by them, or has erroneously interpreted his information and directions; if not sufficiently informed, it was the fault of the parties; if when presented for their signatures they thought or assumed that no discord existed, their signing would be the result of their co-operative fault; if one of them discovered the discord and remained silent, it would be a fraud upon the other not to call attention to it. In any conceivable event, therefore, reformation would be decreed. Why then not recognize it as a distinct branch of equity jurisprudence and be relieved of the reduction of the facts to a case of mutual mistake? Such a reduction is to a large extent a matter of argument, if not fiction. As is said in a note, 1 Story, Eq. Jur. (14th Ed.) at pages 162, 206, speaking of mutual mistake in connection with this ground for reformation:

It is "not a perfectly accurate term for the case, as the mistake is in the writing, and not in the agreement. * * * This circumstance has often led courts to say that there must be a mutual mistake to authorize the reformation of a contract, when it is only necessary to say that the intention with regard to a term sought to be imported into the writing must be mutual, that is that that term has been part of the contract actually made."

In other words, if the contract does not express the terms of the prior agreement, contrary to the intention of both parties, a case for reformation is presented. Further the author of the note says:

"It is clear that it need not be shown, as necessary to this result either that the defendant (i. e., the party resisting the reformation, we interpolate) was mistaken concerning the written instrument, or that he was guilty of fraud in putting it or having it put into the improper form. He merely may have seen that it was not in conformity with the agreement and kept silent; but this will not prevent rectification on satisfactory evidence of what was agreed."

We are thoroughly convinced that the written contract did not express the terms of the parol agreement between the parties; that the discord was due to the fault of both parties in not sufficiently informing the attorney as to the terms of the agreement between them, or of his failure to properly interpret that information, and to the failure of both parties not to carefully read the contract before signing and to detect the discord; that both parties honestly believed at the time of the execution of the contract, or confidently assumed, that the written contract correctly stated the terms of that agreement.

[8] Under these circumstances, we assert that it would be a monstrous perversion of justice to deny the right of reformation upon the ground that the defendant was negligent in not reading the contract before signing it. It was as much the duty of the plaintiff to read the contract and see that it conformed to the agreement as it was the defendant's. If the plaintiff read it and discovered the discord and allowed the execution to proceed intending to take advantage of it, he does not assume a position that commends him to a court of equity. If he did not read it and thereby discover the discord, he himself was guilty of negligence. Is he to be relieved of the consequence of his negligence which was beneficial to him, and the defendant charged with the consequence of the same act of negligence which was prejudicial to him? In other words, is immunity from negligence to be determined by the fact of its beneficial consequences? The English authorities declare that relief based upon mutual mistake of fact is not to be refused on the ground that the party claiming it had the means of knowledge at the time of the mistake. See Story, Eq. Jur. (14th Ed.) p. 209. The author of the note pertinently states:

"It is conceived that the English rule is the correct one, so far as the mere question of failing to inquire is concerned; for how can a man be entitled to property by an unintended gift simply on the ground that the giver was negligent?"

The case of *Forrester v. Moon*, 100 S. C. 157, 84 S. E. 532, cited by appellant, is not at all controlling upon the facts of the case at bar. There the plaintiff owned property adjoining the railroad right of way. Her first idea was to lay off a street upon her own property, paralleled with the line of the right of way, subdivide her property into lots fronting on this street, and sell them. She had a plat made carrying out this idea. Afterwards she changed her mind and had a new plat made, omitting the street, and fronting the lots directly on the right of way. One of the lots she sold to the defendant. She then went with him to her attorney, presented to him the new plat, and directed him to draw a deed conveying the lot to the defendant,

which he did in her presence and that of the defendant, using the new plat which omitted the street. The deed was executed, drawn as she had directed her lawyer to draw it. The defendant paid the purchase price, had his deed recorded, and went into possession. The plaintiff then brought suit against the purchaser of the lot contending that there was a mistake in the deed, that she did not intend to convey up to the right of way, but to the street indicated on the first plat. Under these circumstances, even if she could have convinced the court that she had made a mistake which is extremely doubtful, she utterly failed to show that the purchaser had done so, or that her mistake was due to misconduct on his part, or to her own imbecility, or that other circumstances existed making it a very great wrong to sustain the deed. The court following the *Kennerty* Case held that the plaintiff was not entitled to a reformation of the deed.

The cases relied upon by the appellant, upon this question of negligence, are without exception, cases involving the mistake only of the party claiming reformation, cases of unilateral and not mutual mistake, as to which there does not appear to be any doubt of the application of the doctrine. *Kennerty v. Etiwan Co.*, 21 S. C. 226, 53 Am. Rep. 669; *Forrester v. Moon*, 100 S. C. 157, 84 S. E. 532; *Montgomery v. Scott*, 9 S. C. 20, 30 Am. Rep. 1; *Coates v. Early*, 46 S. C. 220, 24 S. E. 305; *Murrel v. Murrel*, 2 Stro. Eq. 148, 49 Am. Dec. 664; *Gilchrist v. Martin*, Bail. Eq. 494; *Lumber Co. v. Matheson*, 69 S. C. 91, 48 S. E. 111; *Baum v. Raley*, 53 S. C. 32, 30 S. E. 713; *Case Threshing Co. v. Dyches*, 108 S. C. 417, 94 S. E. 1051; *Baldwin v. Tel. Co.*, 78 S. C. 419, 59 S. E. 67.

The case of *Montgomery v. Scott*, 9 S. C. 20, 30 Am. Rep. 1, has little, if any, application to the facts of this case. It and all the cases cited in the opinion involve unilateral mistakes and the rights of innocent third parties. The kernel of the decision is in the following extract:

"The plaintiff knew that she was signing some kind of a written obligation, and if she, through carelessness or negligence, signed a paper of a different character from that which she intended, and that paper has been received by an innocent third person, for value, she ought not to be allowed, when called upon to respond to the obligations imposed by the terms of the paper," to contest her liability upon the ground of mistake.

The circuit judge should therefore have decreed a reformation of the written contract and specific performance by the plaintiff according to the terms of such reformed contract in harmony with the oral contract which preceded it.

Now this extraordinary situation is presented: The circuit judge decreed rescission of the contract; this court declares that to

have been erroneous; the circuit judge did not decree reformation and specific performance; this court declares that also to have been erroneous; the plaintiff has appealed from the order decreeing rescission; the defendant has not appealed from the order refusing reformation.

[7] In the consent order of reference there is a provision that, in consideration of the brief life of the timber contract held by the defendant, the timber be sold and the proceeds deposited in the bank, to await the final determination of this case; said proceeds to stand in lieu of the timber and timber rights without prejudice to the rights of either party. Pursuant to this and a subsequent order of the court, which does not appear to be objected to by the plaintiff, the timber and timber rights were sold for \$5,000 cash, and the proceeds deposited in the savings department of the Bank of Summerville, at interest, to the credit of this case and subject to and to await the final determination of the circuit court and its further orders in this cause. The parties have therefore by these orders, unobjected to, transferred the contest as to their respective rights under the contract, for damages on account of its alleged breach for a rescission of the contract for a reformation of the contract and specific performance, to the fund in bank. We hold that the plaintiff is not entitled to damages on account of the alleged breach, and it is apparent that whether the defendant be entitled to a rescission of the contract or a reformation of it, the result is the same; he is entitled to the said funds on deposit. It follows that the administrative portion of the decree is, in its result, the proper determination of the controversy.

The judgment of this court is that the judgment of the circuit court, subject to the conclusions herein announced, be affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(115 S. C. 448)

WEST v. SOVEREIGN CAMP, W. O. W.
(No. 10588.)

(Supreme Court of South Carolina. March 16, 1921.)

Insurance §755(1)—Knowledge that insured was working on train not basis of waiver or estoppel.

Where the laws of a fraternal beneficiary association specified certain occupations, including that of brakeman on a railway freight train, as hazardous occupations, for which additional dues were required, which one becoming a brakeman never paid, waiver or estoppel could not be predicated on the knowledge of officials of the local camp that he was "working on a train"; that not being specified as a hazardous occupation.

Appeal from Common Pleas Circuit Court of Spartanburg County; T. S. Sease, Judge.

Action by Frances West against Sovereign Camp, Woodmen of the World. From a judgment for defendant, plaintiff appeals. Affirmed.

H. E. De Pass and J. Hertz Brown, both of Spartanburg, for appellant.

Bomar & Osborne, of Spartanburg, for respondent.

FRASER, J. The appellant in her argument in this case thus states her cause:

"This action was commenced by the service of summons and complaint on June 2, 1919, and was heard before Hon. T. S. Sease and a jury at the May, 1920, term of the court of common pleas for Spartanburg county. The action was brought on a beneficiary certificate of insurance issued by the defendant, which was a fraternal beneficiary association, on the life of John Claud West, in which Frances West, his wife, the plaintiff, was named as beneficiary. The amount of the certificate was \$1,000, and the certificate also provided for the payment of \$100 for the erection of a monument to the memory of the insured. The certificate was issued subject to the terms of the constitution and by-laws of the defendant.

"The answer admitted the insurance and the death of the insured, but alleged that his certificate was void because, at the time of his death, the insured was not in good standing as a member of the defendant order, in that he had entered a hazardous occupation without giving, within 30 days thereafter, the required notice of change of employment to the clerk of the local camp of which he was a member and without paying to the said local clerk the sum of 30 cents per month in addition to the regular payment under his certificate, all of which, the answer alleges, is provided in the laws of the defendant order. The defendant then denies liability for both the amount of the insurance and the monument fund.

"At the trial, it was shown that insured had been a conductor on an electric street railway in Charleston for six years prior to January, 1918, and that this employment was known to the clerk of the local camp. It was shown also that insured became a brakeman on a Southern Railway freight train in January, 1918, and that while so employed, he was killed in a railroad accident on September 24, 1918; that in June or July, 1918, three or four months before his death, insured told the clerk of his local camp that he was 'working on a train,' but the clerk could not remember whether insured had stated that his new employment was as a brakeman or as a flagman and whether on a freight or a passenger train.

"Insured had always been particular about paying his dues, had frequently paid them in advance, and had paid them for September, the month of his death; but neither during the six years of his employment on a street railway nor during the nine months of his employment on a steam railway had he ever paid any additional hazardous occupation dues. Neither

had the local clerk, during any of this time, ever called on him for additional dues on account of his hazardous employment.

"The laws of the defendant order class the following among so-called hazardous occupations: 'Conductor or brakeman on railway freight trains, baggageman, locomotive engineer, locomotive fireman, expressman, switchman, hostler or other similar railway and steamship employee (excepting agents, office men and those engaged in employment not more hazardous.)'

"At the close of all the testimony, defendant moved for a directed verdict upon the grounds set out in the case, the substance of the grounds being (a) that insured was not in good standing at the time of his death and his certificate void because he had engaged in a hazardous occupation without giving the required notice within thirty days thereafter and without making the required additional monthly payments; (b) that there was no evidence of waiver of the forfeiture thus brought about; and (c) that there was no evidence sufficient to estop defendant from relying on the forfeiture.

"The motion was granted, and a verdict was directed substantially on the grounds (a) that the members of the local camp cannot waive any rights of the headquarters; and (b) that the superior officers of this insurance company did not know of insured's entering a hazardous occupation.

"Plaintiff's exceptions charge error in directing a verdict, the substance of the exceptions being that there was (a) error in holding that

there was no evidence of waiver to be submitted to the jury, whereas it was shown that the local clerk knew of insured's employment and continued to collect his regular dues after such knowledge without protest up to his death; (b) error in holding that the insurance was forfeited because the superior officers of the defendant did not know of deceased's hazardous employment, whereas, it is submitted, the knowledge of the local clerk, as the agent of the sovereign camp, was the knowledge of the sovereign camp; and (c) error in failing to submit the question of estoppel to the jury, whereas, it is submitted, the sovereign camp was estopped from denying liability on the ground of the failure of its agent, the local clerk, to perform his duties required by the laws of the order."

It thus appears that the record shows that the company itself had no knowledge of the extra hazard; that all that the local officers knew was that the deceased was "working on a train." Merely "working on a train" is not rated in the policy as an extra hazard, for which an extra premium was required. The extra hazardous employments are specified, and working on a train is not one of the specifications. There was no basis, therefore, for waiver or estoppel. There was no error in directing a verdict.

The judgment is affirmed.

GARY, O. J., and WATTS and COTHRAN, JJ., concur.

(181 N. C. 146)

**LONG et al. v. COMMISSIONERS OF
BRUNSWICK COUNTY. (No. 284.)**(Supreme Court of North Carolina. March 30,
1921.)**Counties** \Rightarrow 35(2)—Majority vote of qualified
electors required for removal of county seat;
"majority of qualified vote of county";
"vote."

For removal of county seat under Pub.
Loc. & Priv. Laws 1919, c. 263, there must
be a vote in favor of a particular place of a
majority of the qualified electors of the coun-
ty, whether voting or not, this being the mean-
ing of the statute's requirement of "a majority
of the qualified vote of the county"; vote be-
ing used in the sense of voters.

[Ed. Note.—For other definitions, see Words
and Phrases, First and Second Series, Major-
ity; Vote.]

Appeal from Superior Court, Brunswick
County; Daniels, Judge.

Action by W. A. Long and others against
the Commissioners of Brunswick County to
enjoin the removal of the county seat. From
judgment for plaintiffs, defendants appeal.
Affirmed.

The General Assembly of North Carolina,
at its regular session, 1919, passed an act
entitled "An act to submit to the voters of
Brunswick county the question of the loca-
tion of the county seat, and to provide county
buildings," same being chapter 263 of the
Public Local and Private Laws of 1919.
Under this act, the board of elections of
Brunswick county was authorized and direct-
ed to submit to the qualified voters of the
said county the question of whether the coun-
ty seat should be located at Southport, Bol-
ivia, or Supply. It was provided in said act
that in the event no one of these places re-
ceived a majority of the qualified votes of
Brunswick county in said election, then un-
der this statute a second election should be
held for a choice to be made between the
two places receiving the highest and the
next highest votes.

In the first election Bolivia received 624
votes, Supply, 562, and Southport, 406; and
it appears that 474 registered voters did not
vote in said election. No one place receiving
a majority of the qualified votes, a second
election was ordered to be held between
Bolivia and Supply. In this second election
Bolivia received 754, Supply, 370 votes, and
it appears that 1,003 registered voters cast
no ballot. The returns of said election were
duly canvassed and the result declared by
the board of commissioners of Brunswick
county on the 5th day of July, 1920, said
board declaring and designating Bolivia the
county seat of Brunswick county. This action
of the board of commissioners of Brunswick
county in declaring and designating Bolivia

as the county seat is attacked by the plain-
tiffs on the ground that a majority of the
qualified voters resident in Brunswick county
did not cast their ballots in favor of Bolivia,
either in the first or second election. It ap-
pears from the allegations of the complaint
that 754 qualified votes were cast in the
second election for Bolivia, the same being
a majority of the qualified votes polled, but
less than a majority of the total number of
registered voters in the county.

The whole case presents the question as to
whether it was necessary for Bolivia, in the
second election, to receive a majority of the
qualified vote, as cast, or the vote of a major-
ity of the total number of registered voters
in said county, in order to be declared the
county seat. The court then held that, be-
fore Bolivia could be declared the county
seat of Brunswick, it must have received the
favorable vote of a majority of the qualified
voters resident in said county, whether all
of them actually voted or not. The action
was brought to enjoin defendants from de-
claring Bolivia the county seat of Brunswick
county, or to take any action whatever for
the purpose of effecting a removal of the
county seat from its present location at
Southport. Upon the foregoing ruling, the
court gave judgment for the plaintiffs, citi-
zens, and taxpayers of Brunswick county,
enjoining the removal of the county seat.
Defendants appealed.

McLean, Varser, McLean & Stacy, of Lum-
berton, for appellants.

John D. Bellamy and Robert Ruark, both
of Wilmington, for appellees.

WALKER, J. (after stating the facts as
above). The only question necessary to be
considered is whether a removal to Bolivia
could take place, under the terms of the stat-
ute, unless a majority of all "the qualified
voters of Brunswick county" had actually
voted in favor of the same at the polls, or
whether a majority of those who voted at the
election was sufficient to authorize the re-
moval, and the decision of this question turns
on the meaning of the word "voters" as used
in the statute. If the words "qualified vote
or voters" is equivalent to "qualified elec-
tors," the judgment of the court below is
correct, as Bolivia did not receive a majority
of the qualified electors, or of the qualified
votes of the county, when the word "vote"
is taken in the sense of the registered vote,
or list of registered electors.

There may be, and perhaps is, apparent
conflict in the authorities elsewhere, but in
this state, and by this court, the meaning of
the words "a majority of the qualified voters
of a county" was finally settled long ago, and
that meaning must now prevail with us. In
Railroad v. Commissioners, 72 N. C. 486, the
very question we have here was presented.

There the plaintiff applied for a mandamus to compel the defendant to subscribe for 600 shares of the plaintiff's stock for the county, and to issue county bonds in payment thereof. An election was held to ascertain the will of the people and to get their approval thereof. Here the proposal is to remove the county seat from Southport (formerly Smithville), and for that purpose that the county shall incur a very large debt to pay the costs and expenses of the removal and the erection of new buildings; that is, \$60,000 or more. In *Railroad v. Commissioners*, supra, the object was to buy stock of the railroad company with bonds of the county, while in this case the purpose is to remove the county seat, and thereby to incur a debt for which the defendants are authorized to issue the bonds of the county. It will be seen, therefore, that this case and that of *Railroad v. Commissioners*, supra, are alike for all practical purposes, and are governed by the same principle. It was said in *Railroad v. Commissioners*, supra, by Justice Rodman:

"Our opinion as to the meaning of section 7 of article 7 of the state Constitution relieves us from the necessity of considering any of the other questions which were ably and learnedly discussed by counsel. That section is in these words: 'Sec. 7. No county, city, town or other municipal corporation, shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected, by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.' It is contended for the plaintiffs that these words mean a majority of the qualified voters therein, who actually vote at the election upon the question. It is not the natural meaning of the words used, but requires an addition of words to qualify and limit the generality of the expression. If the words used are so ambiguous as to be unintelligible without some addition (as were the words prescribing the tenure of a judge appointed to fill a vacancy, commented on by the Chief Justice, in the case of *Cloud v. Wilson* [ante, 155]), such addition must be made as may be found proper on a consideration of the context, and of all other circumstances bearing on it. But to add limiting or qualifying words is not in general permissible, or except for very strong reasons, when the words used contained an intelligible description of the object. The word 'therein' is important. It means 'in the county,' and the phrase may then be read as, 'a majority of the qualified voters of the county.'"

And likewise in *Duke v. Brown*, 96 N. C. 127, 1 S. E. 873, Chief Justice Smith says that it was not intended to dispense with the approval of a majority of the qualified voters, and allow a minority, or inconsiderable fraction it might be, to determine the result. Indifference, he says, is not the test, but an "active and expressed approval is necessary, and this is ascertained by a majority of those entitled to vote," and he further says that,

however numerous the contrary rulings in other states, we must adhere to our own construction of the words "qualified voters" as being necessary to protect our people. To the same effect are *Southerland v. Goldsboro*, 96 N. C. 49, 1 S. E. 760, *McDowell v. Construction Co.*, 96 N. C. 514, 2 S. E. 351, *Norment v. Charlotte*, 85 N. C. 387, and *Clark v. Statesville*, 139 N. C. 490, 52 S. E. 52, where the words "qualified voters" have been used in different connections. It is a rule applicable to the construction of statutes that, where they make use of words which have definite and well-known sense in the law, they are to be received and expounded in the same sense in the statute. *Asbury v. Albemarle*, 162 N. C. 247, 78 S. E. 146, 44 L. R. A. (N. S.) 1189, citing *Adams v. Turrentine*, 30 N. C. 149. As said by a very able and learned judge, whose opinion is entitled to the greatest weight, "the literal meaning of the clause (majority of the qualified voters) seems to me unmistakably to require a majority of the qualified voters, whether they voted or not." The Supreme Court of the United States adopted this view in *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747, by a unanimous opinion written by Justice Bradley. It is true that court afterwards in *County of Cass v. Johnston*, 95 U. S. 860, 24 L. Ed. 416, overruled the former case as to this point, but only for the reason that the court had, in that case, overlooked the decision of the Supreme Court of Missouri, from which both cases came, upon the question, by which Chief Justice Waite said they were bound, but no indication whatever is given in the opinion by him in the later case that any of the Justices concurring in the former opinion had abandoned, or even abated, his own individual view of the matter, but there is room for clear inference that there had been no such change of mind. Two of the judges dissented, Bradley and Miller, Justice Bradley writing an able opinion, if not unanswerable, and both he and Justice Miller expressly adhering to their first opinion, and dissenting from the last opinion upon the ground that not even the Missouri cases had given any contrary meaning to the phrase we are considering, and therefore the general rule of procedure did not apply, and the court was free to express, and enforce, its own independent opinion, and to give effect to its own construction of the statute, and also, upon such construction, to declare its invalidity. The case of *State ex rel. Woodson v. Brassfield et al.*, 37 Mo. 331, directly sustains our conclusion.

We do not agree that the use of the word "vote" instead of "voters" should make any difference in the result. It means substantially the same thing. The words "vote" and "voters" are inaccurately used to express what is manifestly the meaning as heretofore held by us. "Vote" is the choice expressed at the ballot box, "ballot" the means

by which it is expressed, and "voter" the person who expresses it. The proper, or more exact, word, perhaps, would have been "electors," instead of "voters" or "vote" in the phrase "a majority of the qualified voters or vote." But the intent and meaning of the Legislature is just as clear with either word, and the legislative will is not to be disappointed by the lack of rhetorical, or verbal, accuracy, if the meaning and intention are plainly disclosed. 36 Cyc. 1114-1127. But without the aid of any authority, or decided case, we are of the opinion that it was intended by the Legislature that all of the "qualified electors" should be counted in ascertaining whether a majority of those entitled to vote, and called "qualified voters," or "qualified vote" in the act, had actually voted.

The judgment of the court directing a permanent injunction was correct.

Affirmed.

STACY, J., having been of counsel, took no part in the decision of this case.

(181 N. C. 537)

STATE v. HALL. (No. 275.)

(Supreme Court of North Carolina. March 30, 1921.)

1. Criminal law \S 1038(1)—Timely objection to judge's statement of contentions necessary for review.

That there may be review of the judge's manner of stating to the jury the contentions of the parties, objection must have been made in time for him to make any needed correction.

2. Criminal law \S 957(1)—Verdict not impeachable by testimony of jurors.

A verdict cannot be impeached by the testimony of jurors, especially where the only witness by whom this could be met is dead.

Appeal from Superior Court, Cumberland County; Daniels, Judge.

George Hall was convicted of a secret assault, and he appeals and petitions for certiorari. No error, and petition denied.

W. C. Downing, McCormick & Clark, and Robinson & Robinson, all of Fayetteville, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. The defendant was convicted of a secret assault, and from the judgment upon such conviction he appealed to this court, and assigns several errors.

[1] First. That his contentions were not stated, though the state's were given in full. This exception is not supported by the record, which shows that the contentions of both

sides were stated by his honor with fairness and impartiality. Besides, the objection, or rather suggestion, came too late. We have often held that such an objection must be made in apt time, so that the court may have opportunity to supply any omission. The proceedings of the court must be conducted in an orderly manner, and, of course, all objections should be made at the proper time, and especially an objection of the kind here made. The latest case on the subject is *McMahan v. Spruce Co.*, 180 N. C. 636, 105 S. E. 439, where other authorities are cited. It is there held that an exception to the manner of stating contentions of the parties must be brought to the attention of the court by action taken promptly and for the obvious purpose of having the omission, if there is one, corrected by the presiding judge at the time. There was no proper request to correct this oversight, if there was any, in the respect indicated.

Second. The contention as to the absence of a motive for the assault was stated to the jury in such a way that they must have understood it. The state contended that there was a motive for committing the assault, and the defendant denied that there was any such motive, or any evidence of one, and the judge explained these contentions pro and con to the jury, stating both phases of it, and certainly allowed neither side any advantage in the statement. The jury could not well have misapprehended the court, and the defendant's rights were fully protected. He therefore suffered no harm.

[2] Third. The power of the court to set aside a verdict for cause after the adjournment is discussed in *State v. Alphin*, 81 N. C. 566, *State v. Bennett*, 93 N. C. 503, and *State v. Kinsauls*, 126 N. C. 1095, 36 S. E. 31. But we need not refer to this feature of the case any further, and will assume, for the sake of argument, that we have possession of the cause sufficiently to grant relief, if the appellant is entitled to any, and we think he is not. He seeks to set aside the verdict, because of misbehavior of the jury, and proposes to impeach their verdict by their own affidavits. This is not allowable, as we have repeatedly decided in former cases, and his honor, Judge Daniels, so held, and was, of course, right in so deciding. Justice Bynum said, in *State v. Smallwood*, 78 N. C. 560:

"Misconduct on the part of the jury to impeach their verdict must be shown by other testimony than their own. This has been long settled and for the most convincing reasons, which will readily suggest themselves to all minds at all familiar with the administration of justice through the medium of trial by jury"

—citing *State v. McLeod*, 8 N. C. 344, where Judge Henderson said:

"As to the misconduct of the jury, it has been long settled, and very properly, that evidence

impeaching their verdict must not come from the jury, but must be shown by other testimony. We can therefore perceive no grounds for a new trial."

In *State v. Best*, 111 N. C. 638, 15 S. E. 930, much like this one, Justice MacRae stated the rule very strongly when he said:

"To meet the earnest contention of the prisoner's counsel that the presiding judge, having permitted the affidavits to be filed, ought to have found the facts and spread them upon the record, it appears that the affidavit offered alleges, or was intended to allege, that the affiants had agreed to the verdict of guilty through mistake in their understanding of the effect of the verdict. In this event, as has been said above, the Supreme Court cannot correct errors committed by a jury. This is the province of the judge below, and therefore it was unnecessary for his honor to find the facts upon the affidavits. But it might well be held that the affidavit, if we were at liberty to consider it, alleges misconduct upon the part of the five jurors making it, for, if they were not satisfied by the evidence of the guilt of the prisoner, it was a gross wrong in them, for any consideration of personal inconvenience, to compromise with the other members of the jury and agree to a verdict of guilty, with a recommendation to mercy, in the hope that the life of the prisoner would be spared at the cost of a long imprisonment. If they were not satisfied of the prisoner's guilt, the only verdict they could conscientiously render would have been one of not guilty. And if the ground of the motion was the misconduct of the jurors, it should, as we have seen, have been based upon other testimony than the affidavits of the jurors who alleged their own misconduct, for they cannot be heard, and no facts could be found by the judge below upon their affidavit."

And again:

"We find ourselves concluded by the authority of an established and long-settled rule, based upon the wisest reasons of public policy, that a juror should not be permitted to impeach his own conduct in the rendition of a verdict. The result of a departure from the old rule would unsettle other important principles, protract litigation, and weaken the public regard for the ancient and well-tried methods of trial by jury."

It was deemed necessary to discuss this matter somewhat at length, with a citation of a few leading cases, in order to prevent inferences from some of the general language used in *State v. Fuller*, 114 N. C. 835, 19 S. E. 797, which we think are unwarranted, but which may lead to confusion and a correct understanding of the law in cases belonging to same class as this one. It would lead to very grave consequences if we should permit jurors to impeach their own verdict. It would render judicial trials unstable, and soon undermine public confidence in the integrity of our courts and the justice of their decisions.

In this respect, at least, we had better take

heed of the ancient landmarks, and follow the precedents so firmly established by those who have gone before us. The rule should be especially applicable to this case, where the only witness upon whose testimony the state could possibly, or safely, rely is dead, and any decision must necessarily rest upon the impeachment of jurors alone. But it appears that what the jurors did has worked no substantial harm to the defendant. Language of the presiding judge, much stronger and more emphatic than that which the jurors here supposed the judge had used, but which he did not use, was held by this court, in a former case, not to impair the verdict. *Osborne v. Wilkes*, 108 N. C. 615, 13 S. E. 285. But the decisive test is that some of the jurors are attempting to impeach their own verdict and to state the mental process by which they reached their verdict.

No error.

PER CURIAM. The petition for a certiorari in this case is denied, for the reason set forth in the opinion filed in this case on the merits.

Denied.

(181 N. C. 120)

ALLEN v. CAMERON. (No. 251.)

(Supreme Court of North Carolina. March 23, 1921.)

Willis §587(3)—Daughter named as residuary "legatee" held entitled to realty as well as personalty; "legacy."

Under a will whereby testator, to provide for any omission, declared his daughter to be residuary legatee, to receive and take all that should be omitted, or that should fall in and become his, with further provision that she should have paid her full child's part on the division of his personal property, without any deduction for advances, such daughter took, not only the undisposed-of personalty of testator, but also the undisposed-of realty; such being his intention, in view of the clause itself and the remainder of the will, "legacy" including a devise, and "legatee" a devisee, if necessary.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Legacy*—*Legatee*.]

Appeal from Superior Court, Wake County; Kerr, Judge.

Action by W. M. Allen against Bennehan Cameron. From a judgment for defendant, plaintiff appeals. Affirmed.

This is a civil action, brought by W. M. Allen against Bennehan Cameron for the specific performance of a written contract, whereby Mr. Cameron agreed to sell to W. M. Allen, and said Allen agreed to buy from him, a house and lot in Raleigh, N. C., on

East Jones street, at the price of \$8,000 in cash. The defendant Cameron, in apt time, tendered the deed from him and his wife to said Allen, and demanded the payment of the sale price of \$8,000. Mr. Allen made no objection to the form of the deed, or that the property was not free from incumbrance, but refused to accept the deed, or to pay the sale price, solely on the ground that item 16 of the will of Mr. Paul C. Cameron did not pass said house and lot to his daughter, Mildred Cameron, who devised the same to defendant, Bennehan Cameron, and hence that the defendant, Bennehan Cameron, did not have and could not convey a good title to said house and lot; the said Allen contending that the words "residuary legatee" in item 16 passed undisposed-of personal property alone, but did not pass undisposed-of real estate, while the defendant, Cameron, claimed that item 16 passed undisposed-of real estate also, including the house and lot in question.

The house and lot was owned by Paul C. Cameron at the time of his death, but is not specifically mentioned in his will, and there is no other residuary clause in the will except item 16. Mr. Paul C. Cameron wrote his own will. Item 16 of the will of Paul C. Cameron is as follows:

"Item 16. And to provide for any omission I name and declare my daughter, Mildred Cameron, the residuary legatee, to receive and take all that shall be omitted, or that shall fall in and become mine, either in law or equity, and that she shall be paid her full child's part on the division of my personal property, without any deduction for any advances, as she has needed none and received nothing beyond what she deserved for her care of her parents, and as a member of my family."

The court below rendered judgment in favor of the defendant, and held that item 16 of the will of Paul C. Cameron did pass the house and lot to Mildred Cameron, and that her will devised the same to the defendant, Bennehan Cameron, and therefore that he was the owner in fee simple of the same, and that, upon his tendering to the plaintiff a deed in sufficient form to pass title in fee to the house and lot free from incumbrances, the plaintiff should accept the same and pay the sale price of \$8,000 over to the defendant.

The plaintiff excepted and appealed, and filed six exceptions and assignments of error set out in the record. All of plaintiff's exceptions and assignments of error are based upon his contention that the court erred in holding that item 16 of the will of Paul C. Cameron operated to make his daughter, Mildred Cameron, his residuary devisee as well as residuary legatee, and that the house and lot passed to her; it being conceded that, if she acquired the title to the house and lot, it passed by her will to the defendant, and that he is now the owner in fee of the same, and that the deed already tendered by him

is fully sufficient to convey the house and lot to plaintiff in fee. Therefore all of plaintiff's exceptions and assignments of error will be considered together.

The only question is as to whether item 16 of the will of Paul C. Cameron passed to his daughter, Mildred Cameron, the undisposed-of real property as well as the undisposed-of personal property.

R. N. Simms, of Raleigh, for appellant.

Ernest Haywood, of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). We have no doubt as to what Mr. Cameron meant by the language employed in the residuary clause of his will. It is clear from the preamble, or introductory clause, that he intended to dispose of all that he owned or possessed, and not to die intestate as to any part of his large estate. He disposed of the larger part of it with great care and particularity, and when he came to the final clauses, thinking that he may have inadvertently overlooked some part of it, he inserted the residuary clause to provide for any such omission on his part. This is generally the intention of a testator in making such a provision, and is the peculiar office of a residuary clause. It will embrace anything not before disposed of in the will, both real and personal property, unless there are words used to restrict its meaning. Perusing the entire will of Mr. Cameron, and comparing all of its parts with each other, we are led to the conclusion that he has expressed his intention throughout with unusual clearness and precision; with the clear understanding of the other parts of his will, in which he provides for all those whom he regarded as the proper objects of his bounty and solicitude, he then takes precaution against the contingency of anything being left out, which shows additionally that he intended to dispose of everything he had, and this also is according to the presumption of fact which the law raises, for Justice Ruffin said in *Reeves v. Reeves*, 16 N. C. 386:

"It is to be remembered that every testator is presumed not to intend to die intestate, as to any part of his estate, and, therefore, that a residuary clause is always, unless expressly restrained, held to pass whatever is not otherwise disposed of. If there was nothing particular, therefore, in this will, there could be no question."

See, also, *Powell v. Wood*, 149 N. C. 235, 62 S. E. 1071; *Austin v. Austin*, 160 N. C. 367, 76 S. E. 272; *Homes v. Mitchell*, 6 N. C. 228, 5 Am. Dec. 527; *Williams v. McComb*, 38 N. C. 450; *Page v. Foust*, 89 N. C. 447; *Foil v. Newsome*, 138 N. C. 115, 50 S. E. 597, 3 Ann. Cas. 417; *Jones v. Myatt*, 153 N. C. 225, 69 S. E. 135; *Norris v. Durfey*, 168 N. C. 325, 84 S. E. 687.

Cases in other jurisdictions are to the like

effect. *Wilson v. Wilson*, 261 Ill. 174, 103 N. E. 743; *Russell v. Elden*, 15 Me. 193; *Bacon v. Bacon*, 55 Vt. 243; *Yopp v. Railroad*, 148 Ga. 539, 97 S. E. 534.

Justice Story in *Burwell v. Cawood*, Executor of Mandeville, 2 How. 560, 577, 11 L. Ed. 378, 385, considered a case very much like ours, and thus said, after referring to certain legal principles and to the testator's intention, as disclosed by his will, when read in the light of these principles:

"There can, we think, be no doubt that the testator intended by his will to dispose of the whole of his estate, real and personal. The introductory words to his will, already cited, show such an intention in a clear and explicit manner. * * * He therefore looks to the disposal of all the estate he shall die possessed of. It is said that, admitting such to be his intention, the testator has not carried it into effect, because the residuary clause declares John West his 'residuary legatee' only, and not his residuary devisee also, and that we are to interpret the words of the will according to their legal import as confined altogether to the residue of the personal estate. This is, in our judgment, a very narrow and technical interpretation of the words of the will. The language used by the testator shows him to have been an unskillful man and not versed in legal phraseology. The cardinal rule in the interpretation of wills is that the language is to be interpreted in subordination to the intention of the testator, and is not to control that intention, when it is clear and determinate. Thus, for example, the word 'legacy' may be construed to apply to real estate, where the context of the will shows such to be the intention of the testator."

He then cites some of the English cases. *Hope v. Taylor*, 1 Burr. Rep. 269, where the word "legacy" was held to include lands, from the intention of the testator, deduced from the context of his will; and *Hardacre v. Hash*, 5 Term Reports, 716, where a like doctrine was announced upon similar facts. *Doe, dem Toffield, v. Toffield*, 11 East, 246, and *Pitman v. Stevens*, 15 East, 505, were to the same effect. He treats the law as settled upon this point. The above English decisions have been followed by the courts of this country, and especially by this court.

We may therefore take the general rule to be unquestioned that, where it appears to be the intention of the testator, the word "legacy" may include "devise," and "legatee" a "devisee," so that a "residuary legatee" would take land as well as personalty. In the following cases the words "residuary legatee" were used by the testator and held by the court to have the same meaning as if they had been "residuary legatee and devisee." *Evans v. Crosbie*, 15 Sim. 600, 60 Eng. Rep. 753; *Estate of Henderson*, 161 Cal. 354, 119 Pac. 496; *Dann v. Canfield*, 197 Mass. 591, 84 N. E. 117, 14 Ann. Cas. 794; *Day v. Daveron*, 12 Sim. 200 (59 Eng. Rep. 1108); *Wilds v. Davies*, 1 Smale & Giffard, 475 (65 Eng. Rep.

Rep. 208); *Laing v. Barbour*, 119 Mass. 523; *Singleton v. Tomlinson*, 3 Appeal Cases, 404. So it is seen that the current of authority is decidedly in one and the same direction.

But the language of the residuary clause is itself sufficient to show the intention of the testator. He first declares that he wishes "to provide for any omission" and therefore appoints his daughter, Mildred Cameron, his "residuary legatee"—"to receive and take all that shall be omitted or that shall fall in (or lapse) and become mine." Nowhere does he restrict this gift to personal property, but uses general words, such as "any" and "all," which included his property of every kind not expressly given to another, or which reverts to him by reason of a lapse on account of the death of any beneficiary during his lifetime. He could not have written a more inclusive or comprehensive clause. The subsequent reference to her child's part in the division of the personalty (already provided for) was inserted, in order to make it clear that he intended that the daughter should be treated with special favor, and that there should be no deduction from her child's share in the personalty when the division of it was made as before directed, on account of any advancement he had made to her. The latter part of the clause was not intended to limit the words of the first part, by confining the latter to personalty alone, but was inserted there for a very different purpose. He assigns the reason for thus favoring his daughter, which is that no real advancements had been made—

"as she had needed none, and had received nothing beyond that she deserved for her care of her parents and as a member of my [his] family."

There can be no doubt as to the true construction of Mr. Cameron's will, if there was room for it. Where the meaning is plain, or without any ambiguity, no construction is required; but we simply enforce the intention as it is clearly expressed, and, for this reason, further discussion would be useless, and we would end it here, but for the fact that this court has once passed upon this will some years ago, in construing another clause of it, and in the opinion of the court reference also was made to this residuary clause, which is pertinent to this case and deserves some attention from us. The court there said:

"It is a presumption of fact that every man that makes a will intends to dispose of all of his estate. *Blue v. Ritter*, 118 N. C. 580; *Jones v. Perry*, 38 N. C. 200. This presumption may be rebutted, but it stands until it is rebutted. It is therefore presumed that Mr. Cameron did not intend to die intestate as to this large body of land, amounting to some 800 acres. And, besides this presumption the law makes, we have other evidence in the will tending to show that he did not intend to die intestate as to any part of his estate. We find

that in the sixteenth item of his will he says: 'And to provide for any omissions I name my daughter Mildred the residuary legatee.' But she is to have her full share, and not to account for anything she may receive under this residuary clause." *Peebles v. Graham*, 128 N. C. 222, 39 S. E. 25.

The sixteenth clause is the one now under consideration. It appears from the above excerpt from the opinion of the court in the case that our Brethren of that day regarded clause 16 as referring to both realty and personality. They were considering whether a tract of land containing about 800 acres had been sufficiently described to pass to the defendant under the will, but the court was unanimous in the opinion that Mr. Cameron did not die intestate as to any of his property, but that it all, realty and personality, had passed under specific devises and bequests, and, if not, then under the residuary clause. But we do not agree to the suggestion in that opinion that the reference at the close of the quotation referred "to anything she received under the residuary clause," but solely to money or property given to her in the testator's lifetime, which, but for his explicit direction in the residuary clause, might be taken, and charged against her, as advancements.

Our conclusion is that, upon the facts stated in the record, this property passed to Mildred Cameron by her father's will, and by her will it passed to the defendant, and that the latter is now the owner thereof, and can convey a good and indefeasible title thereto to the plaintiff by the deed which the court has required him to execute.

There is no error, and we affirm the judgment.

Affirmed.

(181 N. C. 151)

COTTON v. FISHERIES PRODUCTS CO. et al. (No. 286.)

(Supreme Court of North Carolina. March 30, 1921.)

1. Trial \S 252(20)—Instruction stating contention was unsupported by evidence did not submit such contention.

A charge mentioning contentions of plaintiff that he was entitled to certain special damages, but stating that no evidence had been offered to support this position, was not objectionable as calculated to create in the jurors' minds an impression that the court thought the evidence sufficient to submit the question to them.

2. Libel and slander \S 120(2)—Punitive damages held warranted.

Where defendant corporation's manager told plaintiff in the presence of listening observers that he had orders from the corporation's president not to allow plaintiff to remove

household goods until searched for stolen goods, the accompanying acts, in causing plaintiff's goods to be opened publicly and searched in the presence of divers persons, gave such pronounced color and tone to the entire setting of the case as to warrant the jury in assessing exemplary damages.

3. Damages \S 87(1)—"Smart money," or "punitive damages," allowable for malicious, wanton, or reckless injury.

"Punitive damages," sometimes called "smart money," are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner, where defendant's conduct is either actually malicious or wanton, displaying a spirit of mischief toward plaintiff, or of reckless and criminal indifference to his rights; such damages being awarded on the grounds of public policy, for example's sake, and not because plaintiff has a right thereto.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Punitive Damages; Smart Money.]

4. Damages \S 208(8)—Punitive damages for jury.

In a proper case, both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury.

5. Libel and slander \S 32, 123(6)—Defendants not exonerated by ineffectiveness of slander.

That plaintiff's standing in the community had not been impaired by defendants' conduct, and that plaintiff could still show a good character, held not to exonerate defendants from their wrongful purpose, as this might tend to show a smaller injury actually sustained, but a greater damage really intended, and the malice, ill will, and spite of defendants were not per se reduced or mitigated by the meager results accomplished.

6. Libel and slander \S 113, 120(1)—Distinction between compensatory and punitive damages stated.

In a slander action, "compensatory damages" are based upon injuries suffered by plaintiff, while "punitive damages" are awarded upon wrongs intended by defendants; but the amount of punitive damages, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compensatory Damages.]

Appeal from Superior Court, Brunswick County; Daniels, Judge.

Civil action for slander, brought by J. K. Cotton against the Fisheries Products Company and Thomas H. Hayes and H. B. Therian, president and manager, respectively, of said corporation. Upon motion duly made, the court directed a verdict in favor of the defendant Thomas H. Hayes, and there was a verdict against the other two defendants for damages in the sum of \$6,500. His honor reduced this award to \$3,500, and entered

judgment in favor of plaintiff for said amount. The defendant corporation and H. B. Therian excepted and appealed. No error.

Rountree & Carr, of Wilmington, and C. Ed. Taylor, of Southport, for appellants.

Robert W. Davis, of Southport, and John D. Bellamy & Sons, of Wilmington, for appellees.

STACY, J. This cause was before the court at a previous term and is reported in 177 N. C. 56, 97 S. E. 712. The first appeal was from a judgment overruling defendants' demurrer. This was affirmed, and the case is now before us upon exceptions noted on the trial. The material allegations, which, upon the hearing, were supported by evidence, and the principles of law arising thereon, are fully set out and considered in the former opinion of the court and need not be repeated here.¹ The case seems to have been tried in accordance with the opinion heretofore rendered and the same doctrine more recently announced in *Vincent v. Pace*, 178 N. C. 421, 100 S. E. 581. The only exceptions deserving special attention are those relating to the charge on the issue of damages.

[1] The plaintiff alleged and contended that he had suffered special damages, in that certain business negotiations, which he had on hand, were broken up as a result of the defendants' alleged wrongful acts. The court, in its charge to the jury, took occasion to mention these contentions of the plaintiff, but stated that no evidence had been offered to support this position, as there was no testimony tending to show that the matters and things complained of in this case had been brought to the attention of the parties with whom plaintiff was negotiating. Defendants excepted to this portion of the charge, on the grounds that the giving of a contention, not warranted by the evidence, was calculated to create in the minds of the jurors an impression that the court thought the evidence was sufficient to submit the question to them. We are unable to agree with this conclusion. The court's statement that the plaintiff was making a contention, unsupported by evidence, would hardly be considered hurtful or prejudicial to the defendants. This was tantamount to saying that the plaintiff's con-

tentions, to this extent, were not well founded. The exception must be overruled.

[2] The defendants' eighth and last exception relates to the charge on punitive damages. The basis of this assignment is that there is no evidence from which the jury would be justified in awarding such damages, and that it was therefore error to instruct them upon the subject. We think his honor properly submitted this phase of the case to the jury for their consideration. Not only did the language of defendant's employees amount to a charge of larceny, actionable per se under our law, but the accompanying acts, in causing plaintiff's goods to be opened publicly and searched in the presence of divers persons, gave such pronounced color and tone to the entire setting of the case as to warrant the jury in assessing exemplary damages. *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. 342.

[3, 4] Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendants' conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendants. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. In a proper case, like the one at bar, both the awarding of punitive damages, and the amount to be allowed, if any, rest in the sound discretion of the jury. *Cobb v. Railroad*, 175 N. C. 132, 95 S. E. 92; *Fields v. Bynum*, 156 N. C. 413, 72 S. E. 449; *Hayes v. Railroad*, 141 N. C. 199, 53 S. E. 847; *Smithwick v. Ward*, 52 N. C. 64, 75 Am. Dec. 453.

[5, 6] The fact that plaintiff's standing in the community has not been impaired by defendants' conduct, and that he can still show a good character, does not exonerate the defendants from their wrongful purpose. This might tend to show a smaller injury actually sustained, but a greater damage really intended. The malice, ill will, and spite of the defendants are not per se reduced or mitigated by the meager results accomplished. Compensatory damages are based upon injuries suffered by the plaintiff, while punitive damages are awarded upon wrongs intended by the defendants. However, the amount of punitive damages, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case. *Gilreath v. Allen*, 32 N. C. 67; *Sloan v. Edwards*, 61 Md. 100; *Bernheimer v. Becker*, 102 Md. 250, 62 Atl.

¹ The opinion in the former report (177 N. C. 56, 97 S. E. 712) says:

"The complaint, in effect, alleged that just prior to the slanderous utterance plaintiff had been the general manager of defendant company's oil and fertilizer business, and had done his duty honestly and faithfully; that, having left the employment of the company, he was in the act of having his household goods moved to the dock, with a purpose of being placed on the boat, when the bearers were stopped by direction of defendant Harry B. Therian, present manager, acting under orders of his codefendant, the president, the goods opened and searched, accompanied by the statement, in the hearing of divers persons, that plaintiff was suspected of having taken the property of defendant company, consisting of towels, bed sheets," etc.

526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356.

We have carefully examined the record, the defendants' exceptions, and assignments of error, and find no sufficient reason for disturbing the results of the trial.

No error.

(181 N. C. 126)

BURCH v. J. D. BUSH & CO. (No. 253.)

(Supreme Court of North Carolina. March 26, 1921.)

1. Contracts §309(2), 311—Executors and administrators §202½—Rule of survival of obligation of contract stated.

Contracts bind a party's executor or administrator, though not named therein, and death does not absolve a contractor from his engagement, an exception being that in contracts requiring the continued existence of a person or thing a condition is implied that the impossibility of fulfillment arising out of the death of the person or destruction of the thing shall excuse performance.

2. Contracts §311—Personal contracts die with contractor.

Contracts of a strictly personal nature, involving particular personal skill or taste, such as a contract of an author to write a book, an artist to paint a picture, etc., die with the person, and the obligation does not survive against his representative.

3. Contracts §311—Whether contract is one surviving a party one of intention.

Where the contract is of such a nature that it may have been intended either to survive or not to survive a party's death, the question of survival of obligation depends on the intention of the parties, and in every case is purely a question of their understanding and agreement.

4. Contracts §311—Executors and administrators §202½—Contractor to cut tract and manufacture lumber survives against contractor's administratrix.

Contract by plaintiff's intestate to cut a certain tract of standing timber and manufacture it into lumber as per specifications held such that its obligation survived the contractor's death as against plaintiff administratrix.

5. Executors and administrators §426—Personal representatives of deceased contractor who offered to perform entitled to recover on quantum meruit.

Where the personal representatives of a deceased contractor in good faith offered to complete his contract, and the other parties refused to accept it, and declined to permit the personal representatives to proceed, they are relieved from further performance, and entitled to an accounting and recovery as upon a quantum meruit.

6. Executors and administrators §202½—By abandonment surviving contractor forfeits right to call on representatives of other party.

The surviving party to a contract may abandon and thus forfeit his right to call upon

the personal representatives of the other party to continue with the agreement, and in such case he cannot hold decedent's estate liable for damages occasioned by his own effort to fulfil the contract.

7. Executors and administrators §450—Evidence of overpayments by contractor with decedent admissible to show payments under mistake of fact.

In suit by the administratrix of a deceased contractor to recover a balance withheld, evidence of overpayments for which defendant counterclaimed was competent to show payments made under a misapprehension or mistake of fact.

Appeal from Superior Court, Franklin County; Kerr, Judge.

Action by Maggie E. Burch, administratrix, against J. D. Bush & Co. From judgment for plaintiff, defendant appeals. New trial.

Civil action brought to recover moneys alleged to have been withheld on a logging and sawmilling contract.

On December 16, 1915, plaintiff's intestate entered into a written contract with the defendant whereby he undertook to cut a certain tract of standing timber and manufacture the same into lumber as per specifications set out in the written agreement; the work to be completed within 18 months. It was stipulated in the contract that the cutting and sawing of said timber was to be paid for as the work progressed, settlements to be made every 2 weeks; and the defendant was given the right to reserve and hold back 10 per cent. of the amount due on the lumber delivered as a guaranty for the satisfactory fulfillment of the contract.

In August, 1916, plaintiff's intestate was accidentally killed at his sawmill while engaged in carrying out his contract with the defendant. Plaintiff alleges that at the time of the death of the intestate the defendant had in its hands the sum of \$445.22 as moneys reserved on lumber manufactured and delivered up to that date. The defendant answered and alleged that upon a proper accounting between the parties, up to the date of the death of plaintiff's intestate, it would appear that the defendant had made overpayments to the amount of \$282.19 and asked for an affirmative judgment against plaintiff for this sum. Later the defendant filed an amended answer and set up by way of further defense and counterclaim that the defendant had suffered damages in the sum of \$1,126.77 as the difference between the contract price and what it cost the defendant over and above that price to have the remainder of the timber cut and manufactured into lumber.

His honor, being of opinion that the contract was personal to plaintiff's intestate,

and that his death relieved his representatives from further fulfillment, and also being of opinion that the fortnightly settlements were binding between the parties, excluded evidence which the defendant proposed to offer on its counterclaims and directed a verdict in favor of the plaintiff. Defendant accepted and appealed.

Willis Smith, of Raleigh, for appellant.

Wm. H. & Thos. W. Ruffin, of Louisburg, for appellee.

STACY, J. We think his honor erred in holding, as a matter of law, that the contract in question was personal, and that further performance was not required after the death of plaintiff's intestate.

[1] The general rule is that contracts bind the executor or administrator, though not named therein, and that death does not absolve a man from his engagements. There is an exception, however, to this general rule, equally well established, that in contracts requiring the continued existence of a given person or thing a condition is implied that the impossibility of fulfillment arising out of the death of the person or destruction of the thing shall excuse the performance. *Stagg v. Land Co.*, 171 N. C. 583, 89 S. E. 47; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578; *Mendenhall v. Davis*, 52 Wash. 169, 100 Pac. 336, 21 L. R. A. (N. S.), 914, 17 Ann. Cas. 179, and note.

[2] The line of demarcation between a personal contract, which is terminated by death, and one which the personal representatives of the deceased are required to fulfill, is not very clearly defined. The reasons for this become obvious and apparent upon a moment's reflection. Two elements which enter into the making of a contract, namely, the intention and understanding of the parties, are not subject to any fixed standard of "weights and measures." They are invisible and intangible things, variable with time and place, and undeterminable by any constant or set formula. Hence no hard and fast rule can be established for their ascertainment. To be sure, in the broad outlines certain contracts are not difficult of classification. Those of a strictly personal nature, involving particular personal skill or taste—such as a contract of an author to write a book, an artist to paint a picture, a sculptor to carve a piece of statuary, a singer to give a concert, and a promise to marry—are personal contracts and die with the person. Death makes the performance of such contracts impossible, and, indeed, removes the main object and inducement for the agreement. Executors and administrators are unable to perform such contracts, and the estate of the deceased cannot be held liable in damages by reason of the failure to complete them. Ordinarily contracts not falling under this exception come under the general

rule, and death does not excuse performance. 13 C. J. 643 et seq.

"The true question is whether the contract, properly construed, requires a continuance of the promised action beyond the lifetime of the promisor. It is the same question, and is to be answered in the same way, as if the promisor himself were alive for purposes of being sued, but dead for the purposes of performance." *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460.

On the other hand, the parties, by express terms, may exclude substituted performance. But there is a twilight zone in which, by reason of the ambiguity of some contracts, the intention of the parties must become the determining factor. The facts and circumstances of each particular case should be taken into consideration in determining whether the contract is purely personal in its nature, and therefore terminated by death, or one which the personal representatives can complete as well as the deceased could have done, had he lived. As said in *Siler v. Gray*, 86 N. C. 566:

"The general rule unquestionably is that the personal representatives of a party are bound to perform all his contracts, whether specially named in them or not, or else make compensation for their nonperformance out of his estate. But to this there is the exception, as well established as the rule itself, of all such contracts as require something to be done by the party himself in person."

[3] Assuming such to be the law, whether a given case falls under the general rule, or the exception, must depend upon the intention of the parties; for, at last, it is in every case purely a question of their understanding and agreement. *Steamboat Co. v. Transportation Co.*, 166 N. C. 582, 82 S. E. 956; *Railroad v. Railroad*, 147 N. C. 368, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363.

[4] Viewing the contract between the parties here presented in light of the foregoing principles, we see nothing which would take it out of the general rule. Its terms are clear and unambiguous. It may be performed by the administrator, or he may secure others to do it, as well as the deceased could have done had he not been killed. The parties have agreed unconditionally, and this is the law of contracts voluntarily assumed. *Clancy v. Overman*, 18 N. C. 402.

[5, 6] Of course, where the personal representatives of the deceased are able to do so and in good faith offer to complete the contract, and the other party refuses to accept such offer and declines to permit the personal representatives to proceed, such would relieve them from further performance. They would be entitled then to an accounting and to recover as upon a quantum meruit. *Whitlock v. Lumber Co.*, 145 N. C. 120, 58 S. E.

909, 12 L. R. A. (N. S.) 1214; *Navigation Co. v. Wilcox*, 52 N. C. 481, and *Buffkin v. Baird*, 73 N. C. 283. Again, the surviving party may abandon the contract and thus forfeit his right to call upon the personal representatives of the party to continue with the agreement. In such case, he could not hold the estate liable for damages occasioned by his own effort to fulfill the contract. *Harwood v. Shoe*, 141 N. C. 161, 53 S. E. 616; *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751.

[7] The record discloses no evidence, as offered by the defendant, tending to support its first counterclaim relating to alleged overpayments. In the absence of any evidence to support an allegation, the court would be justified in giving a peremptory instruction. But such evidence, if any, we think, would be competent to show payments made under a misapprehension or mistake of fact, following the doctrine announced in *Simms v. Vick*, 151 N. C. 78, 65 S. E. 621, 24 L. R. A. (N. S.) 517, 18 Ann. Cas. 669, and *Worth v. Stewart*, 122 N. C. 258, 29 S. E. 579.

With the case going back for a new trial, we refrain from further comment, as we do not care to prejudge the rights of the parties prior to a development of all the evidence.

New trial.

(181 N. C. 110)

CLARK v. BLAND et al. (No. 97.)

(Supreme Court of North Carolina. March 23, 1921.)

1. Corporations ⇨423—Liable for malicious torts of agents.

Corporations may be held liable for the malicious and willful as well as negligent torts of their agents and employees when committed in the course of and scope of their employment, and also for injuries inflicted in breach of some duty owing directly from the company to the injured person growing out of the conditions existent between them.

2. Trial ⇨165—Evidence of plaintiff accepted as true on motion to nonsuit.

On motion to nonsuit the evidence which makes in favor of plaintiff's claim must be accepted as true and construed in the light most favorable to him.

3. Carriers ⇨320(2)—Whether assaulted person was passenger held for jury.

In an action against a railroad for an assault and battery by employee in railroad office, whether plaintiff was, at the time of the assault, a passenger of defendant railway, held for the jury.

4. Carriers ⇨283(3)—Carrier liable to passenger for assault by servant.

A railroad was liable for assault by an employee upon a passenger at railroad station, though the assault was made because employee believed the passenger had told certain persons the employee had been peddling whisky on the streets.

5. Carriers ⇨247(2)—Person going to station to await arrival of train a "passenger."

One who goes to a railroad station to take the next train in a reasonable time before the time for the arrival of the train is a passenger, though he has not purchased a ticket, and the duties imposed by the relation of carrier and passenger are obligatory on the railroad.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

6. Carriers ⇨247(2)—Custom not to open ticket window until 15 minutes before train time not controlling on question whether person entering station prior thereto was passenger.

Custom not to open ticket window until 15 minutes before scheduled time for train, while evidential, was not controlling on question whether a person entering the station before such time and within a reasonable time before the departure of the train was a passenger in an action against the railroad for assault and battery.

7. Carriers ⇨319(2)—Punitive damages awarded for willful attack by employe on passenger.

When injuries are inflicted on a passenger by an employee of a railroad willfully and of malice or under circumstances of insult, rudeness, and oppression, punitive damages may be awarded in the discretion of the jury.

8. Carriers ⇨283(3)—Carrier liable for assault on passenger off premises.

If one is waiting for a train and is called off of the carrier's premises by an employee of the railroad to a point a short distance away and for the purpose of a personal difficulty, and is there assaulted and beaten, the same rules apply as would apply if the assault takes place on the premises of the railroad; the intending passenger having no knowledge or warning of the employee's wrongful purpose.

Appeal from Superior Court, Halifax County; W. A. Devin, Judge.

Action by H. N. Clark against H. G. Bland and others. Judgment for plaintiff, and certain defendants appeal. No error.

The action is to recover damages for an unlawful and wrongful assault and battery on plaintiff by defendant H. G. Bland, and in which plaintiff seeks to hold defendant company liable by reason of the fact that plaintiff was a passenger of defendant road, and that Bland was an employee of the company at the time, and that the assault was made and injuries inflicted under circumstances that rendered the company, etc., responsible for his wrongful conduct. There was denial of liability on the part of the company and Director General, who insisted that Bland, while an employee, was not on duty at the time and place of the occurrence, and that these defendants were in no way liable for his acts. On issues submitted the jury rendered the following verdict:

"(1) Did the defendant Bland unlawfully assault the plaintiff as alleged? Answer: Yes.

"(2) Did the defendants Atlantic Coast Line Railroad and Walker D. Hines, Director General of Railroads, through their agent, unlawfully assault the plaintiff as alleged? Answer: Yes.

"(3) What damages, if any, is the plaintiff entitled to recover therefor? Answer: \$2,250."

Judgment on verdict for plaintiff, and defendants other than Bland excepted and appealed.

F. S. Spruill, of Rocky Mount, R. C. Dunn, of Enfield, and F. E. Winslow, of Rocky Mount, for appellants.

J. Crawford Biggs, of Raleigh, D. M. Clark, of Greenville, and Daniel & Daniel, for appellee.

HOKE, J. [1] It is now fully recognized that corporations may be held liable for the malicious and willful as well as negligent torts of their agents and employees, when committed in the course of and scope of their employment, and also for injuries inflicted in breach of some duty owing directly from the company to the injured person growing out of the conditions existent between them; an instance of this last rule of liability being not infrequently presented from the relationship of carrier and passenger. *Cotton v. Fisheries Product Co.*, 177 N. C. 56-59, 97 S. E. 712, citing *Cooper v. Railroad*, 170 N. C. 490, 87 S. E. 822; *Seward v. Railroad*, 159 N. C. 241, 75 S. E. 34; *Sawyer v. Railroad*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Ann. Cas. 440; *Jackson v. Telegraph Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; *Hussey v. Railroad*, 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312; *Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Railroad v. Quigley*, 62 U. S. (21 How.) 202, 16 L. Ed. 73; *Palmer v. Railroad*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Maynard v. Fireman's Fund Insurance Co.*, 34 Cal. 48, 91 Am. Dec. 672.

It is on this ground that liability has been fixed on appellants in the case before us, and we find no good reason for disturbing the results of the trial. It is objected to the validity of plaintiff's recovery that the court refused defendants' motion of nonsuit, and this principally on the ground that there is no evidence of legal significance that the relationship of carrier and passenger existed between the parties at the time; second, that there was error in allowing the jury to consider the question of punitive damages. But in our opinion neither position can be maintained. On the motion to nonsuit, there was evidence on the part of plaintiff tending to show that on March 27, 1919, plaintiff went to the railroad station of defendant company at Norfleet, N. C., for the purpose of becoming a passenger on the next train of the company going towards Kelford, the next station on the road; that plaintiff went to the sta-

tion, which was then open for reception of passengers, about an hour before schedule time, which was 10:20 a. m.; that defendant Bland and one O. W. Parker were in the regular railroad office at the time, apparently engaged in some official work; that plaintiff inquired for an express package he was expecting, and after and while waiting for the ticket window to open, which was usually done about 15 minutes before the arrival of trains, plaintiff stepped into station yard about five feet from office, and while there Bland and Parker came out and passed plaintiff going towards the store of Moses Moore, which abutted on the station premises; as they passed, Parker asked plaintiff to come on and have a drink; that soon Bland, while standing about 40 steps away in the direction of the store and in the station yard, called to plaintiff to "come over here, I would like to speak to you"; plaintiff went to him, when Bland asked plaintiff why he had told that Bland was selling whisky; plaintiff replied that he didn't recall having said anything about that; Bland said to plaintiff, "Didn't you tell Capt. Haley that I had been peddling whisky on the streets of Kelford?" Plaintiff replied, "No," when Bland called him a God damned liar and picked up a heavy stick three feet long and hit plaintiff several times with it over head, and shoulders, etc.; that plaintiff tried to make defense, but was too much stunned and crippled by the blows with the stick; that plaintiff went up on platform of the store to get something to protect himself, and Bland followed; they clinched and fell off the porch; that during the occurrence, Bland, who was at the time station agent of the company at Norfleet, continued to curse and abuse plaintiff and in the assault inflicted protracted and painful injuries upon him.

[2-4] Considering this statement under the rule which uniformly prevails in this jurisdiction that on motion to nonsuit the evidence which makes in favor of plaintiff's claim must be accepted as true, and construed in the light most favorable to him (*Lamb v. Railroad*, 179 N. C. 619, 103 S. E. 440, and authorities cited), the facts clearly permit the inference that plaintiff was a passenger of defendant company on this occasion, and that under the circumstances presented the company is liable for the misconduct of Bland, their agent and codefendant.

[5] There was evidence on the part of defendant tending to show that plaintiff had come to the station and made inquiry of its agent at or near 8 in the morning, more than two hours before the schedule time for the train, that plaintiff had said nothing of his purpose of becoming passenger, and that he knew of the custom not to open the ticket window till 15 minutes before schedule time for train. Defendant's evidence further tended to show that Bland was not the agent at Norfleet at this time, but had surrendered the keep and control of the station the after-

noon before to O. W. Parker, the new man at Norfleet, and with view of becoming agent at Kelford the next station on the line, and that, if Bland was at or about the station on that occasion at all that day, he was there only for the purpose of assisting Parker, the new agent, to take up the work, and that he was otherwise without authority or duty at Norfleet, and further that the fight was not on the company's premises proper, but commenced on the platform of the store. On the motion to nonsuit this testimony coming from defendant could not properly be considered, and, as to plaintiff's being a passenger, the question on the conflicting testimony was submitted to the jury, with the instruction, among other things, that—

"If plaintiff, Clark, went to said railroad at Norfleet upon this occasion to take the next train for Kelford, and went to the station at Norfleet in a reasonable time before the time for the arrival of the train, though he had not purchased a ticket, he is in contemplation of law a passenger, and the duties imposed by the relation of carrier and passenger would be obligatory on the railroad," etc.

—a position that is fully supported by the decided cases with us and by the authorities generally on the subject. *Thomas v. Railroad*, 173 N. C. 494, 92 S. E. 321; *Seawell v. Railroad*, 132 N. C. 856-859, 44 S. E. 610; *Tillett v. Railroad*, 115 N. C. 665, 20 S. E. 480; *Hansley v. Railroad*, 115 N. C. 603, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474; *Kidwell v. Chesapeake & Ohio R. R.*, 71 W. Va. 664, 77 S. E. 285, 43 L. R. A. (N. S.) 999; 4 *Elliott on Railroads* (2d Ed.) § 1579; 4 *R. O. L.* pp. 1029, 1030, title Carriers, § 489.

[§. 7] In a note to the *Kidwell* Case, reported also in 43 L. R. A. (N. S.) section IV, at page 999, it is said to be the general rule sustained by the great weight of authority that a person who goes to a railroad station with the intention of taking the next train is in contemplation of law a passenger, provided his coming is in a reasonable time before the departure of the train, citing numerous cases. And in 4 *Elliott* the author says:

"A person may become a passenger before he has entered the train or vehicle of the carrier. We think it safe to say that a person becomes a passenger when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting room, or the like, at a time when such place is open for the reception of persons intending to take passage on the train of the company."

The evidence as to a custom not to open the ticket window until 15 minutes before schedule time for trains, while evidential, is not at all controlling on the question whether the person enters the station "open for his reception, and within a reasonable time before the departure of his train." The jury under a correct charge having accepted the view that the relationship of carrier and passenger existed between plaintiff and defendant com-

pany, the authorities are very generally to the effect that the corporation is held to a high degree of care in protecting plaintiff from violence and insult, and may be held liable for injuries inflicted in breach of this duty on the part of their employees and of others also which it could have prevented in the reasonable and proper performance of their duty. *Lanier v. Pullman Co.*, 180 N. C. 406, 105 S. E. 21; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Daniel v. Railroad Co.*, 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485; *White v. Railroad Co.*, 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489; *Britton v. Railroad Co.*, 88 N. C. 536, 43 Am. Rep. 749; *Birmingham, etc., v. Railroad Co.*, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43. And these and many other cases in this jurisdiction hold that, when such injuries are inflicted willfully and of malice or under circumstances of insult, rudeness, and oppression, punitive damages may be awarded in the discretion of the jury. *Lanier v. Pullman Co.*, supra; *Huffman v. Railroad*, 163 N. C. 171, 79 S. E. 307; *Williams v. Railroad*, 144 N. C. 498, 57 S. E. 216, 12 L. R. A. (N. S.) 191, 12 Ann. Cas. 1000; *Hutchinson v. Railroad*, 140 N. C. 123, 52 S. E. 263, 6 Ann. Cas. 22; *Strother v. Railroad*, 123 N. C. 197, 31 S. E. 386.

[8] Appellants except further that, as to the exact point where the difficulty took place, the court instructed the jury in effect that—

"If plaintiff, being on the railroad premises and on business with the company as claimed, was called off by an employee of the railroad to a point a short distance away and for the purpose of a personal difficulty, and was there assaulted and beaten, the same rules would apply whether the point at which the assault took place was just on or off the premises of the company."

But we think this is undoubtedly a correct ruling. The evidence is clearly to the effect that either Bland was the company's agent at the station, or, being an employee of the company, he was there assisting the new agent in his duties. This last position seems to be recognized in the brief of counsel, and in such case he would be charged in part with extending to plaintiff the protection owing to him as a passenger, and under such circumstance, if he called plaintiff from the premises for the purpose of assaulting him and did assault him as claimed just beyond the line, the breach of duty might well be considered as commencing at the time of the call. Assuredly so if the plaintiff had no notice or warning of the agent's wrongful purpose, and in any event, on the facts presented, plaintiff would still be within the sphere of protection owing to him as the company's passenger at the time; for the principle by no means requires that the passenger should remain continuously in the company's vehicles nor on the immediate premises. *Wallace v. Rail-*

road, 174 N. C. 174, 93 S. E. 731; Palmer v. Railroad, 131 N. C. 250, 42 S. E. 604. In this last case the present Chief Justice states the principle applicable as follows:

"If plaintiff had been a passenger, or his passage had not been fully terminated, or if, when he left his car at his destination, the employee had immediately followed the passenger up and assaulted him, the defendant concedes that there would be no question as to the liability of the company"—citing Daniel v. Railroad, 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485; Williams v. Gill, 122 N. C. 967, 29 S. E. 879; Strother v. Railroad, 123 N. C. 197, 31 S. E. 386.

We were referred by counsel to the case of Stewart v. Lumber Co., 146 N. C. 47, 59 S. E. 545, as an authority against the award of punitive damages in the present instance, but we do not so consider it. That was a case where a traveler along the highway sought to impose liability on the company by reason of the willful wrong of its engineer in blowing the engine whistle for the purpose of frightening plaintiff's mule, causing it to run away and injure plaintiff. It will be noted that plaintiff there was an outsider or third person, and the breach of an independent duty owing directly from the company to claimant was in no way presented or involved. The claim depended entirely on principles of agency or the relationship of master and servant alone. The distinction adverted to is pointed out in Sawyer's Case, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Ann. Cas. 440, as follows:

"According to the varying facts of different cases, the question of fixing responsibility on corporations by reason of the tortious acts of their servants and agents is sometimes made to depend exclusively on their relationship as agents or employees of the company, and sometimes the facts present an additional element and involve some independent duty which the corporation may owe directly to * * * the injured or complaining party."

In our case this additional element is present, the suit being for a breach of duty growing out of the relationship of carrier and passenger, and by an agent of the company charged in part with performance of the duty of protection and care of plaintiff, and in such case the authorities in this jurisdiction uphold the award of punitive damages where, as stated, the wrong is done willfully

and under circumstances of insult, rudeness, or oppression. Thus in Huffman v. Railroad, supra, it was held:

"That defendant R. R. Co. was liable in punitive damages for willful and malicious abuse of a female passenger, traveling on his train, occasioned by her not having purchased a ticket for a nine year old child traveling with her."

In Williams v. Railroad, 144 N. C. 498, 57 S. E. 216, 12 L. R. A. (N. S.) 191, 12 Ann. Cas. 1000:

"That defendant company is liable for punitive in addition to compensatory damages for willful refusal to stop a train at a flag station," etc.

And in Hutchinson v. Railroad:

That in a question of punitive damages the court "correctly instructed the jury that, if the conductor maliciously or with wanton recklessness carried [plaintiff] by her station, or if he maliciously or wantonly mistreated and humiliated her, [they] could assess punitive damages."

And so here it was proper to submit the question of punitive damages to the jury on evidence tending to show an unlawful and malicious assault on plaintiff, who was on the premises of defendant as a passenger, and by an agent or assistant agent of the company, who was charged in part with the duty of the protection due plaintiff from the company as its passenger.

We were also cited to Lake Shore, etc. R. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, where it was held that a corporation is not liable to exemplary or punitive damages for a willful or malicious tort on the part of its employee or agent unless such tort was directly authorized or ratified by the company. It is recognized, however, in that opinion that in many of the states the liability of corporations for punitive damages is not so restricted, and on the facts of this record the rule is clearly otherwise in this jurisdiction.

On careful consideration, we find no error in the record, and are of opinion that the judgment for plaintiff establishing liability of defendant company should be affirmed.

No error.

CLARK, C. J., did not sit.

(181 N. C. 153)

JACKSON v. ATLANTIC COAST LINE R. CO. et al. (No. 291.)

(Supreme Court of North Carolina. March 30, 1921.)

1. Railroads ⇐346(5)—Presumption against contributory negligence.

Even in the absence of C. S. § 523, making contributory negligence an affirmative defense, the presumption is against contributory negligence, so that the burden is clearly on a railroad to prove that an automobile driver was contributorily negligent in attempting to cross the track.

2. Railroads ⇐350(18)—Failure to stop before crossing track not contributory negligence as matter of law.

The failure of an automobile driver to come to a complete stop before entering upon a railroad crossing is not contributory negligence as a matter of law, but is a circumstance to be considered by the jury in determining whether he exercised due care under the conditions.

3. Railroads ⇐330(3)—Driver with obstructed view may rely on hearing at crossing.

Where the view of an automobile driver approaching a railroad crossing is obstructed, he may rely on his sense of hearing, and if he listens, and is induced to enter upon the crossing because of the negligent failure of the company to give the ordinary signals, he can recover for injuries.

4. Railroads ⇐312(13)—Failure to give signals negligence.

The failure of a railroad engineer to blow his whistle or ring a bell at a reasonable distance from a highway crossing, to warn those approaching the crossing, from which his train was hidden, is negligence per se.

5. Railroads ⇐350(22)—Automobile driver's contributory negligence held question for jury.

Evidence that the driver of an automobile could not see along the track until he came within 11 feet of the rail, that he was proceeding at not more than 10 miles an hour, and that no crossing signal was sounded by the train which struck him, which was going 60 miles an hour, held to warrant submission to the jury of the issue of contributory negligence.

6. Trial ⇐178—In directing verdict for defendant, evidence must be considered most favorably to plaintiff.

In determining whether defendant was entitled to a directed verdict, the evidence must be taken in the aspect most favorable to the plaintiff, though there was evidence from which the jury could have reached a different conclusion.

Appeal from Superior Court, Robeson County; Gulon, Judge.

Action by S. M. Jackson, administrator of A. K. Jackson, against the Atlantic Coast

Line Railroad Company and Walker D. Hines, Director General of Railroads, for the death of plaintiff's intestate. From a judgment for defendants, on a verdict finding, as directed by the court, that defendants were negligent, also finding from the evidence that plaintiff's intestate was contributorily negligent, and that plaintiff was not entitled to recover damages, both parties appeal. Error, and new trial granted.

The plaintiff's intestate was a farmer, who was killed at a railroad crossing about a quarter of a mile from his house as he was returning home in his automobile. He was struck by the defendant's north-bound express train at a point where the railroad track crosses the public road at 1½ miles north of the station at Bule's. In approaching this crossing for a distance of several hundred yards the railroad and the public road run nearly parallel, gradually converging into a "V," and at a point about 114 feet from the crossing the public road makes a sharp turn and approaches the railroad at a right angle and through a cut about 11 feet deep. The railroad approaches the crossing through a cut of about the same depth.

The uncontradicted evidence is that, after turning this curve, 114½ feet from the defendant's track, it was impossible to see the train running north until within 10 feet of the track. The evidence shows that, when the plaintiff's intestate turned the curve at that point and started through the cut, the train was 854 feet from the crossing. The railroad cut extended 250 yards in that direction. The evidence also shows that between the track and the public road there was a very heavy growth of young pine timber, bushes, shrubbery, and other undergrowth, and that this, together with the fact that the track is constructed through a cut 11 feet deep, obstructed the vision of the plaintiff's intestate in seeing the approach of the north-bound train, which was running late and at a high rate of speed, estimated at 60 miles an hour or more by the railroad employees and other witnesses.

Practically all the witnesses, including the defendant's section foreman and his helpers, testified that the engineer did not blow for the crossing, nor did he ring the bell or give any other signal. The section foreman who reported the collision indicated in his report to the company, made on the day the deceased was killed, that no signal was given. One witness, Patterson, testified that, when he saw the smoke from the defendant's engine, it was 854 feet from the crossing, according to measurements afterwards made, and at the same instant he saw plaintiff's intestate turn the curve and start through the cut to the crossing. He was traveling slowly, about 8 or 10 miles an hour. He was not seen again until after the train had passed.

ed, when he was found crushed and wounded, having been struck and thrown about 35 feet by the defendant's train. He died about 10 o'clock p. m. of the same day in a hospital in Fayetteville.

Russell & Weatherspoon, of Laurinburg, and McIntyre, Lawrence & Proctor and Johnson & Johnson, all of Lumberton, for plaintiff.

McLean, Varser, McLean & Stacy, of Lumberton, and G. B. Patterson, of Maxton, for defendants.

CLARK, C. J. The court submitted three issues, as follows: (1) Was plaintiff's intestate killed through the negligence of the defendant as alleged in the complaint? (2) If so, did plaintiff's intestate, by his own negligence, contribute to his injury and death? (3) What damages, if any, is plaintiff entitled to recover?

The court instructed the jury that, if they believed all the evidence and found the facts to be as testified, they would answer the second issue "Yes," and the third issue "No," and they responded accordingly. The plaintiff excepted and appealed. The court also instructed the jury to answer the first issue "Yes," to which the defendant excepted and appealed.

[1] There was no evidence that the plaintiff's intestate did not look and listen. There was evidence from which the defendant contends the jury should so find. There is evidence from which the jury could find to the contrary. There is no presumption in favor of contributory negligence, and the burden was on the defendant to prove it. In *Norton v. Railroad*, 122 N. C. 928, 29 S. E. 892, it is said:

"Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of any statute, like our own, making it a matter of affirmative defense. *Railroad v. Gentry*, 163 U. S. 353, 366; *Railroad v. Griffith*, 159 U. S. 603, 609."

[2] It cannot be declared, as a matter of law, that failure to come to a complete stop before entering upon a railroad crossing is contributory negligence. In *Perry v. Railroad*, 180 N. C. 290, 104 S. E. 673, the court said:

"Failure to stop before crossing a railroad track cannot be declared to be contributory negligence as a matter of law, but it should be considered by the jury in connection with the surrounding circumstances in determining whether the party was exercising the care of one of ordinary prudence."

[3] In *Johnson v. Railroad*, 163 N. C. 442, 79 S. E. 694, Ann. Cas. 1915B, 598, the court uses the following language:

"Defendant requested the court to enter a judgment of nonsuit upon the evidence, as plaintiff's intestate was guilty of such contribu-

tory negligence in driving upon the crossing, without looking or listening, as barred his recovery. The judge could not have done so without deciding an issue of fact, which he is forbidden to do, that being the function of the jury. *Pell's Revisal*, § 535, and cases cited in note. The evidence favorable to defendant's view of the case may be ever so strong and persuasive, but if there is a conflict of testimony it must be left to the jury, and they must find the facts."

In *Shepard v. Railroad*, 166 N. C. 544, 82 S. E. 874, the court through Mr. Justice Hoke, laid down the rule as follows:

"Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen, and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence."

In *Hinkle v. Railroad*, 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581, substantially the same rule is stated in the following language:

"Where the injured person would not have gone on the crossing, but for the negligence of the engineer in failing to give the proper signal, the railway company will be held liable for the damages resulting from a collision, although the party injured may have been careless in exposing himself."

[4] The uncontradicted evidence tended to show that the train which struck the plaintiff's intestate was running late and at a speed of about 60 miles an hour; that there was a whistle post about 250 to 300 yards south of the crossing, put there for the purpose of indicating to the engineer that the whistle should be blown for the crossing and the bell rung; that the defendant's foreman and a crew of men were standing near the whistle post at the time the train passed, having been forced to remove a hand car from the track to allow the train to pass; and that no signal whatsoever was given. About one-half dozen witnesses testified that they were in close proximity to the place where the train should have blown and carefully observed that no signal was given, some of these witnesses being farmers residing in the neighborhood and some of them employees of the railroad company.

In *Jenkins v. Railroad*, 155 N. C. 203, 71 S. E. 213, the court said:

"It is a railroad engineer's duty to blow his whistle or ring his bell at a reasonable distance from a crossing, to warn those approaching the crossing with a view of passing over the tracks."

In *Hinkle v. Railroad*, 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581, it was also said:

"For a moving train to omit to give, in a reasonable time, some signal when approaching a highway from which a train is hidden by an embankment, cut, or curve, is negligence per se."

[5] The defendant put on no evidence. The jury could have found directly, or by inference from the evidence taken in its most favorable aspect to the plaintiff, the following state of facts: That the space between the county road and the railroad had so thickly grown up in trees, gum bushes, alder bushes, gum trees, pine bushes, and pine trees that the view of the deceased was completely obscured; that because of such obscurity, together with the screen afforded by the embankment on the defendant's right of way, the deceased could not see the approach of the train until within 11 feet of the T-iron at the crossing; that the deceased was carefully driving his automobile along the public highway, approaching the crossing at a speed of not more than 8 or 10 miles an hour; that the deceased knew of the crossing, and was driving slowly and carefully for the purpose of effecting a safe crossing, no other conclusion being reasonably assignable for the slow speed of his machine, and it being presumed that he was conducting himself as an ordinarily prudent man; that the deceased, while purposing to cross in safety, considered the danger and looked and listened for some warning or signal of the approach of the train, and hence reduced the speed of his automobile as additional precaution; that those in charge of defendant's train, which was running at not less than 60 miles an hour, failed and neglected to ring the bell or blow the whistle as a warning to the deceased of its approach to the said crossing; that the failure to give such warning lulled the deceased into the belief that no train was near, and that he could cross in safety, and that, so believing, he attempted to drive over the crossing, and while so doing was fatally injured; and the jury could find that the conduct of the deceased, under all the facts and circumstances, was as an ordinarily prudent man would have conducted himself under similar circumstances, and, being lulled into a state of security by the negligent conduct of the defendant, the deceased did not have the time or opportunity to save himself after passing within the danger zone.

[6] It is true there was evidence from which the jury could have reached a different conclusion upon some of the statements in this recital; but as the evidence must be taken in the most favorable aspect to the plaintiff in which the jury could have considered and found it, it was error to direct a verdict against the plaintiff on the second issue, especially as the burden was upon the defendant to prove the affirmative on that is-

sue. C. S. § 523, and cases there cited. Among the most recent cases on the subject, directly in point are *Penninger v. Railroad*, 170 N. C. 473, 87 S. E. 249; *Perry v. Railroad*, 180 N. C. 290, 104 S. E. 673; *Kimbrough v. Hines*, 180 N. C. 274, 104 S. E. 684.

There being error as to the instructions on the second issue, it is unnecessary to continue the discussion, and the case will be sent back for a new trial on all the issues. Error.

(181 N. C. 129)

WATTS v. LENOIR & BLOWING ROCK TURNPIKE CO. (No. 473.)

(Supreme Court of North Carolina. March 23, 1921.)

1. Statutes \S 80(2), 97(2)—Statute amending law as to turnpike company maintaining tollgate held invalid as special legislation.

Pub. Loc. & Priv. Laws Ex. Sess. 1920, c. 144, amending Pub. Loc. Laws 1911, c. 62, by providing that the Lenoir & Blowing Rock Turnpike Company shall not maintain a tollgate nearer than eight miles from Lenoir, held invalid as special legislation, in view of Pub. Laws 1903, c. 474, and Const. art. 11, § 29, and article 8, § 1.

2. Constitutional law \S 101—Turnpikes and toll roads \S 3—Statute amending charter of turnpike company invalid as impairing vested rights.

Pub. Loc. & Priv. Laws Ex. Sess. 1920, c. 144, providing that the Lenoir & Blowing Rock Turnpike Company shall not maintain a tollgate nearer than eight miles from Lenoir, is invalid as impairing vested property rights in view of Pub. Laws 1903, c. 474, and Pub. Loc. Laws 1911, c. 62.

3. Statutes \S 67—Amendment to Constitution held to withdraw from General Assembly power to create, extend, or amend charters by special enactment.

Except for purpose of absolute repeal, which is retained throughout as essential to the proper exercise and enforcement of the police powers of government, and except also in the instances expressly designated in the section of "corporations for charitable, educational, penal or reformatory purposes that are to be and remain under the patronage and control of the state," Const. art. 8, § 1, withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corporations, and all quasi public corporations, such as railroads, incorporated turnpike or toll roads, bridge companies, and the like, and also those corporations which, while having at times and to some extent powers appertaining to government, are in fact and in truth business corporations for the purpose principally of promoting private interests.

Appeal from Superior Court, Caldwell County; Harding, Judge.

Action by J. W. Watts against the Lenoir & Blowing Rock Turnpike Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Civil action is instituted by plaintiff, a taxpayer, citizen, and resident of Caldwell county, living on the line of the defendant's road within the prescribed limits, and necessarily paying toll for travel thereon, in behalf of himself and all others in like case, and also a stockholder of defendant company, to compel defendant, an incorporated turnpike company, from maintaining tollgates, and enforcing the collection of toll on that portion of the road from Lenoir, N. C., eight miles out towards and beyond the town of Patterson, N. C.

On the pleadings, affidavits, and evidence offered the court found the facts and entered judgment denying relief in terms as follows:

"This cause coming on to be heard before me at chambers in Marion, N. C., by agreement of the parties plaintiff and defendant, and being heard upon the pleadings, exhibits, and affidavits offered as evidence in the case and admissions made by counsel at the argument, the court finds the following facts:

"(1) That in the year 1903 the General Assembly of North Carolina passed an act authorizing the board of county commissioners of Caldwell county to lease, or otherwise contract and dispose of, to any turnpike company or person, a stretch of road $6\frac{1}{2}$ to 7 miles in length, and leading from Lenoir to the ford of the Yadkin river at the old Baptist and Advent churches. Reference to said act is hereby had. See chapter 474 of Public Laws of 1903.

"(2) That on the 6th day of September, 1901, the board of county commissioners of Caldwell county, under and by virtue of authority contained in the act referred to, leased to the Lenoir & Blowing Rock Turnpike Company, a corporation which had been chartered and organized under the laws of North Carolina, the said stretch of road mentioned in finding of fact No. 1 for the term of 50 years. A certified copy of lease so made to said turnpike company is on file in the papers in this case, and reference to the same is hereby had as a part of this finding of fact.

"(3) That under said lease said turnpike company immediately took possession of said road, which was then in bad condition, and at once began to improve and repair it, such repairs consisting in laying down of macadam on and along the said road, cutting down the grade, and, where it became necessary, by changing the location of the road for a considerable distance, that is to say built on a new and better grade from the foot of Warrior's Gap on the south side of the foot of said gap to the north side a new road for some distance entailing the expenditure of a large sum of money extending over a period from the date of the lease up to the present time, which would not be less than from \$40,000 to \$50,000 so expended.

"(4) That, after said Lenoir & Blowing Rock Turnpike Company took over the said stretch

of road, it maintained a tollgate over the same and has continued to do so up to the present time, collecting such tolls as it was authorized to collect from subjects of toll passing over said road.

"(5) That during the year 1911 the General Assembly of North Carolina amended the act of 1903 before referred to by permitting the said company to maintain one or more tollgates, and the right to declare dividends, repealing that portion of the act restricting the location of a tollgate and fixing the tolls over said road.

"(6) That on the 28th of January, 1911, the General Assembly of North Carolina passed an act ratifying, confirming, and approving the charter of the Lenoir & Blowing Rock Turnpike Company and all proceedings and acts thereunder, and in pursuance thereof made all such acts valid. Reference is hereby made to said act. Chapter 62, Public Local Laws 1911.

"(7) That the General Assembly of North Carolina at its special session in August, 1920, passed the following act:

"H. B. 466, S. B. 362. An act to amend chapter 62, Public Local Laws, Session one thousand nine hundred and eleven. The General Assembly of North Carolina do enact:

"Section 1. That chapter 62, Public Local Laws of North Carolina, session one thousand nine hundred and eleven, be amended by adding at the end of section three of said chapter, the following:

"The said company shall not be allowed to maintain any tollgates thereon nearer than eight miles from the corporate limits of the town of Lenoir, nor shall it increase its tolls over those charged at present.

"Sec. 2. That this act shall be in force from and after its ratification.

"In the General Assembly read three times and ratified this 28th August, 1920."

"Pub. Loc. & Priv. Laws 1920, c. 144.

"(8) That the charter of the Lenoir & Blowing Rock Turnpike Company provides, among other things, that the company has the right to maintain two or more tollgates at desirable points between Lenoir and Blowing Rock, N. C., and by the amendment before referred to, said act of 1903, one or more tollgates is allowed to be maintained by said company over the stretch of road from Lenoir to the ford of the Yadkin river at the Baptist and Advent churches.

"(9) That the amount of tolls which are taken in from subjects of toll passing over this stretch of road from Lenoir to the ford of the Yadkin river at the Baptist and Advent churches amounts annually to a large sum, which, together with toll, defendant would be unable to collect on through travel from Lenoir to Blowing Rock, and from Blowing Rock to Lenoir, if its tollgate be moved as required by the act of August, 1920, would entail a loss upon the defendant in tolls of approximately \$4,000 to \$5,000 per annum.

"(10) And that to maintain and keep in good state of repair, said stretch of road, it will take several thousand dollars a year.

"(11) That the effect of the act of August, 1920, if any, upon the Lenoir & Blowing Rock Turnpike Company, would be to repeal by

implication the right of said company to maintain a tollgate between Lenoir and the ford of the Yadkin river at the Baptist and Advent churches, and remove said tollgate about one mile up the mountain from Patterson, N. C., and that, if said company is denied the right to maintain said tollgates as at present located, and to collect tolls from subjects passing over and upon said road, it will entail a loss of several thousand dollars to said company, and said company would not have any revenue from this portion of the road with which to keep up and maintain the same, where travel on said portion originated thereon and went in the direction of Lenoir, N. C., or where the travel originated for points east and concluded before reaching the first gate.

"(12) That, owing to the expenditure of a large sum of money on the part of the Lenoir & Blowing Rock Turnpike Company upon said road, including the purchase of land for a new road bed at Warrior's Gap, making grades, and otherwise improving said road represents a large vested interest of said company.

"(13) That if said tollgate now maintained along the line of said road is required to be taken down, and the company denied the right to collect tolls, the effect of this will be to leave the company without any means derived from this portion of the road with which to keep it up, as set out in paragraph 11 above, but would still leave the company in a position of responsibility to keep up and maintain the same, and be responsible for any liabilities resulting from a failure of the performance of this public duty.

"(14) That, if said tollgate is removed, it will at once open up the road to a portion of the inhabitants of Caldwell county and others to use free this stretch of road, while other persons and subjects of toll living north of the tollgate between Patterson and Blowing Rock would be required to pay toll.

"Upon the foregoing finding of facts, the court is of the opinion that the act of the Legislature passed by the General Assembly of North Carolina, Special Session 1920, before herein referred to, is unconstitutional and void.

"It is therefore considered and adjudged that the relief sought by the plaintiff be, and the same is hereby, denied. It is further adjudged that the plaintiff pay the costs of this action to be taxed by the clerk. By consent this order was signed out of the district on October 27, 1920.

"Wm. F. Harding, Judge Presiding."

Plaintiff excepted and appealed.

Mark Squires and W. C. Newland, both of Lenoir, for appellant.

Council & Yount, of Hickory, Lawrence Wakefield, of Lenoir, and H. P. Grier, of Statesville, for appellee.

HOKE, J. (after stating the facts as above). It appears from the legislation and findings of fact pertinent to the inquiry and fully embodied in the judgment that defendant is a corporation having the right under the statutes applicable to construct and maintain a turnpike road from Lenoir, N. C., to Blowing Rock and beyond, to operate

stage lines thereon, to charge and collect tolls of travelers using the same, and are allowed to establish two or more tollgates along the route at points considered desirable for the convenient and efficient collection of tolls; that for a part of this route from Lenoir for six miles or more to the ford of the Yadkin river near Patterson, N. C., the road is held by a lease of 50 years' duration from September 6, 1909, said lease being made by the county commissioners under legislative authority expressly conferred by statute, and that soon after taking said lease defendant company at great cost changed the grade and otherwise improved said road, and the tolls of persons living along this portion of the road when traveling to Lenoir and otherwise amounts to several thousand dollars per year; that one of the tollgates established under the laws applicable and necessary to the efficient collection of tolls is on this portion of the route and about four miles from Lenoir; that at the Special Session of 1920 the General Assembly passed a special act purporting to amend chapter 62, Public Local Laws of 1911, the same containing in effect the chartered rights of the company, and which provided that the statute referred to be amended by adding to the end of section 3 the following:

"The said company shall not be allowed to maintain any tollgate thereon nearer than eight miles from the corporate limits of the town of Lenoir, nor shall it increase its tolls over those charged at present."

[1, 2] It further appears that the force and effect of this statute, if the same is allowed to prevail, will be not only to deprive the company of its right to maintain its tollgates as the act of incorporation provided, but in its practical and necessary operation will disenable it from collecting any tolls of persons using only that portion of the road for eight miles out from Lenoir, and, this being true, we are of opinion that the act is void as contrary to certain recent amendments to our Constitution which inhibit any special legislation in amendment of charters of this kind, and that in any event such an amendment would be declared invalid as impairing and destroying vested property rights of the company contrary to the law of the land. In reference to the first proposition it will be recalled that, with the view of relieving the Legislature of the time and work not infrequently expended on local measures which could as well be accomplished under general laws, and allowing time for fuller deliberation on matters of public moment, the General Assembly of 1915 submitted several amendments to the Constitution which were ratified by vote of the people in 1916 and became effective as part of the organic law January 10, 1917. See Laws 1917, p. 7. *Kornegay v. Goldsboro*,

180 N. C. 441, 105 S. E. 187; *Mills v. Commissioners*, 175 N. C. 215, 95 S. E. 481; *Reade v. Durham*, 173 N. C. 668, 92 S. E. 712. In a large number of these designated subjects appearing principally in article 2, § 29, of the Constitution, among them measures which authorize the laying out, opening, altering, maintaining, or discontinuing highways, etc., the General Assembly is expressly prohibited from passing any "local, private or special act or resolution" except to repeal same, and the section provides further that "any local, private or special act or resolution passed in violation of this section shall be void."

In pursuance of the same purpose and policy and by amendment submitted, ratified, and becoming effective at the same time, section 1 of article 8 of the Constitution was stricken out and a new section substituted. This article 8 is entitled "corporations other than municipal," and the original and substituted sections are as follows:

Section 1 as it originally appeared:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of the corporations cannot be attained under general laws. All general laws and special acts, passed pursuant to this section, may be altered from time to time, or repealed."

And the substituted section is as follows:

Section 1. Corporations Under General Laws.

"No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal or reformatory purposes that are to be and remain under the patronage and control of the state; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation."

[3] From a perusal and comparison of the two sections and a proper consideration of authoritative cases in which same have been interpreted and applied, it is clear in our opinion that, except for purposes of absolute repeal which is retained throughout as essential to the proper exercise and enforcement of the police powers of government, and except also in the instances expressly designated in the section of "corporations for charitable, educational, penal or reformatory purposes that are to be and remain under the patronage and control of the state," this section withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corpora-

tions and all quasi public corporations, such as railroads, incorporated turnpike or toll roads, bridge companies and the like, and also those corporations which, while having at times and to some extent powers appertaining to government, are in fact and in truth business corporations for the purpose principally of promoting private interests, as in *Southern Assembly v. Palmer*, 166 N. C. 75, 82 S. E. 18; *Commissioners v. Webb*, 160 N. C. 594, 76 S. E. 552.

For reasons stated in the fully considered case of *Kornegay v. Goldsboro*, 180 N. C. 440, 105 S. E. 187, the inhibitory features and effect of these amendments do not apply or extend to municipal or quasi public corporations such as counties, cities, towns, and other recognized governmental agencies, other than changing the names of cities and towns, and creating or changing lines of townships and schools and districts. Apart from these, however, and as to corporations above stated, special legislation is now prohibited, and the act of 1920 upon which the plaintiff rests his claim for relief, coming directly within the constitutional provision, has been properly held invalid. *Kornegay v. Goldsboro*, supra; *Mills v. Commissioners*, 175 N. C. 215, 95 S. E. 481; *Board of Education v. Board of Commissioners*, 174 N. C. 47, 93 S. E. 383. And, though the attempted amendment in question here had been passed in accord with constitutional methods—that is, under the provisions of a general law—it could not be upheld for the reason that it destroys or impairs vested rights of property. True that, in order to relieve the state and its Legislature from the restrictions imposed by the principles of the *Dartmouth College Case*, and which were such as to threaten, and in their subsequent application at times interfere with, the efficient administration of well-ordered government, this article 8 in section 1 reserves to the General Assembly the power to amend or repeal all corporate charters, and, while the right of repeal is at all times absolutely with the Legislature, the power of amendment as contained in this reservation is by no means unlimited. In order to its proper exercise, the proposition must be germane or in some way promotive of the principal corporate purpose as contemplated by the charter or in reasonable regulation of its methods, and the decided cases are agreed in the position that an amendment which destroys or sensibly impairs the vested property rights of the company or which attempts to transfer them either to the public or otherwise except under the principles of eminent domain and upon compensation duly made must be held invalid. The principle as stated was fully recognized by this court in *Railroad v. Commissioners*, 108 N. C. 56, 12 S. E. 952, and is in general accord with the authorities on the subject. *Shields v. Ohio*, 95 U. S. 319,

24 L. Ed. 357; *Commissioners v. Power Co.*, 104 Mass. 446, 6 Am. Rep. 247; *Commonwealth v. Essex Co.*, 79 Mass. (13 Gray) 239; *City of Detroit v. Howard Turnpike Road Co.*, 43 Mich. 140, 5 N. W. 275; *Clark on Corporations*, p. 212; 26 R. C. L. p. 1399; *Turnpike and Toll Roads*, § 5; 10 Cyc. p. 1087.

In *Railroad v. Commissioners*, supra, it was attempted under guise of an amendment and by a proposed popular vote to divert a municipal subscription made to a designated railroad route, after said subscription had been contracted to another and in part earned, and in disapproving the measure the court held:

"The provision in the Constitution (article 8, § 1) which reserves to the General Assembly the power to alter or repeal acts incorporating companies, does not authorize the enactment of a statute which, under the pretense of protecting a public interest, or exercising an acknowledged police power, appropriates the corporate property to the public use."

In *Commonwealth v. Essex*, Chief Justice Shaw states the principle as follows:

"The rule to be extracted is this: 'That where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.'"

And, speaking generally to the position in *Shields v. Ohio*, supra, Associate Justice Swayne said:

"The power of alteration * * * is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of * * * corporations in such cases are surrounded by the same sanction, and are as inviolable as in other cases."

Doubtless, as in other cases of quasi public corporations, who have dedicated their property to public use, the rates of toll through properly constituted agencies may be and are subject to reasonable regulation. It was so held in the last case cited of *Shields v. Ohio*, and the principle is fully established with us. But such a principle gives no sanction to the case presented here, where the proposed act in its practical operation takes from defendant company, and without compensation, eight miles of its road, in which they have a chartered right to collect tolls, and which they hold by a lease for 50 years under legislative authority, and on which they have done a large amount of costly work.

In any event, therefore, such an act is in clear conflict with the constitutional guarantees protecting vested rights of property, and the judgment of his honor declaring same invalid must be affirmed.

Affirmed.

(181 N. C. 158)

WALLACE et al. v. WALLACE et al.
(No. 113.)

(Supreme Court of North Carolina. March 30, 1921.)

1. Deeds ⇨128—Rule in Shelley's Case applies within state.

The rule in *Shelley's Case*, under which property conveyed for life with limitation to the heirs or the bodily heirs of the life tenant is construed as giving the life tenant a fee simple, and which operates as a rule of property regardless of a contrary intent, applies within the state.

2. Deeds ⇨128—Rule in Shelley's Case not applied where "heirs of the body" meant children.

The rule in *Shelley's Case* applies only where the words "heirs" or "heirs of the body" were used in the conveyance in their technical sense carrying the estate to the entire line of heirs, and, where there was an ultimate limitation to others after a limitation to the heirs of the body, the latter expression was evidently intended to mean children and the rule did not apply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs of the Body.]

3. Deeds ⇨129(4)—Conveyance held to give life estate with remainder to children or next of kin; "bodily heirs."

In a deed conveying the estate to grantor's son for life and after his death in fee simple to his bodily heirs if any, and if none to his next of kin, the words "bodily heirs" mean children, so that the son took only a life estate which he could not devise and in which his widow was entitled to no dower, since it was not an estate of inheritance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bodily Heirs.]

4. Deeds ⇨132—Remainder to "next of kin" does not permit representation.

In a deed giving a life estate with remainder to bodily heirs or, if none, to next of kin, the words "next of kin" mean those nearest in degree and do not recognize or permit the principle of representation, so that the property vests in the living brothers and sisters on the death of life tenant without issue, to the exclusion of the children of deceased brothers and sisters.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Next of Kin.]

5. Deeds 132—Wife not included in "next of kin."

In a deed conveying the remainder to the next of kin of the life tenant, the expression "next of kin" means nearest of blood kin, so that the wife of the life tenant is not entitled to a share of the remainder.

Appeal from Superior Court, Johnston County; Devin, Judge.

Special proceedings to sell land for partition by W. H. Wallace and others against Ashley Wallace and others and against Selina Wallace as the widow of C. A. Wallace, deceased. From a judgment declaring the defendants other than the widow to be the owners of the property as tenants in common, petitioners and the widow appeal. Affirmed.

Special proceedings to sell land for partition, transferred on answers filed to the superior court and heard on case agreed, before his honor, W. A. Devin, Judge, at September term, 1920, of the superior court of Johnston county. The facts pertinent to the inquiry and his honor's judgment thereon are set forth in the case on appeal as follows:

"It was agreed by all the parties thereto, Abell and Ward representing the petitioners, Wellons and Wellons representing the defendant Selina Wallace, and Parker & Martin representing the defendants other than Selina Wallace, that this case be heard upon the following agreed facts, to wit:

"(1) That C. A. Wallace died without birth of issue, and that Selina Wallace is the widow, and that the petitioners and other defendants, except Selina Wallace, are the brothers and sisters of the said C. A. Wallace, deceased, and the representatives of dead brothers and sisters.

"(2) That the defendants Ashley Wallace, Elisha Wallace, and R. I. Wallace are and were at the time of the death of the said C. A. Wallace his only surviving brothers or sisters; and that all of the petitioners are the representatives and children of deceased brothers and sisters of the said C. A. Wallace; and if the lands described in the petition descend to his heirs at law, then their respective interests are as set out in the petition.

"(3) That on February 25, 1889, Elisha Wallace and wife executed to their son, C. A. Wallace, deceased, a deed for the 62½ acres of land described in the petition, which deed is duly recorded in Book S, No. 5, at page 280 of the office of the register of deeds of Johnston county, a copy of which deed is hereto attached, marked 'Exhibit A,' and made a part thereto.

"(4) On June 27, 1919, the said C. A. Wallace made a last will and testament which was duly probated on August 23, 1919, and is recorded in Will Book No. 6 at page 529 of the office of the clerk of the superior court of Johnston county, a copy of which will is hereto attached, marked 'Exhibit B,' and made a part thereof.

"(5) The petitioners contend that they, together with the defendants, except the said

Selina Wallace, widow, are the owners as tenants in common in the aforesaid lands under and by virtue of the aforesaid deed to C. A. Wallace.

"(6) That the defendants Ashley Wallace, Elisha Wallace, and R. I. Wallace, contend that they are the owners of said lands as the only surviving brothers and sisters, and being the next of kin of the said C. A. Wallace, deceased.

"(7) That the defendant Selina Wallace contends that she is the sole owner of said lands by virtue of said will of the said C. A. Wallace, deceased.

"(8) That this agreement of facts shall not interfere with the dower of the said Selina Wallace, provided, if in law she is entitled to the same."

The portion of the deed, Exhibit A, relevant to the inquiry, is as follows:

"This indenture made 25 day of February, 1889, between Elisha Wallace and wife, Penny Wallace, of the county of Johnston and state of North Carolina of the first part, and C. A. Wallace of the same county and state above written of the second part, witnesseth, that we, Elisha Wallace and wife, do, for and in consideration of the love and good will that we have for our son, C. A. Wallace, and for his better support, do by these presents loan and set over unto him, the above said C. A. Wallace, one tract or parcel of land to have and to hold during his natural lifetime, with the exception that we, the above said Elisha Wallace and wife, hold the above said land subject to our support and protection during our natural life. And then after the death of the above said C. A. Wallace, then said land to descend in fee simple to his bodily heirs if any, and if none, to go to his next of kin," etc.

In the will of said C. A. Wallace, Exhibit B, the land is devised to his widow, Selina H. Wallace, for life, and at her death to the children of R. I. Wallace. And upon these facts the court rendered judgment:

"This cause coming on to be heard before Hon. W. A. Devin, Judge Presiding, at the September term, 1920, of the superior court of Johnston county, N. C., and being heard upon the pleadings and an agreed statement of facts, Abell & Ward representing the petitioners, Wellons & Wellons representing the defendant Selina Wallace, Parker & Martin representing the defendants Ashley Wallace, Elisha Wallace, and R. I. Wallace, and S. S. Holt representing the defendant Elisha Wallace, upon the motion of Parker & Martin and S. S. Holt.

"It is considered, ordered, adjudged, and decreed that the defendants Ashley Wallace, Elisha Wallace, and R. I. Wallace are the sole owners in fee as tenants in common and are entitled to the immediate possession of the lands described in the petition in this cause."

From this judgment the petitioners, the nephews and nieces and the widow, Selina Wallace, appealed.

Ed. S. Abell and Ed. F. Ward, both of Smithfield, for appellants.

Parker & Martin and S. S. Holt, all of Smithfield, for appellees.

HOKE, J. [1] The deed of Elisha Wallace to his son, C. A. Wallace, conveys the land in question to said C. A. Wallace, "to have and to hold during his natural lifetime subject to a life support for the grantors and after the death of C. A. Wallace, the land is to descend in fee simple to his bodily heirs if any and if none to go to his next of kin." The grantee having devised the property to his widow, remainder to the children of R. I. Wallace in fee, it becomes necessary to determine what is the nature and extent of the estate conveyed; the widow insisting that her husband took a fee-simple estate under the rule in Shelley's Case. In numerous decisions of the court, many of them of recent date, this rule has been recognized as existent in this state, and it is held that when a limitation comes under this principle, it operates as a rule of property passing a fee simple both in deeds and wills, and regardless of a contrary intent on the part of the grantor. In *Nobles v. Nobles*, 177 N. C. 245, 98 S. E. 716, the principle referred to is stated as follows:

"So stated, the rule in question has always been recognized with us, and a perusal of these and other like cases will disclose that when the terms of the instrument by correct interpretation convey the estate in remainder to the heirs of the first taker as a class, 'to take in succession from generation to generation' to the same persons as those who would take as inheritors under our canons of descent and in the same quantity, the principle prevails as a rule of property both in deeds and wills and regardless of any particular intent to the contrary otherwise appearing in the instrument"—citing *Crisp v. Biggs*, 176 N. C. 1, 96 S. E. 662; *Cohoon v. Upton*, 174 N. C. 88, 93 S. E. 446; *Ford v. McBrayer*, 171 N. C. 421, 88 S. E. 736; *Robeson v. Moore*, 168 N. C. 389, 84 S. E. 351, *L. R. A.* 1915D, 496; *Jones v. Whichard*, 163 N. C. 241, 79 S. E. 503; *Price v. Griffin*, 150 N. C. 523, 64 S. E. 372, 29 *L. R. A.* (N. S.) 935; *May v. Lewis*, 132 N. C. 115, 43 S. E. 550; *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459.

And the same position is approved and impressively illustrated in *Leathers v. Gray*, 101 N. C. 163, 7 S. E. 658, 9 *Am. St. Rep.* 30, overruling same case in 96 N. C. 548, 2 S. E. 455, and where the rule as understood and more frequently presented and applied in this jurisdiction is thus stated by Merrimon, Judge:

"That, whenever an ancestor by any gift or conveyance took an estate of freehold (an estate for life), and in the same gift or conveyance an estate is limited either mediately or immediately to 'his heirs,' or to the 'heirs of his body,' as a class, to take in succession as heirs to him, such words are words of limitation of the estate, and convey the inheritance (the whole property) to the ancestor, and they are not words of purchase."

[2] From these and other authorities it will be noted that in order to an application

of the rule in Shelley's Case (being contrary as it is to the expressed will of the grantor that the first taker should have a life estate only), the word "heirs" or "heirs of the body" must be taken in their technical sense carrying the estate to the entire line of heirs and at this time and in this jurisdiction to hold as inheritors under our canons of descent, and if it appears by correct construction that these words are not used in that sense, but only as words designating certain persons or confining the inheritance to a restricted class of heirs, the rule does not apply and the ancestor or first taker will be held to have acquired only a life estate according to the express words of the instrument.

Thus in the case of *Puckett v. Morgan*, 158 N. C. p. 344, 74 S. E. 15, a devise to "M. of certain lands, 'during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters,'" the court was of opinion that from a perusal of the entire devise, the words "heirs of the body if she have any" with an ultimate limitation to her brothers and sisters, showed clearly that the words "heirs of the body" were not used in their technical sense but were intended to mean children or issue, and the estate by correct interpretation was "to M. for life, remainder to her children in fee and in default of children, over to the brother and sister," citing numerous cases in support of the position. And in a subsequent case of *Jones v. Whichard*, a father conveyed to his son a tract of land, "to have and to hold the [same] to said Robert M. Jones and Martha F. Jones, his wife, during their natural life and then to their legal bodily heirs, provided they leave any, and if not to be equally divided among my nearest of kin," etc.

The case of *Puckett v. Morgan* was held to be controlling, and stating the principle applicable, the court said:

"In approval and illustration of the rule as stated, there are many decisions here and elsewhere to the effect that, in order to its proper application the word 'heirs' or heirs of the body (these last by reason of our statute, *Revisal*, § 1578) must be used in their technical sense, carrying the estate to such heirs as an entire class to take in succession from generation to generation, and they must have the effect to convey 'The same estate to the same persons, whether they take by descent or purchase,' and, whenever it appears from the context or from a perusal of the entire instrument that the words were not intended in their ordinary acceptance of words of inheritance, but simply as a descriptio personarum designating certain individuals of the class, or that the estate is thereby conveyed to 'any other person in any other manner or in any other quality than the canons of descent provide,' the rule in question does not apply, and interest of the first taker will be, as it is expressly described, an estate for life."

—citing also for the position *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15; *Smith v.*

Proctor, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172; Wool v. Fleetwood, 136 N. C. 460-470, 48 S. E. 785, 67 L. R. A. 444; May v. Lewis, 132 N. C. 115, 43 S. E. 550; Whitesides v. Cooper, 115 N. C. 570, 20 S. E. 295; Mills v. Thorne, 95 N. C. 362; Ward v. Jones, 40 N. C. 404.

The same principle was applied in the latter case of Blackledge v. Simmons, 180 N. C. 535, 105 S. E. 202, the court being of opinion that on perusal of the entire instrument it appeared that the words "heirs of her body" were not intended to be words of general inheritance but were used in a more restricted sense.

[3] Considering the present deed in view of these authorities, the estate being conveyed to C. A. Wallace for life and after his death "to his bodily heirs in fee simple, if any, and if none to go to his next of kin," the limitation comes directly under the decisions of Jones v. Whichard, and Puckett v. Morgan, and that line of cases to the effect that the words "heirs of body" here are used in the sense of children or issue, and the estate conveyed is to C. A. Wallace for life, remainder to his children or issue if any and then over, and under May v. Lewis, 132 N. C. 115, 43 S. E. 550, the limitation over being to the next of kin of the grantee should be held as a limitation affecting his estate by confining the descent potentially to a restricted class of heirs, to wit, his "nearest of kin," and so preventing the application of the rule in Shelley's Case on that ground. This in our opinion being the true construction of the deed, C. A. Wallace, under the primary limitation having only a life estate, could not pass any interest by his will, and for the same reason his widow is not entitled to dower, the husband having never been seized of an estate of inheritance.

[4] And considering the facts further and the grantee C. A. Wallace having died without children or issue to take under the deed, the question recurs as to who are entitled under the ulterior limitation to "his next of kin"; the claimants being respectively his three surviving brothers, his widow, and the children of deceased brothers and sisters. On this question it has been held in this jurisdiction, in a long line of cases in which the question was directly considered, that these words mean "nearest of kin," and that in the construction of deeds and wills, unless there are terms in the instrument showing a contrary intent, the words "next of kin" without more do not recognize or permit the principle of representation. Redmond v. Burroughs, 63 N. C. 242; Harrison v. Ward, 58 N. C. 236; Davenport v. Hassel, 45 N. C. 29; Simmons v. Gooding, 40 N. C. 382; Peterson v. Webb, 39 N. C. 56; Henry v. Henry, 31 N. C. 278.

In Redmond v. Burroughs, supra, the suggestion was made that the term "next of kin" should receive its technical meaning that was

usually given it in construing the statute of distribution, so including the principle of representation; but the court, in rejecting the suggestion, called attention to the fact that the principle of representation as it prevailed in the statute did not arise from the use of the term "next of kin," but by reason of further words appearing therein, to wit, "next of kin of equal degree and those who legally represent them." And to show how consistently the court has adhered to this ruling, as the correct principle of interpretation, in the closing portion of his opinion in Harrison v. Ward, supra, Manly, Judge, speaks to the question as follows:

"In the case of Simmons v. Gooding, supra, the court felt constrained by the weight of authority, and we now feel constrained by that, and the force of our own decision, to hold the words 'next of kin,' in the will in question, to mean the nearest in degree, and that the sister of the deceased brother, Benjamin, will take the slave property limited to him for life, to the exclusion of the nephew and niece.

"The able argument which has been addressed to us upon this point has caused us to consider it again more at large, than we might otherwise have done, and we are again brought to the same conclusion. We do not feel at liberty to depart from the construction heretofore adopted—a construction, it may be added, which has the sanction of the most eminent Judges, Thurlow, Eldon, Grant, Plumer, and others. Those who are desirous of examining the authorities upon this vexed question will find them referred to by Jarman, in his treatise on Wills (volume 2, p. 38).

"The construction which we thus put upon the will may disappoint the expectations of defendants' friends, and work a case of hardship, not foreseen, and not desired by the testator; but it cannot be otherwise without unsettling again the sense of words, which it has given the courts great trouble to fix, and which the public interest now requires should remain so."

[5] Again, in these and other decisions, on the subject, it is held uniformly so far as examined that the term, as the equivalent of "nearest of kin" signifies "nearest of blood kin" and that relationship by marriage is not within its proper meaning. Thus in Jones v. Oliver, 38 N. C. 369, the testator died leaving a will in which there was an ulterior limitation to the "next of kin of himself and of his wife." The widow having remarried and died, her husband made claim to a portion of the property as her next of kin, and it was held that the limitation was to the nearest of kin by blood, and the husband was excluded. And it was so directly held in Peterson v. Webb, 39 N. C. 56. The same rule prevailed in England as to the meaning of the words "next of kin," Elmesly v. Young, 2 Myl. K. 780; and courts of the highest authority in this country have also approved the position. Swasey v. Jaques, 144 Mass. 135, 10 N. E. 758, 59 Am. Rep. 65; Locke v. Locke et al., 45 N. J. Eq. 97, 16 Atl. 49. In an elementary

work of recognized merit, it is said that the courts in this country have very generally held that "next of kin" when unexplained by the context means "next of kin according to the statute of distributions," but we doubt if the statement is justified as the rule of interpretation for deeds and wills. Thus, in one of the authorities sometimes referred to in illustration of such a statement, *Blagge v. Balch*, 162 U. S. 439, 16 Sup. Ct. 853, 40 L. Ed. 1032, the court in upholding a portion of the principle of representation was passing on the distribution of the French Spoliation claims dependent and determined on the construction of the act of Congress controlling in the matter, and in *Seabright v. Seabright*, 28 W. Va. 412, the court was construing a statute excluding the evidence of certain persons in suits against "next of kin," and it was held that the scope and purpose of the statute justified and required the interpretation that the term "next of kin" should include all of those who took and held a pecuniary interest under the statute of distributions; but both of these able courts recognized that in the interpretation of deeds and wills the principle of representation was ordinarily excluded in the use of the term "next of kin." But however this may be, it is beyond question the settled principle of construction in this state that, unless the instrument shows a contrary intent, the words "next of kin" mean "nearest of kin," and that the principle of representation is excluded.

There is nothing in *May v. Lewis*, 132 N. C. 115, 43 S. E. 550, that is in necessary conflict with this position. That was a case involving the question whether the grantee under the deed could convey a valid title, and dependent on whether the rule in *Shelley's Case* applied; the limitation being to the grantee for life and then to his heirs if any and if none to revert back to his next of kin. After holding that a good title could not be presently made as the term "next of kin" might serve to withdraw the limitation from our general canons of descent, the court in the opinion by our former associate, Mr. Justice Connor, and by way of illustration merely quoted 21 A. & E. Enc. to the effect "That it was very generally held in the United States that the term 'next of kin' meant 'next of kin' according to the statute of distributions," meaning no doubt that the term meant only "nearest of kin" as our cases construing the statute had uniformly held. And we are well assured that this able and learned judge who has ever evinced a wholesome regard for established precedent as affording a dependable base line for all intelligent and well ordered progress, had no intent in this casual reference to break down or set aside a long line of well-considered decisions so uniform and consistent as to establish the contrary

principle as a rule of property on which many titles must depend.

In accord with these principles, we must affirm the judgment of the court below and hold that C. A. Wallace took only a life estate under the deed from his father, and that under the ulterior limitation to his next of kin, the property belongs to his surviving brothers and sisters to the exclusion of the widow and his nephews and nieces.

Judgment affirmed.

(115 S. C. 512)

ROBERTS v. COLUMBIA RY. & NAV. CO.
(No. 10592.)

(Supreme Court of South Carolina. March 22, 1921.)

Master and servant @—276(3)—Evidence insufficient to show defective appliances caused injury to workman on boat.

In an action for injuries to the employe of a railway and navigation company when he left the boat on which he was employed, which had broken loose, so that he was subjected to exposure, evidence held insufficient to show that plaintiff would have been injured if he had remained on the boat where he agreed to work, showing instead that he was taken off the boat and put in a place of safety by a government boat, and voluntarily left such place, an island, and walked into the water to leave it, getting wet, and so sustaining injury.

Appeal from Common Pleas Circuit Court of Richland County; W. N. Townsend, Judge.

Action by L. B. Roberts against the Columbia Railway & Navigation Company. From judgment for plaintiff, defendant appeals. Reversed.

J. Fraser Lyon and T. H. Moffatt, both of Columbia, for appellant.

James H. Hammond, of Columbia, for respondent.

FRASER, J. "I live in Richland county. During the month of January, 1915, I was employed by the Columbia Railway & Navigation Company, for the purpose of keeping the logs and rafts off the boat Ruth No. 2, which boat was owned by the said company. This was in the winter time, and the river was very high, and there was a snow storm. I was sent for one afternoon, and undertook the employment. One of the watchmen at the bank came for me. I went down to the bank, and Mr. Shannon met me with a shall boat and took me to the large boat; he and Mr. Parr were keeping logs and drifts off the large boat, the Ruth No. 2. I then went out in the Ruth No. 2, when they came to the bank and got me. They wanted me to keep the logs and rafts off which were coming down the river. The river was flooded, and when it floods the logs and that kind of matter drift down and must be kept away

from the boat, else it might cause the boat to break loose. During that night I would keep the rafts and logs from accumulating by going down from the upper deck every time one would strike and taking a pole and punching it off. I punched some off that night. Nothing happened to the boat until about 12 that night. * * * About 12 o'clock on this night Parr, Shannon, and myself were on the upper deck eating peanuts and sitting by a heater when something struck the boat. We immediately went down, but before we could get there the boat had broken loose and was drifting down the river. These boats are each about 150 feet long and 25 or 30 feet wide. When the boat broke loose we all got frightened. The boat floated downstream about three-fourths of an hour, when we were rescued by a government boat and then taken by this boat to an island. After landing on this island we tried to wade to the main shore. They said, 'We are going.' I said, 'I will have to follow; I won't stay by myself.' I did not get wet until after I landed on this island and tried to wade to the mainland. I could not make it to shore, and had to climb a tree, and I stayed there until help came. I was in this tree until daylight, at about which time the government people sent a stove and blankets. The government boat did not overturn. I stayed in wet clothes until I got home, which was about 10 o'clock. Each of these boats was about 150 feet long and 25 or 30 feet wide. They were tied together. The Ruth No. 2 to a cottonwood tree about six inches in diameter. I was frightened going downstream. I saw an anchor and rope in this boat. The cabin which we were in was 14 feet or higher from the lower deck. There are no curves in the stream. That night it was so dark we could not see. I was in water and up a tree about eight or nine hours. I did not want to stay on this island by myself was the reason why I left. I did not go to bed on account of this experience for about two weeks, and during this two weeks I was cutting wood and staying around a woodyard; afterwards I did some light carpenter work."

Plaintiff brought suit for the injury and alleges:

"That the aforementioned injuries and damages suffered by the plaintiff are all directly resultant from the defendant's failure to provide a reasonably safe and sound place for him to work and in failing to provide appliances on the said boat that were sound, in that the defendant failed to lash the boat to a substantial tree or anchor on the land, and on the contrary had it tied to a small and insufficient tree that was unable to hold the boat, and also, in that the defendant used old, worn, and rusty and defective cables lashing the boat and the other boat to the side, all of which caused the plaintiff to drift down the stream. That had

the defendant properly tied the boat at the bow, or had the cables used on the sides been good and serviceable, and not rotten and worthless cables, as they were, the said boat would never have broken away, and the damages to the plaintiff would have been averted."

It will thus be seen that the plaintiff alleges: (1) An unsafe place to work; and (2) defective appliances.

At the close of the plaintiff's testimony, the defendant moved for a nonsuit and at the close of all the testimony moved for a directed verdict. Both motions were refused, and the judgment was for the plaintiff, from which the defendant appealed. It was error to refuse the nonsuit, and again it was error to refuse to direct a verdict.

In order to recover for negligence, the negligence complained of must be the proximate cause of the injury. The evidence fails to show that the plaintiff would have been injured if he had remained on the boat where he agreed to work. It shows positively that the plaintiff was taken off the boat and put in a place of safety; that he voluntarily left the safe place on the island and walked into the water that wet him and caused his injury.

The plaintiff shows no cause of action, and inasmuch as the record not only fails to show a cause of action, but shows positively that the plaintiff has no cause of action, a verdict should have been directed.

The judgment is reversed.

GARY, O. J., and WATTS and COTHRAN, JJ., concur.

(115 S. C. 517)

LEE v. CITY TRANSFER & BAGGAGE CO. et al. (No. 10594.)

(Supreme Court of South Carolina. March 25, 1921.)

1. Carriers §137—Law of agency properly charged in action for loss of suit case.

In an action against a transfer and baggage company for loss of a suitcase, call for which was taken by the baggage company's agent, its codefendant, the trial court properly charged the law of agency, and explained how the relationship of principal and agent may be created; the evidence and issues making it necessary.

2. Appeal and error §215(1)—Attorneys under duty to call court's attention to error in misstating issues.

If the trial court committed an error in misstating the issues raised by the pleadings to the jury, it was the duty of the attorneys to call his attention to such error.

Appeal from Richland County Court; M. S. Whaley, County Judge.

Action by Mrs. C. M. Lee against the City Transfer & Baggage Company and another. From judgment for plaintiff, the named defendant appeals. Affirmed.

J. Hughes Cooper and Alfred Wallace, Jr., both of Columbia, for appellant.

James H. Hammond, of Columbia, for respondent.

WATTS, J. This was an action by plaintiff against defendants for loss of suit case, the defendant Wise defaulted, and the City Transfer & Baggage Company answered and contested. The case was heard by Hon. M. S. Whaley, county judge and a jury, and a verdict rendered in favor of the plaintiff. Wise did not appear and testify. The issue raised by the other defendant was that Wise was not their agent, and that Wise took the notice of call from their desk without their knowledge, and answered the call without their knowledge or authority. After entry of judgment defendant appeals and takes four exceptions, but on the hearing of the case abandoned the fourth exception. All three of the exceptions complain of error in the judge's charge. No motion was made in the trial below for a nonsuit or directed verdict, so the only question to be determined was whether or not the judge erred in his charge.

[1] The first and second exceptions are overruled. His honor committed no error in charging the law of agency, and explaining how the relationship of principal and agent may be created; the evidence and issues made in the case made it necessary that his honor should elucidate this. The complaint alleged such facts that the inference could be drawn that Wise was the agent of the appellant, and from the evidence offered at trial that inference could be inferred and the real question in the case was, Was Wise the agent of appellant for the purpose of transporting the plaintiff to the depot? and not whether Wise was the general agent of the appellant, or how he was appointed.

[2] If his honor committed an error in misstating the issues raised by the pleadings to the jury it was the duty of attorneys to call his attention to such error. We see no merit in any of the exceptions as made. Under the undisputed facts of the case the plaintiff was clearly entitled to a verdict, and the appellants got a trial that was free from error on the part of the trial judge. All exceptions are overruled, and judgment affirmed.

GARY, C. J., and FRASER and COTHRAN, JJ., concur.

COTHRAN, J. I concur in the result upon this ground: The complaint was plainly demurrable; it did not allege that the defend-

ant received the baggage for transfer; it did not allege that the defendant Wise who actually received it was the agent of the transfer company; it did not allege that the transfer company by its negligence permitted Wise to represent himself as the agent of the transfer company; it simply alleged that the transfer company had agreed to transfer the baggage, and that Wise had called for it, representing himself as the agent of the transfer company, and that in the movement Wise had lost the baggage.

The defendant not having demurred to the complaint, not having made a motion to require the complaint to be made more definite, and not having objected to testimony along both lines (that Wise was the agent of the transfer company, and that the latter was negligent in allowing him to represent himself as their agent), is not in a position now to object to the testimony or charge of the court upon either theory. Both of these issues were fairly presented to the jury in the circuit judge's charge, without objection on the part of the defendant, and with the finding of the jury we are not concerned.

(115 S. C. 520)

SON v. WESTERN UNION TELEGRAPH CO. (No. 10595.)

(Supreme Court of South Carolina. March 20, 1921.)

Commerce §28—Message between points within state transmitted through another state held interstate message.

A telegraph message between two points in the state, unnecessarily transmitted through another state, is an interstate message, and not subject to state law permitting damages for delay of death message, preventing receiver from attending relative's funeral.

Appeal from Common Pleas Circuit Court of Aiken County; John S. Wilson, Judge.

Action by S. Son against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

Francis R. Stark, of New York City, and Nelson & Gettys, of Columbia, for appellant. Julian B. Salley, of Aiken, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant, in failing to deliver the following telegram:

"Batesburg, S. C.

"Mary Napper, Graniteville, S. C. Mother is dead be buried at Leesville eleven o'clock to-morrow.
S. Son."

The message was delivered to the defendant for transmission, at 11:30 o'clock on Sun-

day morning, but was not delivered at Graniteville until 7:30 o'clock Monday morning, when it was too late for the plaintiff to attend the funeral of her mother. The plaintiff also received the message by telephone at 9 o'clock on Monday morning, and the telegram, likewise, by mail from Augusta, Ga., on Tuesday morning. The defendant has three direct wires leading from Batesburg to Graniteville, both places being in this state, and 38 miles apart. It also works in conjunction with the Southern Bell Telephone Company, and sometimes sends messages over the telephone wires.

The defendant offered in evidence an agreed statement of what J. B. Breland would testify, if present, which is as follows:

"On March 31, 1918, I was joint operator for the Southern Railway and the Western Union Telegraph Company, at Batesburg, S. C. The attached message was filed with me at 11:50 a. m. March 31, 1918, and was sent by me to Charlotte, N. C., for relay, at 5:25 p. m."

R. O. Johnson, telegraph operator for the defendant at Graniteville, testified that the telegram was received by him as No. 1, from Charlotte, N. C., on the morning of April 1, 1918. This was delivered to the plaintiff before she received either the telephone message from Batesburg, or the letter containing the telegram from Augusta, Ga.

The crucial point in the case is whether this was an interstate or an intrastate message. In the case of *Western Union Telegraph Co. v. Speight*, 254 U. S. 17, 41 Sup. Ct. 11, 65 L. Ed. —, the facts were very similar to these in the present case. The jury found that the message was sent out of North Carolina into Virginia, for the purpose of fraudulently evading liability under the law of North Carolina, and gave the plaintiff a verdict. The presiding judge then set the verdict aside "as a matter of law," and ordered a nonsuit. But on appeal the Supreme Court of the state set aside the nonsuit, and directed that a judgment be entered on the verdict. Mr. Justice Holmes, who delivered the opinion of the court, said:

"We are of opinion that the judge presiding at the trial was right, and that the Supreme Court was wrong. Even if there had been any duty on the part of the telegraph company to confine the transmission to North Carolina, it did not do so. The transmission of a message through two states is interstate commerce as a matter of fact. * * * The fact must be tested by the actual transaction. * * * The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement, but held that when, as here, the termini were in the same state, the business was intrastate unless it was necessary to cross the territory of another state in order to reach the final point. This, as we have said, is not the law. It did, however, lay down that the burden was on the company to show that what was done 'was not done to evade the jurisdic-

tion of the state.' If the motive were material, as to which we express no opinion, this again is a mistake. The burden was on the plaintiff to make out her case. Moreover, the motive would not have made the business intrastate. *If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise; but in that case the liability, if it existed, would not be a liability for an intrastate transaction that never took place but for the unwarranted conduct and the resulting loss.*" (Italics added.)

Reversed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(129 Va. 542)

TOWN OF GORDONSVILLE v. ZINN.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Waters and water courses §39—"Riparian land" must be on watershed of portion of stream in question.

Land, to be "riparian" to a particular portion of a stream, must, as an essential condition, be located on the watershed of that portion of the stream.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Riparian.]

2. Waters and water courses §39—Land opposite point below plaintiff's land not riparian to portion of stream above.

Where defendant's land touched a stream both above and below plaintiff's land, but the dwelling house was opposite a point in the stream below plaintiff's land, and any surplus water from the dwelling house would return to the bed of the stream below plaintiff's land, the dwelling house land is not riparian to the portion of the stream above plaintiff's land.

3. Waters and water courses §47 — Water rights incident to riparian lands cannot be used on adjoining nonriparian lands.

Where defendant owned lands on which was a dwelling house, lying back of plaintiff's riparian lands and touching the stream below plaintiff's lands, and also owned a strip connecting such lands with the stream above plaintiff's lands, she could not use the water rights incident to such riparian strip on the dwelling house lands, by diverting water from the stream above plaintiff's land for use at the dwelling house; the dwelling house lands being nonriparian as to the portion of the stream at the point of diversion.

4. Waters and water courses §85—Diversion will be restrained only to extent that it causes substantial injury.

A riparian owner's right to the use of water, to the extent that it exists, will be protected by injunction from substantial injury, actual or threatened, by the wrongful continuous diversion of the water by an upper riparian owner, but beyond this the court will

not go, whatever may be the lack of abstract right in the upper riparian owner to divert the water.

5. Waters and water courses §47 — Town cannot divert water to nonriparian premises.

A town owning one acre of riparian land, on which it has constructed reservoirs, is limited to the use of the water on such land, and has no right to divert it to the town, a nonriparian locality.

6. Waters and water courses §156(6)—Conveyance to town held to convey only right to use water on land conveyed.

A riparian owner's conveyance of one acre of land to a town, on which it constructed reservoirs, with all water and water rights and privileges appurtenant thereto, gave the town no right to use any more of the water than was incident to its ownership of the land conveyed.

7. Waters and water courses §158(2) — Agreement held not to divest riparian rights.

An agreement between a town owning riparian land, on which it constructed reservoirs, and an upper riparian proprietor having constructed a reservoir for his own use, whereby the town was given a continuing right to enter on his land and make changes and improvements in his reservoir for the purpose of keeping the water clean and pure, held not to divest him and his heirs of any riparian rights which they would otherwise have possessed.

8. Waters and water courses §129—Right to divert water as against upper owners not obtainable by prescription.

A lower riparian owner's diversion of water can confer no right thereto by prescription as against upper owners, as no cause of action ever arises in favor of upper owners so as to commence the running of the prescriptive period.

9. Waters and water courses §152(3)—Town having prescriptive right to divert water may enjoin diversion by upper owner.

A town owning but one acre of riparian land, but which, by its adverse collection, dominion, and control of all the water of a stream, has acquired, as against lower owners, a prescriptive right to divert the water to its exclusive use, may enjoin an upper owner from diverting the water to nonriparian lands in such quantity as will in any degree diminish the quantity; it appearing that it would be substantially damaged in times of drought, and that its exclusive right would eventually be barred pro tanto by prescription, if such diversion was permitted.

Appeal from Circuit Court, Orange County.

Suit by the Town of Gordonsville against Mrs. Flora M. Zinn. From a decree dismissing the bill, the complainant appeals. Reversed and remanded.

This is a suit for injunction, instituted by the appellant, the town of Gordonsville, a municipal corporation, against the appellee, Mrs. Flora M. Zinn, the object of which is to perpetually enjoin the latter from with-

drawing any water whatsoever from the flow of a small nonnavigable stream from a locality on such stream which is above the reservoirs of the town located on the stream, from which reservoirs the town draws its municipal water supply.

There was a demurrer to the bill by the appellee. The court below sustained the demurrer and dismissed the bill; and the questions presented for decision on the appeal arise on the demurrer to the bill.

The material issues and facts, as they appear from the allegations of the bill, are, in substance, as follows:

The town claims, as a lower riparian landowner, to be entitled (under a certain conveyance in 1889 from one B. F. Weaver; also under a certain contract in writing, in 1889, with one Alexander Cameron, the adjacent upstream owner of the land on both sides of the stream, including the spring, which is the source of such stream; and by prescription) to all of the water which flows from such spring and would in its natural course flow in said stream from the said Cameron land through the reservoirs of the town, except so much of the water as the said Cameron in his lifetime, and those claiming under him at the time of the institution of this suit, were entitled to use as upper riparian landowners with respect to the said stream and spring.

Prior to 1889, and to the construction of its reservoirs by the town, the said Weaver owned a large tract of land on both sides of said stream adjacent to the said Cameron land and immediately below it on such stream. In that year (1889) Weaver from his said larger tract conveyed to the town the parcel of land owned by it located as aforesaid on and so as to embrace both sides of said stream, consisting of one acre, in shape a parallelogram, 249 feet in length along the Cameron line and 175 feet in width. This deed also conveyed to the town "all the water and water rights and * * * all the privileges appurtenant to said lot of land." This deed was duly recorded in 1889.

The conveyance just mentioned left still belonging to Weaver a considerable tract of land which lay to the south of the Cameron land and the parcel acquired by the town as just stated; the remaining Weaver land being bounded on the west by a portion of the eastern boundary line of the Cameron land for some distance, thence by northern, eastern, and southern boundary lines of the town lot, and thence by the eastern boundary line of the Cameron land again.

In June, 1889, the aforesaid contract in writing between the town and the said Cameron was entered into, which, omitting the formal parts, is as follows:

"Whereas the said town of Gordonsville is desirous of constructing suitable works and

reservoirs for the purpose of securing an abundant supply of pure water, and for this purpose hath purchased of B. F. Weaver an acre of land bounded on the west side of the lands of the said Cameron near his spring and reservoir, the water from which spring in its natural flow passes through the said acre of land; and

"Whereas, the said town is about to construct upon the said acre of land a suitable reservoir for the purpose of supplying water, and in order that said water may at all times be pure and clear, it is necessary that some changes and improvements should be made in the reservoir of the said Cameron, which lies between his spring and the reservoir intended to be built by the said town; and

"Whereas, the said Cameron is willing that the said town may make such changes and improvements in his reservoir as shall be necessary to secure the water in a clear and pure condition, provided his legal right to use and control the water from his spring and reservoir is not in any degree lessened:

"Now, therefore, and in consideration of the premises and the further consideration of \$1 in hand paid to the said Cameron by the said town, he, the said Cameron, doth give and grant unto the said town of Gordonsville the right to enter upon his land immediately in the vicinity of the said spring and reservoir on his farm near Gordonsville, in the county of Orange, and to make such changes and improvements in the said reservoir, by clearing it up, lining, paving, and coating the same and by elevating the water not higher than the present elevation of the discharge pipe from the spring into the reservoir and to inclose the same with a suitable and slightly fence so as to prevent all persons and animals having access to said spring and reservoir except the said Cameron, his representatives, servants, agents, and assigns, and the proper officers of the said town of Gordonsville.

"But it is expressly agreed that neither party shall wash or bathe or permit to be washed or bathed human bodies or other things in said spring and reservoir, which would tend to pollute the waters therein.

"The rights herein granted the said town are to continue as long as the waterworks are kept in proper condition and the water needed for supplying said town as aforesaid.

"And the said town on its part covenants to and with the said Cameron that it will make improvements aforesaid, and in making them it will do no injury to his spring, reservoir, and lands adjacent thereto. That all surplus dirt taken from his reservoir not utilized in their works shall be removed and deposited in some place not injurious to the lands and grass of the said Cameron.

"That in the improvements of his reservoir it will put in at proper place or places one or more discharge pipes for the use of said Cameron and of sufficient size to afford to said Cameron the use of the water from said spring to the same extent that he is entitled under the law to said water at this time. It being the intention of the parties to this deed that no restraints nor limitations shall by this deed be placed upon the legal rights of the said Cameron, his representatives, and assigns as they now exist, to and over the water and the use

thereof for any and all purposes for which he may now lawfully use the same, and to secure to said town the right to cleanse and purify and keep clean and pure the water that will naturally flow into its reservoir.

"The exclusive use and control of the said discharge pipes shall at all times be and remain in said Cameron, his representatives, and assigns, so as to afford to them the right to use the water to the same extent as now exists. The failure of the town of Gordonsville to make in a reasonable time the improvements herein mentioned and to construct and keep in proper repair its waterworks shall operate as a revocation of the rights of entry herein granted by the said Cameron to the said town of Gordonsville."

Under the Weaver deed aforesaid, and under and in accordance in all respects with said contract between it and the said Cameron, the town (according to the allegations of the bill), "continuously from the 25th day of June, 1889, and before," collected in reservoirs, on its said one-acre parcel of land, all the water which flowed from said Cameron spring, except such as was used on the said Cameron land in supplying the dwelling house and outbuildings of the said Cameron located on said Cameron land with the water there used, drawn from the discharge pipe places provided by the town in accordance with said contract, and the water collected in said reservoirs as aforesaid has been taken by the town and conducted in pipes from said reservoirs for some distance to the town of Gordonsville, and thus diverted from the natural channel of the stream, and has been used for municipal purposes and in supplying the inhabitants of the town with water. That this use of such water by the town has been a necessary use, the water thus taken by the town being all needed for its aforesaid purposes, and that during such period of approximately 30 years before the institution of this suit the said diversion by the town of such quantity of water, collected as aforesaid in its reservoirs, "has been absolute and unrestricted, * * * without restriction, hindrance, or objection, under a valid claim of right, without interruption (and) adversely"; and that "in dry seasons there has been no overflow from the reservoirs of the town, the needs of the town having required every drop of water available from said spring."

The following also appears from the allegations of the bill:

Subsequent to the occurrences above narrated the said Alexander Cameron acquired title to 58 acres of the said residue of the Weaver land and added it to his holding of the original Cameron land aforesaid. This 58 acres lay adjacent to the original Cameron land, extending in a southwesterly direction from the southern end of the town lot, along the eastern line of the original Cameron land in that locality. This 58 acres also

extended in an easterly direction along the whole of the southern end of the town lot and thence along its eastern side to the said stream and to the east of such lot, so as to constitute a portion, at least, of such 58-acre parcel, lower riparian land with respect to the town lot and said stream.

The said Cameron did not in his lifetime make any use on said 58-acre parcel of land, for any purpose, of any water taken from said stream above the town lot.

The said Cameron died in 1915, and in 1916, in the partition of his lands among his heirs, the said 58-acre parcel of land became the property of Mrs. Zinn, one of his heirs, and the said original Cameron land became the property of other heirs of said Cameron.

Thereafter the appellee built a handsome residence on the 58-acre parcel of land, located (as admitted in argument in the case) 350 to 400 feet east of the dividing line between such parcel and the original Cameron land. And thereupon a controversy arose between the town and the appellee as to her right to withdraw water from said stream above the town lot for use on said 58-acre tract (presumably for domestic purposes, in connection with her dwelling house aforesaid). After such controversy arose, the appellee, by deed dated in May, 1917, acquired from the other Cameron heirs aforesaid title to a strip of the original Cameron land, 25 feet in width, containing forty-two one-hundredths of an acre, extending from the center of the natural location of the channel of the stream, just above the town lot, thence southwardly along the original eastern line of the Cameron land first above mentioned, with the line of the town lot so far as that extends in that direction, thence with the line of the 58-acre tract aforesaid where that tract lies adjacent to the original Cameron tract aforesaid. And at the time of the filing of the bill the appellee claimed the right, and notified the town that, as upper riparian owner of the 25-acre strip of land above mentioned, she intended as a matter of right to withdraw from the stream, where such strip of land borders upon it and embraces a portion of it, sufficient water for such purposes as she saw fit," as alleged in the bill, but presumably, from the positions taken in the petition and in argument, for her natural uses in and about her dwelling house on said 58-acre tract, by means of pipes laid from the stream, thence, over the 25-foot strip of land and adjacent 58-acre parcel, to the dwelling house.

The town denies that the appellee has any right to do this, claiming that this would be a diversion, pro tanto, of the water of the stream to the exclusive use of which the town is entitled, as it alleges as aforesaid, which would operate such an irreparable injury to the rights of the town, as alleged, that, in equity, as the town claims, the injunction prayed for should be awarded.

Other material matters are referred to in the opinion of the court.

Shackelford & Robertson, of Orange, for appellant.

McGuire, Riely & Eggleston, of Richmond, for appellee.

SIMS, J. (after stating the facts as above). The questions raised by the assignments of error will be disposed of in their order as stated below:

1. Is the land owned by appellee, where her dwelling house is located, riparian land, having reference to that portion of the stream which is immediately above the town lot, from which the appellee claims the right to withdraw water?

This question must be answered in the negative.

In the note to 11 L. R. A. (N. S.) 1062, this is said:

"According to the weight of authority, riparian land is, in any event, limited in its extent by the watershed of the stream; in other words, lands beyond the watershed cannot be regarded as riparian, though part of a single tract, held in a common ownership, which borders upon the stream."

The following cases are cited by the learned annotator to sustain this note, namely: Chauvet v. Hill, 98 Cal. 407, 28 Pac. 1066; Southern California Invest. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Bathgate v. Irving, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Boehmer v. Big Rock Irr. District, 117 Cal. 19, 48 Pac. 908; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. An examination of these authorities discloses that they sustain the text of the note above quoted. See, also, the principal case to which said note is in annotation, namely, Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062, and 2 Farnham on Waters and Water Rights, pp. 1571-1573, which also sustain the text of such note.

In Anaheim Union Water Co. v. Fuller, just cited, this is said:

"The principal reasons for the rule confining riparian rights to that part of lands bordering on the stream which are within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is, in consequence, entitled, so to speak, to the use of the waters."

In 2 Farnham on Waters and Water Rights, § 463a, pp. 1571, 1572, this is said:

"What is riparian land? It being established that the right to use the water of the stream is dependent solely upon the ownership of

land which is in contact with the stream, it becomes necessary to determine what, in fact, is riparian land. This question is not entirely free from difficulty. There are several things upon which the answer to the question might be made to turn. The first and most important is the natural configuration of the country through which the stream flows, so that all land within the watershed which lies in such a manner that the drainage from it finds its way into the stream might be regarded as riparian land. But a rule which would recognize such a vast extent of territory as riparian land would be almost as destructive of the right of the riparian owner as a rule which would permit any one who could gain access to the water to make use of it. Such a rule not only would permit the consumption of the water near its source of supply, but it would result in conflicts between landowners as to rights of way and the construction of the necessary apparatus to make the water available. Another criterion for determining what is riparian land might be the land which is in possession of one person whose holdings actually extend so as to come in contact with the water. This test, in some cases, might be too broad, because part of the land might lie out of the natural watershed of the stream, and therefore be outside of the boundaries established by nature for riparian ownership. The criterion which more nearly meets the necessities of the case is the rule that all land must be regarded as riparian which is within the natural watershed of the stream, the title to which is in one owner and the boundaries of which have been established in accordance with the requirements of the conditions which will best serve the interests of individual landowners. * * * The watershed should certainly form a limit beyond which the riparian rights cannot be claimed; but there is a question whether or not that limit is not too wide. Much may depend upon the character of the stream. A river of large volume might appropriately supply the needs of the population living within its watershed, while a small stream could be used only by those living on its immediate bank. The most satisfactory rule is that the parcels of land should be regarded as riparian so far as their location with reference to the stream has indicated where their boundary should be fixed, so that all that parcel which is regarded as one tract should be regarded as riparian, leaving the question of the extent of the use which may be made of the water to the rules regulating the relative rights of owners on the stream. Under this rule the boundary of riparian land is restricted to land the title to which is acquired by one transaction."

See, to the same effect, notes in 9 Ann. Cas. 1235, 1236, and Ann. Cas. 1913E, 709. See, also, *Stratton v. Hermon School*, 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N. S.) 57, Ann. Cas. 1915A, 768.

In the case of *Anaheim Union Water Co. v. Fuller*, supra, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062, it is said that—

"Where two streams unite, * * * the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered as a separate stream, with regard to lands

abutting thereon above the junction, and that land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream."

In case of *Miller v. Baker*, 68 Wash. 10, 122 Pac. 604 (a suit for injunction), the locations of the lands of the plaintiffs and defendants with respect to the stream and each other were practically the same as the locations with respect to those particulars of the town lot and appellee's 58-acre tract in the case before us. In that case the land of the defendants abutted on the stream below the land of the plaintiffs, and thence extended along adjacent to and on above the plaintiff's land, but away from the stream after defendants' land reached the plaintiffs' land. And in the opinion of the court this is said:

"We find it unnecessary to decide at this time whether the defendants' lands are all riparian to this stream. For the purposes of this case it may be conceded that they are riparian. But it is clear that, if the whole tract owned by the defendants is riparian land, this is so because the stream crosses the tract at a point in the extreme southeast corner thereof [below the plaintiffs' land]. The stream does not touch the defendants' lands at any other point. The tract is, therefore, riparian to the stream at that point only. The mere fact that a tract of land touches a stream at one point does not make such land riparian at other points on the stream or to the whole of the stream. The riparian right of such land, or the owners thereof [the court having reference to the right of withdrawing water from the stream], is confined to the points where the land abuts upon the stream."

There are, therefore, under the above-mentioned authorities, two limitations upon the extent away from the borders of a stream to which land held by one ownership can be considered as riparian; one, the broader limitation, that the land in question in a particular case, to be riparian, must, as one essential condition of fact, be located on the watershed of that portion of the stream which is in question; the other (which is a limitation upon such broader limitation) that the land is restricted to that to which the title was acquired by one transaction. As appears also from such authorities, according to their holding, the latter limitation is itself still further curtailed by the further limitation that the land cannot be considered as riparian in any event beyond the extent of the bounds of the grant from the commonwealth. So that, as said in *Anaheim Union Water Co. v. Fuller*, supra, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062:

"If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary. Land thus conveyed and severed from the stream can never regain the riparian right,

although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership."

The position is taken in argument for appellee that—

"All of the cases cited, in which riparian rights were restricted to land acquired by a single entry, involved land acquired by original government grant; and the cases arose in Western states, where the common-law doctrine as to property in natural streams was held to be inapplicable, and it is insisted that such have no force in Virginia, where the common-law rules have never been questioned."

In this connection it should be said that it appears from the decisions of the states referred to that the holding in question was based, in part at least, on the common-law doctrine referred to, which is expressly held to be in force in those states. See *Lux v. Haggin*, *Crawford Co. v. Hathaway*, and *Watkins Land Co. v. Clements*, *supra*, for the holding that such common-law doctrine is in force in the Western states in question. But it is true that these decisions in the particular just mentioned are largely influenced, as appears therefrom, by the consideration of the policy of the federal and such Western state governments with respect to confining the grants of land to any one individual to a limited quantity of land.

However, in view of the location of the dwelling house of the appellee with respect to the watershed of that portion of the stream in question in the case before us, at which dwelling the appellee claims the right to use the water, it is unnecessary for us to consider the question whether the land on which the dwelling house is located is or is not riparian land, because of the fact that it was not acquired by one and the same transaction by which the title to the Cameron land was originally acquired. For, as we have seen, if such land is not on the watershed of that portion of the stream which is above the town lot, and if the residue of such tract of the appellee's land abuts on the stream only at a location below the town lot, it can, at most, be regarded only as lower riparian land as compared with the town lot, and cannot be held to be riparian at the aforesaid location above the town lot, regardless of whether the title to it and the other land of the appellee was or was not acquired in one transaction within the meaning of the decisions on that subject aforesaid. As we shall presently set out in more detail, the dwelling house land of the appellee is not on the watershed just mentioned, and can therefore, at most, be regarded only as lower riparian land as compared with the town lot aforesaid.

[1] Hence we do not wish to be construed as approving or disapproving in this opinion of the doctrine embodied in the limitations

above mentioned other than the aforesaid broader limitation. We, however, do approve of the doctrine of the last-named limitation (to wit, that the land in question in a particular case, to be riparian, must, as one essential condition of fact, be located on the watershed of that portion of the stream which is in question), and it is decisive against the appellee of the question of whether her dwelling house land is riparian at the location on the stream, above the town lot, at which the appellee claims the right to withdraw the water.

[2] As a matter of fact, as appears before us as aforesaid, the dwelling house land is located 350 to 400 feet east of the original Cameron land's eastern boundary line, whereas the town lot extends in width only 175 feet east of such Cameron land line where that line crosses the stream. The dwelling house land therefore is opposite a point on the stream 175 to 225 feet below the town lot and reservoirs, and hence, as determined by its natural location, the dwelling house land of appellee is normally not upon the watershed of the stream above the town lot, but upon the watershed below such lot. That this normal situation conforms to the fact appears from the position taken for the town in the petition for appeal, that any surplus of water not used at said dwelling house will return to the bed of the stream below the town lot, which is not controverted in argument for the appellee.

There seems to be but one reported decision not in accord with the above-mentioned authorities, and that is the case of *Jones v. Conn*, 39 Or. 30, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630, which is approved in *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971, 988, and cited in 40 Cyc. 558, 559, where the doctrine of that case is stated. See the comment on the *Jones v. Conn* Case in note to 2 *Farnham on Waters and Water Rights*, p. 1573.

Since the dwelling house land of appellee cannot be regarded as riparian with respect to the portion of the stream above the town lot, from which location appellee claims the right to withdraw the water, this brings us to the next question for our decision and that is this:

[3] 2. Has the appellee the right to use, on her nonriparian dwelling house land, water rights incident to the 25-foot strip of Cameron land, which is riparian to the portion of the stream above the town lot, from which location appellee claims the right to withdraw the water?

This question must be answered in the negative.

The English doctrine on the subject is unquestionably to this effect. See note to 22 L. R. A. (N. S.) 383 et seq., and especially the cases there cited of *Swindon Waterworks Co. v. Wilts & B. Canal Nav. Co.*, L. R. 7 H. L.

705, and *McCartne, v. Londenderry, etc.*, R. Co. (1904) A. C. 301.

The English doctrine, as usually stated, is that the upper riparian owner cannot rightfully divert to nonriparian land water which he had the right to use on the upper riparian land, but which he does not so use.

To the same effect is the holding of the American cases of *Williams v. Wadsworth*, 51 Conn. 277, *Crawford v. Hathaway*, supra, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647, and *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181.

As said in the last-cited case:

"The superior proprietor cannot, however, divert to nonriparian lands the water which he would have a right to use * * * but which he does not in fact use. * * * If he does not in fact use any of the water himself, the inferior proprietor has a right to the flow of the entire stream."

In *2 Farnham on Waters and Water Rights*, this is said:

*"Diversion for Use of Nonriparian Land.—*As was seen during the discussion of the question of the right to use the waters from the stream, there is no right to use it on nonriparian land. This rule makes the diversion of water for use there illegal. * * * There are some exceptions to the rule thus broadly stated. * * * To give the lower owner a ground of complaint the quantity taken to the nonriparian land must be sufficient to inflict a perceptible injury on him," citing both English and American cases.

The English case of *Earl of Sandwich v. Great Northern Ry. Co.*, L. R. 10, Ch. Div. 707, cited and relied on for appellee, was expressly disapproved in the later case of *McCartney v. Londenderry, etc.*, R. Co., supra (1904) A. C. 301.

In regard to the case of *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271, 89 S. E. 305, Ann. Cas. 1917E, 60, cited and relied on for appellee to sustain the position that this court has held that the owner of two contiguous tracts of land may recover damages to both tracts due to the destruction of a spring on one of the tracts, this should be said: The opinion in the case does not, nor does the declaration, disclose the fact now to be mentioned; but as appears from the brief for plaintiff, which is not controverted in this particular, the spring, for the destruction of which damages were allowed, flowed in its natural channel from the one tract to the other, both tracts being riparian. Hence the case is not in point in the case now before us.

There is more seeming divergence in the holding of the American cases on the subject under consideration than there is among the English decisions, as appears from the following American cases cited and relied on for appellee, namely: *Elliot v. Fitzburg R. R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec.

85; *Stratton v. Mt. Harmon School*, supra, 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N. S.) 57, Ann. Cas. 1915A, 768; *Harris v. N. & W. Ry. Co.*, 153 N. C. 542, 69 S. E. 623, 31 L. R. A. (N. S.) 543, 138 Am. St. Rep. 686; *Atchison, etc., Ry. Co. v. Shriver*, 101 Kan. 257, 103 Pac. 519; and *Jones v. Conn*, supra, 39 Or. 30, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630, in which *Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18, 68 Am. St. Rep. 645, is cited and quoted from. See, also, *Jones v. Acqueduct*, 62 N. H. 488. But this divergence is, we think, more seeming than real.

These American cases hold, or are based upon the principle, that while, accurately speaking, the English doctrine referred to above is correct, still in an action for damages or suit for injunction by a lower against an upper riparian landowner for wrongful diversion of water by the latter, either upon the upper riparian land or therefrom to nonriparian land, the plaintiff, in order to prevail, must show some substantial actual damage occasioned by the diminution of the quantity of the water which the plaintiff has the right to use, or (in cases of suits for injunction) threatened damages, by the claim of right of the defendant and his conduct in asserting same being of such character as to set in motion the running of the prescriptive period against the right of the plaintiff, so that in time such right would be barred by prescription unless the injunction is awarded. This, of course, is a proper qualification of the English doctrine as stated above, for, as pointed out by Chief Justice Shaw in the opinion of the court in *Elliot v. Fitzburg R. R. Co.*, supra, 10 Cush. (Mass.) 191, 57 Am. Dec. 85, and as is said in *Stratton v. Mt. Harmon School*, supra, 216 Mass. at page 88, 103 N. E. at page 89, 49 L. R. A. (N. S.) at page 61, Ann. Cas. 1915A, at page 771:

"Any other conclusion * * * would lead to the absurd result that every riparian proprietor from near the source of a river or any of its confluent to the sea could maintain an action and recover nominal damage for an abstraction and diversion so trifling as to be beyond the possibility of ever causing actual injury."

But the English doctrine does not, in truth, differ from the holding of the American cases above referred to with respect to the qualification just mentioned. That qualification is recognized by the English cases aforesaid. See *Swindon Waterworks Co. v. Wilts, etc., Co.*, supra, L. R. 7 H. L. at p. 705; also *Norbury v. Kitchin*, 9 Jur. N. S. 132, cited for appellee, in which latter case the flow of the stream was 60,000 gallons and only 6,000 gallons were diverted by the upper riparian proprietor to nonriparian land, leaving the plaintiff, the lower riparian owner,

an ample supply of water in quantity for the uses of it to which he was entitled.

It would seem, therefore, that there is, in truth, no distinctly English or American doctrine on the subject under consideration, and that the doctrine is one and the same in both jurisdictions, being subject in both to the qualification aforesaid.

Further: It is plain that the qualification mentioned does not confer upon an upper riparian owner the right to use, on nonriparian land, water rights incident to the ownership of upper riparian land; such qualification being primarily concerned with and directly affecting merely the extent of the relief to which a lower riparian owner is entitled, who complains of the threatened or actual diversion by an upper riparian owner of water for use on nonriparian land.

This brings us to the next and sole remaining question for our consideration, namely:

3. What is the extent of the relief to which the town is entitled in the case before us?

As we have seen above, the threatened unrestricted diversion of water by the appellee must be regarded as wrongful. But:

[4] As appears from the authorities above referred to (and especially from the American cases), and as results from the application of the principles involved, the extent of the relief to which the town, as plaintiff, in such a case as that before us, is entitled, is measured by the extent of the right the plaintiff has to the use of the water. Relief by injunction being sought by the town, that right of use of the water, to the extent that it exists, should be protected from all substantial injury, whether actual or threatened, by the wrongful continuous diversion of the water by the upper riparian owner. Beyond this the court will not go to the relief of the plaintiff, whatever may be the lack of abstract right in the upper riparian owner to divert the water.

Now the case before us, as made by the allegations of the bill, is not one in which the plaintiff, the town, will suffer no actual damage and will not have the running of the prescriptive period set in motion and running against it, if the appellee is allowed to locate and insert her pipes and proceed to withdraw at all times the water she demands under the claim of right aforesaid. If this were a case in which, notwithstanding such action of the appellee, there would be still left flowing in the stream a sufficient quantity of water (the quality not being drawn in question in the case) to supply the town at all times with all the water it has acquired the right to use, the court below might properly have declined to decide the issue of right raised between the parties to the suit and might have properly refused to award the

injunction. But such is not the case made by the bill.

[5-8] It is true that the right of the town, as a riparian owner, to the use of the water of the stream, is, under the authorities above mentioned, limited to uses on its one-acre lot, and, as an original proposition, it had no more right to divert any water not used on this riparian lot to the town itself (a nonriparian locality) than the appellee has to divert to her dwelling house land water not used on her riparian Cameron land. It is also true, as we think, that the Weaver deed to the town did not confer upon it the right to the use of any more water from the stream than was incident to the ownership of the one-acre lot. It is also true that the contract of the town with the said Alexander Cameron did not divest or deprive him, or the appellee, as his heir or as grantee of the 25-foot strip of the land from his other heirs, of the riparian right claimed by appellee, if the said Cameron or the appellee would otherwise have possessed it. It is also further true, as urged in argument for appellee, that the adverse uses of the water by the town as lower riparian owner has not conferred upon the town any right thereto by prescription, as against upper riparian owners. As said in 30 Am. & Eng. Enc. of Law (2d Ed.) p. 365:

"A lower riparian owner cannot, by prescription, acquire, as against an upper riparian owner, the right to divert the water course, as the upper owner cannot be injured by such diversion and therefore has no legal ground to object thereto."

No cause of action ever arises in such case in favor of the upper against the lower riparian owner, so as to commence the running of the prescriptive period.

[9] But, upon the facts alleged in the bill, the town by its adverse collection, dominion, and control of all the water of the stream which flowed down to its said lot, and its adverse diversion and use of all the water it has been diverting under claim of right for much longer than the prescriptive period before this suit was instituted, has acquired by prescription a substantial right against all lower riparian landowners (and hence a vested right) to the exclusive use of the water to that extent, which right would be interfered with by the unlimited exercise of the right claimed by the appellee aforesaid. So that, if all injunctive relief to the town were denied the town would sustain substantial damage, as appears from the allegations of the bill, in times of drought, from the aforesaid threatened action of the appellee; and, besides, such action, if not restrained to some extent, would set in motion the running of the prescriptive period against the town, which would in time bar, pro tanto, its exclusive right to the use of the water to the ex-

tent that it has by prescription acquired the right to use it.

The case of *Williams v. Wadsworth*, supra, 51 Conn. 277, in which the plaintiff was held to be entitled to an injunction, is, in essential particulars, on all fours with the case before us. We do not mean by this citation that we approve of all that is said in the opinion in the case, but its holding in result seems to us to conform to correct principles. In that case the plaintiff, on land acquired for that purpose, built and maintained a dam across a small stream, and, for a longer period than what was held in that case to be the prescriptive period, diverted as much water as would run through a two-inch pipe to his farm, about half a mile distant, no part of which was riparian, for use on such farm and also for sale to other persons. The stream in winter seasons was of considerable size, containing a volume of water largely in excess of that which plaintiff had acquired the prescriptive right to divert, but in summer it was reduced in quantity in times of drought, and when a drought was severe the flow of the stream was reduced to less than what would run through plaintiff's two-inch pipe. In the report of the case it is said:

"In the winter season, and in times of heavy rains, [the] diversion * * * caused no injury or damage to the plaintiff; but at times in the summer he has sustained injury by reason thereof."

That suit was instituted shortly after the diversion by the defendant commenced. The court held that—

"The defendant should be enjoined against such use of the water upon land not riparian as will prevent the supply of the plaintiff's two-inch pipe."

So in the case before us we are of opinion that the court below erred in dismissing the bill and in refusing all injunctive relief; that the bill should be retained; and that upon the coming in of the proof the appellee should be perpetually enjoined and restrained from withdrawing the water from the location aforesaid, or any other above the reservoirs of the town, in such quantity at any time as will in any degree diminish the quantity of water which the proof may show that the town has by prescription acquired the right to divert for its daily supply.

The decree under review will be reversed and annulled, and the cause will be remanded for further proceedings not in conflict with the views expressed in the above opinion.

Reversed and remanded.

NOTE.

(Cal. 1897) Where two quarter sections were granted, each by a separate patent, mere con-

tiguity cannot extend to one a riparian right which is appurtenant to the other, though both have come into the possession of the same person.—*Boehmer v. Big Rock Creek Irr. Dist.*, 48 Pac. 908, 117 Cal. 19.

(Neb. 1903) Land to be riparian must have the stream flowing over it or along its borders.—*Crawford Co. v. Hathaway*, 93 N. W. 781, 87 Neb. 325, 60 L. R. A. 889, 108 Am. St. Rep. 647.

(Or. 1901) Where defendant owned land bordering on a stream, and subsequently acquired under different grants lands adjacent thereto, but which were not contiguous to the stream, the lands subsequently purchased were riparian.—*Jones v. Conn*, 64 Pac. 855, 39 Or. 30, 87 Am. St. Rep. 634, 54 L. R. A. 630, rehearing denied 65 Pac. 1068, 39 Or. 80, 87 Am. St. Rep. 634, 54 L. R. A. 630.

(Or. 1901) Where defendant's lands bordered on a stream, the fact that a part of it extended beyond the natural water shed of the stream did not prevent that part from being riparian land.—*Jones v. Conn*, 64 Pac. 855, 39 Or. 30, 87 Am. St. Rep. 634, 54 L. R. A. 630, rehearing denied 65 Pac. 1068, 39 Or. 80, 87 Am. St. Rep. 634, 54 L. R. A. 630.

(Tex.) Lands, in order to be riparian to a stream, must be not only within the limits of the original survey or grant by the government, but must also be within the watershed of such stream, and actually touch its waters.—(Civ. App. 1904) *Clements v. Watkins Land Co.*, 82 S. W. 665, judgment reversed *Watkins Land Co. v. Clements* (1906) 86 S. W. 733, 98 Tex. 578, 70 L. R. A. 964, 107 Am. St. Rep. 658.

(129 Va. 481)

RICHMOND CEDAR WORKS et al. v. HARPER et al.

(Supreme Court of Appeals of Virginia. March 17, 1921.)

1. Appeal and error §41—Appeal does not lie unless jurisdiction to entertain is conferred by Constitution or statute.

An appeal from the decision of an inferior court or from a special tribunal organized for a special purpose does not lie unless jurisdiction to entertain such appeal is conferred by Constitution or statute.

2. Master and servant §417(4½)—Compensation case not reviewable after time limit.

Under Workmen's Compensation Act, § 61, there can be no appeal from a decision of the Commission after the 30 days allowed therefor have expired.

3. Master and servant §416½, New, vol. 11A Key-No. Series—Enforcement of compensation award provided for by act.

Workmen's Compensation Act, § 62, was enacted to provide a means not only of enforcing an award which had been affirmed on appeal, but also all the final awards of the Commission from which there has been no

appeal, as well as all agreements between the parties approved by the Commission.

4. Master and servant — 417(1)—Supreme Court of Appeal without jurisdiction of appeal from Industrial Commission.

The Supreme Court of Appeals is without jurisdiction to entertain an appeal from the Industrial Commission's award, unless possibly under Const. 1902, § 88, where a constitutional question is raised, or there is an attempt to exceed jurisdiction justifying exercise of original jurisdiction to issue the writ of prohibition; the Workmen's Compensation Act, §§ 61 and 62, providing exclusive remedies for review, notwithstanding the general provisions in Code 1919, § 6336, for appeals.

Error to Circuit Court, Norfolk County.

Proceedings under the Workmen's Compensation Act by Mary Lucy Harper and others against the Richmond Cedar Works, employer, and the Liberty Mutual Insurance Company, insurance carrier, to recover compensation for the death of Leroy Harper, employee. Compensation was adjudged, and employer and insurance carrier bring error. On motion to dismiss writ of error. Dismissed for lack of jurisdiction.

Venable, Miller, Pilcher & Parsons, of Norfolk, and Varney S. Ward, of Richmond, for plaintiffs in error.

J. W. Willcox, of Norfolk, for defendants in error.

PRENTIS, J. The defendants in error, the widow and children of Leroy Harper, deceased, who lost his life while working as an employee of the Richmond Cedar Works, were adjudged compensation under the Virginia Workmen's Compensation Act (Acts 1918, p. 637). They have moved to dismiss the writ of error which has been allowed in this case, among other reasons, upon the ground that this court has no jurisdiction to review the judgment.

[1] We get little assistance from the numerous cases which have arisen in other jurisdictions, because of the differing methods of procedure and varying constitutional and statutory provisions regulating the right of appeal. The general rules appear to be well settled, and it is generally agreed that an appeal from the decision of an inferior court or from a special tribunal organized for a specific purpose does not lie, unless jurisdiction to entertain such appeal is conferred by Constitution or statute. Generally, however, provision is made for appeals or writs of error to review such final decisions under specified restrictions and limitations.

In *Fitt v. Central Illinois Public Service Co.*, 273 Ill. 617, 113 N. E. 155, it is held that under section 19 of the Illinois Workmen's Compensation Act (Laws 1913, p. 347), as amended in 1915 (Laws 1915, p. 408), the circuit court, upon the application for judgment

on the award of the Industrial Board, has no jurisdiction to inquire into the question whether the Industrial Board has acted legally in making the award, but is only authorized to enter judgment on the award, because the statute provides other methods by which the action of such Board may be reviewed.

Bernstein v. Brothman, 275 Ill. 290, 114 N. E. 120, also holds that the methods of review provided by the Illinois act are exclusive, and that the circuit court, on an application for a judgment on such award, cannot inquire into the legality of the action of the Board.

In the Matter of State Industrial Commission, 224 N. Y. 13, 119 N. E. 1027, it is held that the Court of Appeals of New York had no jurisdiction to answer a legal question certified to it by the Appellate Division of the Supreme Court, and it is interesting to note that the court held that such a question must arise in a case actually pending before the Industrial Commission, and could not be asked merely for the purpose of securing an advisory opinion.

In *Thaxter v. Finn*, 178 Cal. 270, 173 Pac. 163, it is held that even though an award in favor of an employee of a subcontractor against the principal contractor would have been annulled by the Supreme Court for want of power in the Industrial Accident Commission to make it, if the proceedings to review the award had been instituted within the time fixed by the statute, still, where no proceeding of review has been inaugurated within the time thus limited, the judgment is not a nullity, but the award is conclusively presumed to be lawful and binding as against any kind of attack, collateral or otherwise. This, it is observed, is a case where, if the statute authorizing the review had been followed, the award would have been annulled because the Commission exceeded its jurisdiction.

In *Harriss-Irby Cotton Co. v. State*, 31 Okl. 603, 122 Pac. 163, it is said that the Supreme Court of Oklahoma, although it has jurisdiction to review some of the orders of the State Corporation Commission, has no such jurisdiction to review an order requiring a cotton gin to be operated by its owner for the accommodation of the public at a fixed price, because the statute under which the Commission acted did not provide for an appeal.

In *Southern Ry. Co. v. Glenn*, 102 Va. 533, 46 S. E. 776, this is said:

"The benefit of appeal is a purely statutory right. When parties come to this court to have reviewed the action of a lower court, their only warrant for doing so is the statute, and its terms must be strictly complied with. Section 3454 of the Code of 1887 declares that any person who is a party to any

case in chancery, wherein there is a decree or order adjudicating the principles of the cause, who thinks himself aggrieved thereby, may present a petition for an appeal from such decree or order. The person referred to in this statute has been decided to be such person as was a party to the suit in the court below, and who was aggrieved by the decree therein rendered; and to make him a proper party to an appeal these two circumstances must concur."

In *Tyson v. Scott*, 116 Va. 243, 81 S. E. 57, the principle is stated thus in the syllabus:

"The jurisdiction of this court rests wholly upon the written law, and can be exercised only in obedience to the Constitution and laws passed in pursuance thereof. Statutes of limitation are deemed statutes of repose, and this conception of such statutes applies with peculiar force to limitations upon the right of appeal. Where the Legislature has prescribed the method for the exercise of the right of appeal, or supervision, such method is exclusive, and neither court nor judge can modify these rules without express statutory authority, and then only to the extent specified."

The right of appeal, then, is clearly not a vested right, but is subject to legislative control, and only exists if conferred by Constitution or statute. *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263.

Many pertinent cases from other jurisdictions may be found cited in 3 *Corpus Juris*, p. 274.

For the plaintiffs in error it is claimed that the statutory authority which is thus shown to be necessary exists, and that it is found in that portion of the Code of 1919, § 6336,¹ which enumerates the classes of cases in which this court has jurisdiction, and concludes by authorizing any person thinking himself aggrieved by a final judgment, decree, or order, in any civil case, to present a petition, if the case be in chancery, for an appeal from the decree or order, and if not in chancery for a writ of error and supersedeas to the judgment or order complained of; whereas, for the claimants it is urged that this statute does not apply to such a proceeding as this, and that the remedies expressly provided by the Virginia Workmen's Compensation Act are exclusive.

The sections of the act immediately involved are sections 61 and 62, which are as follows:

Sec. 61. Appeals.—"The award of the Commission, as provided in section fifty-nine, if not reviewed in due time, or an award of the Commission upon such review, as provided in section sixty, shall be conclusive and binding as to all questions of fact; but either party to the dispute may within thirty days from the date of such award or within thirty days after receipt of notice to be sent by registered mail, of such award but not thereafter, appeal from the decision of such Commission to the circuit court of the county or corporation court of the city in which the alleged accident happened or in which the employer resides or has his principal office; or if the cause be in the city of Richmond, then to the circuit or law and equity court of said city; the form and manner of said appeal shall be prescribed by the Supreme Court of Appeals of Virginia within thirty days after this act takes effect. The judge shall hear and determine the case within thirty days after the granting of the appeal if court be in session, and if court be not in session the judge granting such appeal shall hear and determine the case within thirty days after the beginning of the ensuing term. The Commission, of its own motion, may certify questions of law to the Supreme Court of Appeals for decision and determination by the said court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Supreme Court of Appeals, said appeal or certification shall operate as a supersedeas, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this act."

Sec. 62. Judgment May be Filed.—"Any party in interest may file in the circuit or corporation court of the county or city in which the injury occurred, or if it be in the city of Richmond, then in the circuit or law and equity court of said city, a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from, or of an award of the Commission affirmed upon appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in re-

¹ Sec. 6336. *In What Cases Petitions for Appeal, Writ of Error, or Supersedeas May be Awarded.*—Any person who thinks himself aggrieved by any judgment, decree, or order in a controversy concerning the title to or boundaries of land, the condemnation of property, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, wharf, or landing, or the right of the state, county, or municipal corporation to levy tolls or taxes, or involving the construction of any statute, ordinance, or county proceeding imposing taxes, or by any final order, judgment, or finding of the State Corporation Commission, irrespective of the amount involved, except the action of the said Commission in ascertaining the value of any property or franchise of a railroad or canal company, for the purpose of

taxation and assessing taxes thereon, or any person who is a party to any case in chancery wherein there is a decree or order dissolving an injunction, or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of a cause, or any person thinking himself aggrieved by the order of a judge or court refusing a writ of quo warranto, or by the final judgment on said writ, or by a final judgment, decree, or order in any civil case, may present a petition, if the case be in chancery, for an appeal from the decree or order; and if not in chancery, for a writ of error or supersedeas to the judgment or order, except as provided in the following section; provided, however, that the commonwealth may take an appeal from the action of the State Corporation Commission in all cases, irrespective of the amount involved."

lation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court."

The question thus presented requires a careful consideration of the purpose of the act as well as of its provisions. Its general purpose is, of course, well known. It was adopted in response to a public sentiment, which is said by the Industrial Commission of Virginia to have developed thus rapidly:

"The first workmen's compensation law was enacted by Germany in 1884. Since that time compensation acts have been adopted by over 50 countries, comprising all the great industrial nations of the world.

"In the United States, the first general workmen's compensation act to stand the test of constitutionality was the New Jersey Law of 1911. Similar laws have now been adopted by 38 states and 3 territories. Congress, in 1916, passed a compensation act covering all civil employees in the service of the federal government.

"The widespread favor with which these laws have been received is due to the fact that they are the outgrowth of natural conditions, and are based upon principles which men and women have come to regard as just."

The Virginia act has features which are common to nearly if not quite all such laws, and has for its humane purpose the providing for all workmen coming within its provisions who are injured during the course of their employment of compensation therefor which is certain in amount without deduction. The doctrines of contributory negligence, assumed risk, and all of those defenses which have so frequently defeated recoveries, occupied the time of courts, and crowded their dockets are abolished. Some of these advantages are thus summarized by the Virginia Commission:

"The compensation system has many advantages over the common and statutory liability laws. These advantages accrue to no one class, but are shared alike by employee, employer, and society at large.

"1. The injured employee receives definite and timely relief without the uncertainty and expense of a lawsuit. Under the older system only a small percentage of accidents were compensated, and in many of these cases the compensation was totally inadequate.

"2. The employer knows that the sums paid by him, or by his insurer, go directly and in full to his injured workmen. The elimination of waste in the litigation of claims will have a material effect in keeping the cost of compensation within reasonable limits.

"Moreover, the certainty that compensation will be paid is conducive to the contentment of the worker, and the removal of friction promotes harmony and productive efficiency.

"3. Society itself benefits through the elimination, in a large measure, of the expense of negligence cases, estimated to consume from one-fifth to one-third of the time and expense of the courts, and through the reduction of poverty and destitution."

Minor's Workmen's Compensation Laws, p. 583.

Bearing in mind the objects in view, it is helpful to consider certain specific provisions of the statute.

Section 12 provides that the rights and remedies granted by the act to an employee coming within its provisions "shall exclude all other rights or remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death." Section 52 creates a Commission to be appointed by the Governor, requires each member thereof to devote his entire time to the duties of his office, and forbids his holding any position of trust or profit, or engaging in any occupation or business interfering or inconsistent with his duties as such member. Section 55 (a) provides, among other things, that "Processes and procedure under this act shall be as summary and simple as reasonably may be." Section 58 requires that immediately after application shall be made for compensation the Commission shall set a date for the hearing, which shall be held as soon as practicable, and in the city or county wherein the injury occurred, unless otherwise agreed to by the parties and authorized by the Commission. Section 59 requires the Commission to hear the parties at issue and their representatives and witnesses, and to "determine the dispute in a summary manner." Section 61, which has been heretofore quoted, shows that the award of the Commission, if not reviewed in due time, as provided in the statute, or an award of the Commission after said review, shall be conclusive and binding as to all questions of fact, but permits an appeal within 30 days, but not thereafter, to the circuit court of the county, or corporation court of the city, in which the alleged accident happened, or in which the employer resides or has his principal office, or, if in Richmond, to the circuit court or the law and equity court of the city.

[2] Under this section (61), it is certain that there can be no appeal from the decision of the Commission after the 30 days has expired. As a further indication of the intention of the Legislature to eliminate the expense and delay of litigation which heretofore have so embarrassed claimants injured in such accidents, the judge of the court, within 30 days after granting the appeal, is directed to hear and determine it, and, if the court be not in session, to determine it within 30 days after the beginning of the ensuing term. This repeated insistence upon promptness in procedure would be unavailing if, in addition to the appeal which the act provides, there is also under the general statute (section 6336) another appeal to this court. The advantages of economy and prompt relief which it is the purpose of

the act to afford such claimants would be denied if such additional appeal lies.

Before the act the plaintiff in an action for personal injury had his case tried in the circuit or corporation court, with an appeal to this court if the jurisdictional amount was involved. If, notwithstanding the act, an appeal to this court still lies, then such a claimant may be subjected to the expense and delay of the initial trial before the Industrial Commission, followed by two appeals, one to the local court followed by another to this court. Experience teaches that civil rights are best protected by one appeal in every case, both because it induces greater care in the tribunal of original jurisdiction, and prevents the arbitrary exercise of power, as well as because it gives to the appellate court the opportunity for more careful investigation and maturer consideration for the correction of those errors which are inevitable in every human endeavor. These reasons, as a general rule, however, do not justify more than one appeal, because the evils of the consequential delay and expense far outweigh the possible advantages of such additional appeal. The unavoidable delays of the law are many, and for this reason all unnecessary delay in the administration of justice should be avoided, for delay has always constituted one of the greatest evils of the law.

It may be difficult for those of us who are accustomed to the Virginia practice readily to accede to the view that this court has no jurisdiction in such cases, but we think that this chiefly grows out of that conservatism which constrains many lawyers and judges to adhere too tenaciously to their previous habits of thought and conduct. That the Legislature intended to enact a complete statute, designed to supply an adequate remedy in every case which might arise under it, is manifested by its 79 sections, with their multitudinous and detailed provisions. The act creates new rights and provides new remedies whereby they may be asserted and maintained.

The last clause of section 61 is itself most significant. It provides that no employer shall be required to make payment of the award until the questions at issue shall have been fully determined "in accordance with the provisions of this act." As it seems to us, this makes it apparent that in the act itself we should seek and find the safeguard of every right thereby created. That the Legislature intended this to be true is not only indicated by the clause of section 61 just quoted, but also by section 66, which reads:

"All questions arising under this act, if not settled by agreement of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided."

Here again the Legislature has manifested its intention to limit the rights and remedies of those interested to the provisions of the act itself, and thus to exclude the application of the general statute with reference to appeals and writs of error. The Legislature also, apparently anticipating that there might be contrariety of decision between the various corporation and circuit courts, has expressly authorized the Commission to propound questions of law to this court, and this provision is sufficient to insure uniformity of construction, and thus to avoid the uncertainty of which otherwise there would be danger.

[3] It is said, however, that a consideration of section 62 affects the question. It is observed that the Commission has no power to enforce its own judgments, and section 61 does not expressly give the circuit or corporation courts any power to enforce its own judgments on appeal. Section 62 was clearly enacted for the purpose of providing a means not only of enforcing an award which had been affirmed on such appeal, but also all other final awards of the Commission from which there had been no appeal, as well as all agreements between the parties approved by the Commission. When this section is invoked, however, the rights of the claimants have already been established. The proceeding then resembles a motion under our statute for execution upon a forthcoming or delivery bond. There is neither necessity nor reason for the procedure under section 62, unless the defendants fail to pay the amounts awarded the claimants. At that time, all of the rights of the parties having been previously litigated and determined, the court is required to render judgment in accordance either with (a) the agreement of the parties, which has been approved by the Commission, (b) an award of the Commission which has not been appealed from, or (c) an award of the Commission which has been previously affirmed upon appeal. At this stage of the proceeding the court is vested with no discretion; the statute is mandatory, and the refusal to render such judgment as that section requires could be compelled by mandamus. It seems hardly necessary to say that action which can certainly be compelled by mandamus cannot be appealed from. The order of the court, under section 62, in rendering judgment so that execution may be had, is the exercise of a ministerial function, and the mere method provided by the Legislature for enforcing the collection by legal process of the amount already legally ascertained to be due, that is, by execution of fieri facias, or any other appropriate process for enforcing a judgment.

[4] Our judgment therefore is to sustain the motion to dismiss the writ because this court is without jurisdiction to entertain

appeals either from the Industrial Commission or from the circuit or corporation courts in cases arising under the Virginia Workmen's Compensation Act, unless possibly under section 88 of the Constitution some constitutional question has been raised in the proceeding, or there be some attempt to exceed the jurisdiction conferred, which would justify the exercise of the original jurisdiction of this court to issue the writ of prohibition.

This conclusion makes it unnecessary for us to consider the other interesting questions discussed in the briefs.

Dismissed for lack of jurisdiction.

(129 Va. 520)

SMITH v. CITY OF NEWPORT NEWS.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

Error to Corporation Court of Newport News.

Proceedings by one Smith against City of Newport News. Judgment was rendered by the corporation court of the City of Newport News upon appeal from a finding of the State Industrial Commission, and plaintiff brings error. Dismissed.

A. C. Garrett, of Newport News, for plaintiff in error.

Lett & Massie, of Newport News, for defendant in error.

PER CURIAM. This is a writ of error to a judgment of the corporation court of the city of Newport News rendered by that court upon an appeal from a finding of the Industrial Commission of Virginia. Upon the authority of the opinion of this court handed down to-day in the case of Richmond Cedar Works & Harper, 106 S. E. 516, the writ of error in this case must be dismissed as improvidently awarded.

Dismissed.

SIMS and BURKS, J., absent.

(129 Va. 494)

ROBERTSON'S EX'R v. ATLANTIC COAST REALTY CO.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Witnesses \S 183½, New, vol. 9 Key-No. Series—Agent of plaintiff corporation held not "adverse or interested party" under statute in action against executor.

In an action by a realty company for breach of a parol contract whereby it was to have the exclusive sales privilege of land owned by defendant's decedent, plaintiff's agent held not an "adverse or interested party" within Code 1919, § 6209, so as to require corroboration of his testimony, he being competent at common law, and not rendered incompetent by the statute, notwithstanding he was plaintiff's

contracting agent in making the contract sued upon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

2. Witnesses \S 164(1)—Decedent's memoranda and bill to perpetuate testimony held inadmissible in action against executor.

In a realty corporation's action against an executor for breach of an oral contract of agency with decedent, a memorandum, made by decedent before his death, containing a full statement of the matter in controversy, and a bill to perpetuate testimony, held inadmissible under Code 1919, § 6209, providing that if an adverse party testifies, all entries, memoranda, and declarations by the party incapable of testifying, made while capable, are admissible; no adverse party having testified.

3. Appeal and error \S 971(1)—Examination of witnesses chiefly in discretion of court.

The subject of examination of witnesses lies chiefly in the discretion of the court in which the case is tried, and its exercise is rarely, if ever, controlled by the appellate court.

4. Trial \S 62(2)—Refusal to allow recall of witness for defendant after plaintiff had rested held error.

In a realty corporation's action on an oral contract of agency made with decedent in his lifetime, it was error to refuse to allow decedent's widow to be recalled, after plaintiff had rested, to testify as to whether a complete and unconditional contract had been entered into, or whether a mere proposition had been made.

5. Appeal and error \S 499(3), 500(3)—Objections must be incorporated by bill or certificate of exceptions.

Where objections to reception of evidence and rulings thereon are relied on, they must be made parts of the record by proper bills of exception, or certificates of exception, otherwise they will be deemed to have been waived.

6. Witnesses \S 318—Reputation for truth inadmissible, where veracity not assailed.

In a realty company's action for breach of an alleged oral agency contract with defendant's decedent, originally brought against decedent, it was not error to exclude evidence as to decedent's reputation for truth and veracity, where decedent had not testified, and his reputation for truth and veracity had not been assailed.

7. Brokers \S 11—Evidence as to local real estate market after breach of exclusive agency contract held inadmissible in suit for breach.

In a realty company's action for breach of an exclusive agency to sell decedent's realty, entered into before his death, where it appeared that decedent, after the execution of the contract, had himself sold the land to another, it was not error to exclude evidence as to the condition of the real estate market in the vicinity shortly after the alleged breach.

8. Trial \S 191(3)—Instruction assuming facts testified to by impeached witness held erroneous.

In a realty company's action against an executor for breach of an exclusive agency contract made with decedent, it was error for the court to instruct on an assumption that the employment was for 12 months, where a witness testifying to that point was claimed by defendant to be impeached.

9. Brokers \S 11—Plaintiff, suing for breach of exclusive agency contract, may base loss of profits on sale to another.

In a realty company's action for breach of an exclusive agency contract for sale of realty, based on a sale by the owner himself after the contract had been entered into, plaintiff could elect to base its loss of profits on the sale actually made by the owner.

Errors to Hustings Court of Petersburg.

Assumpsit by the Atlantic Coast Realty Company against Robertson's Executor. Judgment for plaintiff, and defendant brings error. Reversed.

Mann & Townsend, of Petersburg, and C. V. Meredith, of Richmond, for plaintiff in error.

Lassiter & Drewry, of Petersburg, and James Mann, of Norfolk, for defendant in error.

BURKS, J. This is an action of assumpsit brought by the Atlantic Coast Realty Company, a North Carolina corporation doing business in Virginia, against the executor of Wirt Robertson, to recover damages for the breach of an alleged parol contract, whereby the plaintiff was to have the exclusive privilege of selling a tract of 418 acres of land of Robertson for a stipulated compensation. Action was first brought in the United States District Court at Richmond, against Robertson in his lifetime. There was a demurrer to the declaration, which was sustained, but on appeal to the United States Circuit Court of Appeals the judgment was reversed, and the cause remanded for a trial on the merits. 240 Fed. 372, 153 C. C. A. 298. There the plaintiff asked leave to amend its declaration, but the application was refused, whereupon the plaintiff suffered a nonsuit, and brought the present action in the hustings court of the city of Petersburg, Robertson having died in the meantime. The defendant demurred to the declaration, and the demurrer was sustained. On a writ of error from this court, the judgment of the hustings court sustaining the demurrer was reversed, and the case remanded. Atlantic Coast Realty Co. v. Townsend, 124 Va. 490, 98 S. E. 684. At the trial on the merits, the plaintiff demurred to the defendant's evidence, and the hustings court rendered judgment thereon in favor of the plaintiff, and to

that judgment the writ of error in this case was awarded.

The alleged contract and the negotiations leading up thereto were made and conducted solely by W. E. Burke as contracting agent on behalf of the Atlantic Coast Realty Company, which was engaged in the real estate brokerage business, and Wirt Robertson. No one else was present when the negotiations were conducted, or when the verbal contract is alleged to have been made.

Shortly after the controversy arose, Robertson, being conscious that he was in poor health and would probably live but a short time, at the suggestion of his counsel made a full statement in writing of the whole matter now in controversy, and at a later date filed a bill, sworn to, in the District Court of the United States at Richmond, to perpetuate his testimony, but died before his testimony could be taken.

The plaintiff introduced but one witness, the said W. E. Burke. After he had testified and the plaintiff's counsel announced that they had no further evidence to offer, counsel for the defendant moved to strike out his testimony because it was not corroborated, but the motion was overruled. The defendant's counsel then offered in evidence the written statement aforesaid of Robertson, and also a duly certified copy of the bill to perpetuate his testimony aforesaid, but upon objection by the plaintiff both were excluded. Exceptions were duly taken to the ruling of the trial court in each instance. The motion to strike and also the offer in evidence of the statement and the bill were founded on section 6209 of the Code, which defendant's counsel claimed was applicable to the case. At the time the contract is alleged to have been made Burke owned 10 shares of the stock of the plaintiff company, but at the time he testified he owned no stock in the company, was not an officer thereof, and had no pecuniary interest in the subject of litigation, though he was still an agent of the company.

The above adverse rulings of the trial court constitute the first and second assignments of error, but they will be considered together.

Section 6209 is as follows:

"In an action or a suit by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence."

The revisors' note to this section is in part as follows:

"This section is new; and sections 3346, 3347, 3348 and 3349 of the Code of 1887 have been omitted and thereby repealed. The present Code makes material changes in the law governing the competency of witnesses to testify. The following excerpt is taken from the Report of the Revisors made to the General Assembly at its session of 1918:

"The subject of the competency of witnesses to testify was one that received very careful consideration by the revisors. Nearly all of the difficulties that have arisen in practice have grown out of the exceptions to the rule that interest should not disqualify a witness. In the draft submitted the revisors have removed practically all disqualifications except to protect confidential communications, especially between husband and wife. In order to meet the difficulties that may arise in consequence of a removal of disqualifications, the revisors have added a new section declaring, (See section 6209 above.) 'It was believed that this section, together with the great safeguard of cross-examination, would be ample protection for the estates of persons laboring under disability or who are incapable of testifying. In the business affairs of life all evidence bearing upon the question at issue is received and considered by the business world, and it seemed proper that the same rule should obtain in courts of justice which are enforcing rights arising out of such business transactions.'

"Section 3345 of the Code of 1887 (section 6206 of this Code unchanged) removed common-law disqualifications on account of interest or because a party. The exceptions referred to in the above excerpt were imposed by section 3346 of the Code of 1887, for the most part, which exceptions were in turn qualified by sections 3347, 3348 and 3349 of that Code. The principal exception and the one which was most fruitful of litigation was that pertaining to the survivor of a transaction. Most of the states still retain this exception, but in at least two states other than Virginia it has been abolished. (New Mexico and Connecticut.) The objections to the *principle* of the survivor of a transaction rule cannot be set forth in a note of this character, but they will be found well and ably discussed by Mr. Wigmore, a distinguished authority, in his work on Evidence (1 Wig. Ev. § 578). The objections to the rule in *actual operation* are best illustrated by the numerous cases which arose under the former law, some of which were of such a character as to call for amendment of the sections by which they were governed."

The statute of New Mexico (Code 1915, § 2175) on this subject had been in force for some years prior to the adoption of our statute, and is as follows:

"In a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of a

deceased person, unless such evidence is corroborated by some other material evidence."

The similarity of the two statutes, taken in connection with the note of the revisors, indicates that the Virginia statute was taken from that of New Mexico, though the Virginia statute is much more comprehensive, as it applies to the representative of any person who, *from any cause, is incapable of testifying*, while the statute of New Mexico is limited to the representative of a "deceased person." There are also other differences in the language of the two statutes; for example, the New Mexico statute requires corroboration of "an opposite or interested party to the suit," while the Virginia statute requires it of "an adverse or interested party." The statutes also differ in their use of the words "evidence" and "testimony."

Prior to the adoption of the Code of 1919, there had been several decisions of the territorial court of New Mexico on the subject of the sufficiency of the corroboration when necessary (*Byerts v. Robinson*, 9 N. M. 427, 54 Pac. 932; *Gillett v. Charez*, 12 N. M. 353, 78 Pac. 68), but none on the subject of the circumstances under which corroboration was necessary, nor have we been cited to any case since the territory became a state, except *National Rubber Co. v. Oleson*, 20 N. M. 624, 151 Pac. 695, decided July 8, 1915, reheard September 8, 1915. In that case suit was brought by a corporation on a contract made through its agent for the sale of bicycle tires. The agent offered to prove the terms of the contract was an officer of the corporation and its representative in making the contract sued on, and it was conceded by counsel for the corporation that he needed corroboration. The court decided nothing on the subject of the necessity for corroboration, but, acting on the concession, held that the corroboration was not sufficient.

In *Union Land & Grazing Co. v. Arce*, 21 N. M. 115, 152 Pac. 1143 (decided November 1, 1915), it was plain, and in fact undisputed, that corroboration was necessary, and the only question before the court was the sufficiency of the corroboration.

Neither of these cases can be accepted as an interpretation of the New Mexico statute as to when corroboration is necessary, and when we look to the original notes of the revisors and the minutes of their proceedings on file with the clerk of the House of Delegates, we find that section 6209 of the Code, in its present form, was adopted by them in December, 1915, and it is not probable that they had seen either of the foregoing decisions at the time of its adoption and they make no reference to any such cases either in their report to the Legislature or in their notes aforesaid.

Citizens' Nat. Bank of Rosewell v. Bean (N. M.) 190 Pac. 1016, decided in 1920, 2

years after the adoption of the Code, gives the court's interpretation of the holding in the former case of *Nat. Rubber Co. v. Oleson*, supra, but this is only persuasive authority. We find nothing in these cases to bind us, and feel free to put our own interpretation on section 6209.

[1] The common-law disqualification of interest was abolished in this state in 1866 (Acts 1865-66, pp. 87-88), but the act contained many qualifications and exceptions.¹ From time to time, as decisions were made, it was found that the act was defective or worked hardships, and it was amended by the Legislature. There were qualifications of the section abolishing the disqualification of interest, and exceptions to the qualifications. Serious questions had arisen as to what was the "transaction * * * which was the subject of investigation," and nice distinctions made between the "original party to the transaction" and the "party to the original transaction," and also as to the extent to which disqualification applied. The revisors, for the reasons stated by them, deemed it wise to remove practically all disqualifications. They recognized, however, that in making such removal, and especially in the case of a survivor of a transaction which had been adopted in only a few states, there should be some compensating advantages. Hence they said that in order to meet the difficulties that might arise in consequence of the removal of the disqualifications which they had effected by the repeal of various sections of the then existing statutes, they added section 6209. They required corroboration only of those witnesses whom they had rendered competent to testify by the repeals aforesaid, and not of witnesses already competent. The purpose of the revisors was to remove disqualifications, not to create them in any case, nor to impose burdens on witnesses already competent. Section 3348 of the Code of 1887 provided that if a contract or transaction was personally and solely made or had with an agent of one of the parties, and the agent was dead or incapable of testifying, the other party should not be allowed to testify in his own behalf, except in a few cases mentioned in the statute, but the statute was silent as to the effect of the death of a party, the agent surviving. Under that statute, if the agent died, the other party could not testify, but as far back as 1897, it was held in a most convincing opinion by Judge Riley that if the other party died, the agent could testify because he was competent at common law, even though he was interested in the contract to the extent of his commissions, and the statutes did not create any disabilities. *Mutual Life Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594. The revisors re-

pealed section 3348, with the result that, if the agent dies in such case, the other party is a competent witness, thereby enlarging the capacity of the survivor to testify, but they left untouched the common-law competency of the agent where the other party to the transaction dies. That stands to-day just where it stood in 1897 when the *Oliver* Case was decided. The parties to this litigation are the Atlantic Coast Realty Company, on the one side, and Robertson's executor, on the other. Burke, the agent of the plaintiff, is not a party to the action, is not an officer of the plaintiff, and has no manner of pecuniary interest in the results of the litigation. As between him and the defendant in the action, he is not "an adverse or interested party." He is simply the plaintiff's agent, competent at common law, and not rendered incompetent by the statute. It is true that he was the plaintiff's contracting agent in making the contract in litigation, and might well have been embraced in the class of witnesses requiring corroboration, but the language of the statute does not cover his situation, and the court cannot extend its provision beyond what the language justifies. If it had been intended to extend the requirement of corroboration to contracting agents, the statute should have said so, but it has not, and the court cannot read that provision into it. The first branch of the statute does not deal with the competency of witnesses, but with the weight to be given to their testimony. It provides that—

"No judgment * * * shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony."

In order to require corroboration, there must be a witness who testifies in the cause, and he must be seeking a judgment or decree in his favor, and thus be "an adverse or interested party." He must in some way be beneficially interested in the judgment or decree which is sought to be obtained on his testimony against a party who is incapable of testifying, or some representative of such a party. The witness Burke does not come within this category.

[2] What has been said on this branch of the statute necessarily excludes the admissibility in evidence of the memorandum and copy of the bill offered by the defendant. The "entries, memoranda, and declarations" mentioned in the section are only admissible "if such adverse party testifies," but as no such party has testified they are not admissible.

It has been suggested that the construction we have given to the statute gives to corporations, who can contract only through agents, great advantage over private persons, and denies to the latter the equal protection of the law. The agent of a private person stands

¹ This act repealed an act passed by the Alexandria Legislature January 29, 1864, Acts 1864, c. 13.

on the same footing, as to competency, as the agent of a corporation. The right of an agent to testify existed at common law, and he required no more corroboration than any other witness; and, while it might have been well to have required corroboration of a sole contracting agent where the other party to the contract is dead or for any reason incapable of testifying, it is not at all a constitutional necessity. The decision in *Mutual Life Ins. Co. v. Oliver*, supra, has stood for over 20 years without any change by the Legislature, and the revisors made none. If section 3348 of the Code of 1887 were in force to-day, and also section 6209 of the Code of 1919, the result would be the same as that above announced, so that it is not the repeal of that section or of any other statute that affects the plaintiff in error. It is simply that section 6209 might or should have been extended to contracting agents, but was not.

At the trial, one of the main points of controversy was whether a complete and unconditional parol contract had been entered into between the plaintiff, acting through W. E. Burke, its agent, and Wirt Robertson, and, if there was such a contract, the terms thereof, or did what transpired between the parties on the night of September 9, 1915, amount only to a proposition which was left open and had not been accepted on Monday, September 13, 1915, when Robertson sold the property to another party? The plaintiff examined only one witness, its agent Burke, and rested its case. The defendant examined on the point above mentioned Mrs. Robertson, the widow of Wirt Robertson, on Thursday, February 12, 1920. On the next day, counsel for the defendant asked leave to recall Mrs. Robertson to ask her one or two questions. Counsel for the plaintiff objected, but the court overruled the objection, saying:

"I will allow it, but upon intimation of counsel that counsel for the plaintiff want to put Mr. Burke back on the stand, and as he cannot be had at this time, the case will be adjourned over until to-morrow"

—and the court was accordingly so adjourned. On the next morning (Saturday), Burke being in court, the court heard, in the absence of the jury, the question proposed to be asked Mrs. Robertson and the answer expected, and refused to allow her to be recalled for the purpose aforesaid, and the defendant excepted. The plaintiff then demurred to the evidence, and the court compelled the defendant to join therein. The trial court sustained the demurrer. But before passing on the correctness of that decision, it is proper that we should first pass upon the correctness of the ruling refusing to permit Mrs. Robertson to be recalled for the purpose aforesaid.

The question of the right to recall a witness who has been previously examined has

been so often passed upon by this court that we deem it unnecessary to go outside of our own jurisdiction for authority.

[3] The cases in this jurisdiction state the general rule on the subject with great unanimity, namely, that the subject of the examination of witnesses lies chiefly in the discretion of the court in which the case is tried, and its exercise is rarely, if ever, controlled by the appellate court. This is undoubtedly the general rule. The exceptions to it have been stated with some variation of language, such as that the appellate court will not interfere with the action of a trial court unless it appears that palpable error has been committed, or that the ends of justice require it, or that its abuse was to the prejudice of the other party, or that good cause has been shown why the discretion should have been differently exercised, and the like. *Carter v. Edmonds*, 80 Va. 63; *Atwood v. Shenandoah R. Co.*, 85 Va. 976, 9 S. E. 748; *Burke v. Shaver*, 92 Va. 352, 23 S. E. 749; *Brooks v. Wilcox*, 11 Grat. (52 Va.) 417; *Fant v. Miller*, 17 Grat. (58 Va.) 219; *Tate v. Bank*, 96 Va. 765, 32 S. E. 476; *Leonard v. St. John*, 101 Va. 758, 45 S. E. 474; *Sutherland v. Gent*, 116 Va. 783, 82 S. E. 713; *Wickham v. Leftwich's Adm'x*, 112 Va. 225, 70 S. E. 503; *Livingston's Case*, 7 Grat. (48 Va.) 658, 661. In all of the cases cited, the witness was permitted to be recalled, and the language of the court must be construed in that light, for it is exceptional where injury would be done if the evidence had been received. In only a few cases has the question come up where the trial court excluded the witness. In *Wilson v. Wooldridge*, 118 Va. 209, 214, 86 S. E. 872, 873, the court refused to allow the witness to be recalled, and stated its reason thus:

"This witness had been fully examined. They had made the statement in chief as to their opinion of the genuineness of Wooldridge's signature, and it was not proposed to examine them upon any new or omitted fact not covered by their original testimony, but merely to ask them whether their opinion had been changed by the testimony of Wooldridge that his supposed signature was a forgery."

It was held that the exclusion was not error.

Nowhere, perhaps, has the rule and the exceptions thereto been more clearly stated than in *McDowell's Ex'r v. Crawford*, 11 Grat. (52 Va.) 377, 408, where it is said:

"Although the practice of our courts has been liberal in allowing parties, after their evidence is closed, to recall witnesses for the purpose of supplying facts omitted from inadvertence, and, although I think such permission should be given wherever there is no ground to suspect improper practice, the object being to elicit truth and secure the attainment of justice, yet I am aware that the judge, before whom a case is tried, must necessarily

have large room for discretion on this subject, and I think an appellate court should seldom interfere with its exercise."

In that case it was held that the discretion of the trial court had been improperly exercised, and that therefore it had committed error.

In *Livingston's Case*, 7 Grat. (48 Va.) 658, 661, the commonwealth was allowed to recall a witness who had been examined the day before, in order to prove the ownership of property. This examination was permitted after the case was argued and submitted to the jury, and the court held that there was no error in allowing it to be done, saying:

"Whilst we have no hesitation in saying that, as a general rule, after a cause has been submitted to a jury, it is improper to introduce new testimony or examine new witnesses, there can be no doubt of the propriety for good cause shown of admitting new testimony, or the examination of new witnesses. But in allowing this to be done, the court must exercise a sound discretion."

See, also, *Armstead's Case*, 7 Grat. (48 Va.) 599. From this and other cases it clearly appears that the discretion which is vested in the trial court is not an arbitrary discretion, but a sound judicial discretion, and that an erroneous exercise of it will be corrected.

The right to recall a witness and the right to introduce new testimony are generally treated together, and the right of the court to regulate the order of introduction is practically the same in both.

In *Fant v. Miller*, supra, which was a chancery case, Judge Moncure quotes from 2 *Daniell's Chy. Pr.* p. 1150, § 9, as follows:

"But notwithstanding this unwillingness to allow a second examination of the same witness, there are cases in which, if justice requires that a second examination of the same witnesses shall take place, an order will be made to permit it."

And the judge adds:

"In the ninth section, before referred to, are collected many cases, in which a re-examination of a witness was ordered in that country."

Carter v. Edmonds, supra, was also a chancery suit, in which it was said that, when the circumstances of the case and justice require it, an order for the second examination of the same witness will be made, and in the course of the opinion Judge Lewis said:

"In the present case the re-examination was confined to a single point to which, by the inadvertence of her counsel, as recited in the order, the attention of the witness had not been previously called."

In *Wilkie v. Richmond Traction Co.*, 105 Va. 290, 54 S. E. 43, the objection was to introducing new testimony, and not merely recalling the same witness. It was held that no error was committed in excluding the testimony, as

"no reason is shown for not having introduced the witnesses to testify in chief. It is not said that they were absent, or sick, nor that there was any *surprise, accident, or mistake*, nor any reason whatever given why their introduction as witnesses was delayed." (Italics supplied.)

In *Virginia Ry. & P. Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632, Ann. Cas. 1913B, 838, Prentiss, J., says:

"One of the errors assigned is that, after the evidence had been concluded, the defendant company had demurred to the evidence because it had not been proved that the street car was the property of the Virginia Railway & Power Company, although the plaintiff, Mrs. Gorsuch, had rested and concluded her case, after the statement of the grounds of demurrer, the court allowed her to reopen the evidence and prove the ownership of the street car.

"There is no merit in this assignment. At that stage of the proceedings they were in the control of the trial court, and it was the duty of the judge to permit the plaintiff to prove a fact which had been inadvertently omitted, but about which there was no doubt whatever. Had the court refused to do so, it would have been reversible error. Matters of this sort are within the discretion of the trial court, and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner."

It seems plain from the foregoing cases that, while a very wide discretion is vested in the trial court in matters of this kind, and that this discretion will be rarely interfered with, still it is a judicial discretion, subject to review by the appellate court, and will be controlled by said court, whenever the facts and circumstances are such as make it proper to do so.

The parol contract sought to be enforced in this case is said to have been entered into on Thursday night, September 9, 1915. The witness, Burke, by whom the plaintiff proved its case, had a further interview with Wirt Robertson, the owner of the land, on Monday night, September 13, at which he states that Robertson informed him that he had sold the land to another party. On the Tuesday following he states that he made a full memorandum in writing of all the facts and circumstances relating to the case, which he delivered to his counsel, and which was typewritten at counsel's office and read and corrected by him on the Wednesday following, and which was introduced in evidence by the plaintiff on the trial of the instant case. When the case was tried in the United States District Court, Burke testified at length for the plaintiff, and on the present trial he was the only witness examined for the plaintiff. So that he detailed the transaction at least three times; once in the written statement to his counsel, next before the United States District court, and finally in the present case. It is claimed by counsel

for the defendant that there were sundry variations and contradictions in his testimony. These criticisms we will not at present investigate.

The statement to his counsel, taken in connection with the testimony in the instant case, has an important bearing on the ruling of the trial court in excluding the re-examination of Mrs. Robertson. The plaintiff was claiming that there was a complete unconditional parol contract between the parties; the defendant that there was simply a proposition made to Robertson by Burke which had not been accepted by Robertson. Burke, in his testimony in this cause, proved a complete unconditional parol contract between the plaintiff, through him as agent, and Robertson for the exclusive agency and selling rights for the tract of land in controversy. He gives the details of the proposition which he said was made to him by Robertson, and which he said he accepted. He states that when the proposition was made to him by Robertson he wished to be clear on it, as the proposition was coming from Robertson. He did not want to enter into it until he was absolutely certain of the full purpose of the proposition, and he asked Robertson to repeat it; that Robertson repeated a portion of it, and he explained in his own language how it looked to him, and that Robertson said, "Yes, that is right," and he told Robertson that he would accept the contract on these terms. He states that he accepted Robertson's proposition, and that they shook hands on the trade; that he had blank contracts, and offered to draw up a contract, but Robertson said, "No," he preferred to have his lawyer, Mr. Townsend, to draw up the contract, and he told Robertson that that was perfectly satisfactory. But to make it absolutely clear that there was no misunderstanding, and that they both thoroughly understood the contract, he went over it again, and Robertson said, "Yes; that is right." He further testified that the trade was complete, and that there was nothing left to be done. Burke further testified that afterwards he was called up over the phone at the Stratford hotel by Robertson, and that Robertson said he was not altogether satisfied as to whether it was best to sell the property as a whole or otherwise, and that he (Burke), not wishing to discuss the matter at a public place, or over a phone at all, asked Robertson when he could see him, and made an engagement with him for Monday night. When asked as to the time when this conversation over the phone took place, he stated, "My recollection places the telephone conversation as being on Saturday night, and not Sunday night." Burke further testified that in company with J. W. Ferrell, the president of the plaintiff company, he went to see Robertson on Monday night to get the contract that had been

drawn up by his attorney; that when asked if he had the contract ready, he said "No;" that he had sold the property; that he had received an offer that was so good that he did not feel like turning it down, or words to that effect. In response to inquiries, he said that he had sold the property to Mr. Barrow, a gentleman from Brunswick county, and that the price was a secret; that he had promised not to tell it.

At this juncture, it is proper to state the testimony of Mrs. Robertson. She testified that she did not hear any of the conversation between her husband and Burke on Thursday night, but that on Sunday night her husband called the Stratford hotel, and said he wanted to speak to Mr. Burke; that she supposed Mr. Burke came to the phone, and she heard her husband say, "Mr. Burke, I just wanted to tell you that I have decided not to accept your proposition," and, further, "Yes; I have decided not to accept your proposition." He repeated that twice over the phone Sunday night, and of this she was absolutely positive. When asked if her husband called Burke on Saturday night, she said, "Not that I know of; he did not call him on Saturday night," and that she was at home Saturday night, and that she knew that he did call him on Sunday night. It will be recalled that Burke was not positive as to the date of the call over the phone, though he admits that the conversation related to the dealings of the parties on Thursday night. His statement is, "*My recollection places the telephone conversation as being on Saturday night, and not on Sunday night.*" If we turn now to the written statement made by Burke to his counsel while the matter was fresh in his mind, we will see his version of what Robertson said. In this statement we find the following:

"Then he [referring to Robertson] went off into this statement, 'I looked for Mr. Burke Friday all day, and you [Mr. Ferrell] were expected to be back here Friday evening or Saturday, and I was unable to find you.' Then Mr. Ferrell said to him, 'Did you have the contract ready to sign?' His reply was, 'No; I did not.' Mr. Ferrell said: 'What did you want with us?' Then he said that he had not been able to get me until Saturday night. And then Mr. Ferrell again asked him, 'Well, what did you want, Mr. Robertson; were you ready to sign the contract?' He did not reply to that. Then Mr. Ferrell said, 'Well, Mr. Robertson, you and Mr. Burke had a clear understanding as to this contract, didn't you?' And he said, 'Yes. * * * I feel that I have got a right to back out of this trade.' Mr. Ferrell said, 'Why?' He said, 'Because I could not find you nor Mr. Burke either Friday or Saturday. I then said, 'Mr. Robertson, did you think that we wanted to back out of this trade?' Mr. Robertson replied, 'I did not know what you wanted to do.' During this conversation Mr. Robertson repeated that he had not been able to find us on Friday night or Saturday, and

Mr. Ferrell said, "Well, what did you want to see us about, Mr. Robertson?" to which he replied that he wanted to call off this deal."

The statement attributed to Robertson in the foregoing written statement by Burke would have, at least, a tendency to indicate that Robertson did not think that he had made any binding contract, and that the parties were to have some further interview on the subject, and that he had made unsuccessful efforts to obtain from Burke or Ferrell such an interview "either Friday or Saturday." This written statement of Burke's also has a tendency to confirm Mrs. Robertson's statement that the conversation over the phone took place on Sunday night, and not on Saturday night. Burke makes Robertson say, "I could not find you nor Ferrell either Friday or Saturday." In view of the statement attributed to Robertson, and of the testimony of Mrs. Robertson, it was an important fact to be proved, if true, that on Thursday night previously Mrs. Robertson had heard her husband say to Burke as he left the house, "I will consider your proposition and let you hear from me."

[4] Mrs. Robertson had twice testified in the case, and it was easy for her to have stated on either occasion, if she desired to concoct a story, that she had overheard the conversation of Thursday night, but she distinctly stated otherwise. The court had no reason to suppose that Mrs. Robertson would testify to anything that was untrue if she were permitted to be recalled; and the character of the counsel engaged in the case forbids the idea of any suggestion of any impropriety on their part. It seems plain that the object of the inquiry was simply "to elicit the truth and secure the attainment of justice." While we cannot say that counsel was as diligent and as circumspect as they should have been, we are satisfied that the omission to elicit the answer expected to be given by Mrs. Robertson was the result of accident, mistake, or oversight on their part, and it could certainly have done the plaintiff no serious harm to have allowed her to be recalled. Robertson himself was dead. His version of what had taken place between him and Burke, both in his written statement and his verified bill, had been excluded by the court, and his estate was endangered if Burke should swear to anything that was untrue. It was a case in which, under all the circumstances, the court should have been circumspect to see that the fullest opportunity was afforded for a full and complete investigation of all the facts, even though it might disturb the usual order of the introduction of testimony and delay the trial of the case. Burke was in court, and if Mrs. Robertson made any false statement, it was in his power to contradict her and leave it to the jury to decide between them as to who was telling the truth. Recent

legislation has greatly liberalized the rules of evidence, and much is now admissible which a few years ago was not. Under all the circumstances of the case, we are of opinion that this is an instance in which the trial court should have permitted the witness to be recalled, that the trial court erred in not allowing such recall, and that this is a proper case for this court to supervise and control the discretion vested in said court.

[5] Counsel for the defendant in error devote considerable space in their brief to a discussion of the ruling of the trial court in admitting in evidence, over their alleged objection, the testimony of Mrs. Robertson as to what she heard her husband say over the telephone, but the objection, the ruling of the trial court thereon, and the exceptions thereto are not parts of the record before us. They are not made parts of the record by any bill or certificate of exception filed in the cause. The demurrer to the evidence states that the plaintiff produced to the jury, to maintain the issues on its part, the *following evidence*, and that the defendant to maintain the issue on his part produced the *following evidence*. All through the stenographer's report of the evidence there are interspersed remarks of counsel and of the court, and various exceptions to rulings of the court. For instance, at one place the record shows the following:

"Mr. James Mann: We except to the statement that was made by the court, and especially to the form of it." "Mr. Bernard Mann: And we except to it on the ground that it is not full enough."

And that is the last ever heard of either exception. These things are not parts of the demurrer to the evidence or of the record. This court cannot be burdened with a search through a stenographer's report to ascertain what objections have been made to the reception of evidence and the rulings of the trial court thereon. If they are relied on, they must be made parts of the record by proper bills of exception, or certificates of exception. Otherwise, they will be deemed to have been waived. No proper exception to the ruling complained of appearing in the record, the propriety of the ruling is not open for investigation.

[6] The defendant tendered certain witnesses solely to prove the reputation of Wirt Robertson for truth and veracity; but the trial court refused to permit them to testify on the ground that Robertson had not testified in the cause, and that his reputation for truth and veracity had not been assailed. This ruling is assigned as error. There was no error in the ruling of the trial court. The testimony was properly rejected. It appears from the stenographic report of the evidence that when these witnesses were tendered and the court was stating its rea-

sons aforesaid for their exclusion, counsel for the defendant suggested that the witnesses were tendered, "not only on those respects, but also as to fair dealing," to which the court replied, "Yes." But this does not appear in the bill of exception, and hence is no part of the record, and cannot be considered by us. Upon that feature of the admissibility, we express no opinion.

[7] Under the facts and circumstances of this case, the trial court did not err in excluding testimony tendered by the defendant as to the conditions of the real estate market near Hopewell shortly after the alleged breach of contract set forth in the plaintiff's declaration.

[8] When the case was previously before us, it was upon a demurrer to the declaration. We held that the declaration stated a case which, if proved, entitled the plaintiff to recover, and that the profits sought to be recovered were not speculative. The declaration stated the terms of the contract, and that the plaintiff had, under the terms thereof, 12 months within which to fulfill it, and the witness Burke testified as to that time in the trial of the present case. It was claimed by the defendant that the testimony of Burke was impeached by the written statement aforesaid of Burke to his counsel, and also by his testimony in the federal court. This was a question of fact to be decided by jury, and the measure of damages was not the same where the employment was at will and where it had a definite duration. It was error, therefore, for the court to assume that the employment was for 12 months, and instruct the jury that—

If they believed that Wirt Robertson, the defendant's intestate, "sold the property described in the evidence known as the Baker tract to Charles S. Barrow for the sum of \$80,000, * * * and that the purchase money had been paid in full, they must assess the plaintiff's damages at \$20,000.00."

But when the court decided, on the demurrer to the evidence, that the plaintiff did have 12 months within which to fulfill the contract, the error became harmless, provided the court had fixed the right measure of damages. On the latter question, the trial court simply followed the opinion of this court on the former hearing. It was there said that—

"Robertson himself demonstrated the existence of a market by selling the property himself at an enormous profit over what he was to have as a minimum in his contract with the realty company, and he cannot be heard now to say that the company could not have done at least as well."

And again:

"A principal cannot, after having made a valid contract with an agent for the exclusive right to sell, render performance on the part

of the agent impossible by making the sale himself, and then successfully defend an action for breach of the contract by claiming that the agent might not have made the sale. Sparks v. Reliable Dayton Motor Car Co., 85 Kan. 29, 116 Pac. 363, Ann. Cas. 1912C, 1251; Schiffman v. Peerless Motor Car Co., 13 Cal. App. 600, 110 Pac. 460, 462; Green v. Cole, 127 Mo. 587, 30 S. W. 135; 2 Mechem on Agency (2d Ed.) § 2445."

We have no disposition to recede from what was then said. If the contract and the breach thereof alleged in the declaration was proved, the realty company lost by such breach the benefits of the contract which it would have received if it had been fulfilled, and defendant cannot complain if the plaintiff elects to take a less sum. In addition to the cases already cited on the measure of damages in a case of this kind, see Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; U. S. v. Beham, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; Durkes v. Gunn, 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300; Trigg v. Clay, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723.

[9] The plaintiff had the right to elect to base its profits on the sale to Barrow, and such election was not to the detriment of the defendant.

For the error in refusing to permit Mrs. Robertson to be recalled as a witness, the judgment of the trial court must be reversed, the verdict of the jury assessing the damages will be set aside, and the case remanded to the trial court for a new trial to be had therein not in conflict with the views hereinbefore expressed.

Reversed.

SAUNDERS, J., absent.

(129 Va. 592)

VIRGINIA RY. & POWER CO. v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia.
March 17, 1921.)

1. Street railroads \S 32—Operation evidence of construction of ordinance by parties.

The operation by a traction company of its street cars over the tracks of another company under the terms of a city ordinance for so long as the two companies were separate corporations and for several years thereafter, with the consent of the city authorities, if not sufficient to establish estoppel to deny that the ordinance authorized such operation, is at least of weight as a construction by the parties that the ordinance authorized such operation.

2. Street railroads \S 32—Ordinance held to authorize operation over competitor's tracks.

The Richmond ordinance of December 7, 1900, enacted at the urgent solicitation of a

traction company, which, after reciting the provision of a competitor's franchise permitting the council to authorize the use of its tracks by the traction company, gave the traction company the right to operate its cars along the lines thereafter specified, specified certain tracks which the company was authorized to lay and connections it was to make, and required the cars operated thereunder to be operated according to the provisions of the traction company's franchise, clearly authorized the traction company to operate its cars over the competitor's tracks, though the subsections specifying the particular lines made no mention of the operation of cars.

3. Street railroads §18—Rule of strict construction of franchise not to be used to defeat public rights.

The rule that a street railroad franchise is to be strictly construed so as not to convey any rights by implication which are not expressly granted is for the protection of the public, and is not to be used to defeat the public right to have the required service over the lines covered by the franchise.

4. Street railroads §18—Strict construction of franchise does not mean strained or unnatural construction.

While a franchise is to be construed strictly against the company and in favor of the public, that does not mean that it is to be given a strained or unnatural construction which will defeat the manifest purpose of the grant.

5. Street railroads §18—Right necessarily implied from whole ordinance is sufficiently expressed.

Where the right of a street railroad company to operate cars over the lines specified in a city ordinance is necessarily implied from the whole ordinance, though not specifically mentioned in the provisions designating the lines to be constructed, the right is sufficiently expressed in the ordinance within the rule that a franchise gives only the rights expressed therein, and not those given only by implication.

6. Street railroads §70—Ordinance held to require operation of cars over named route.

The Richmond ordinance of December 7th, 1900, granting to a traction company authority to connect with the tracks of a competitor and to operate its cars over such tracks, which also provided that the cars should be operated by the traction company in accordance with its franchise, requires the company to maintain over the route therein specified the service it was required to maintain by its franchise over the other routes.

7. Street railroads §66—Acceptance of ordinance creates contract which city can enforce.

The acceptance by a traction company of an ordinance authorizing and requiring it to operate cars over the tracks of its competitor creates a contract for the operation of such cars which the city can enforce.

8. Evidence §20(2)—No judicial notice of effect of operation of cars.

On writ of error to a judgment imposing a fine on a street railroad company for discon-

tinuing service on a certain route, the court cannot take judicial notice that the maintenance of service on that route would be unnecessary and would result in congestion of the traffic.

9. Street railroads §70—Reasons for repealing service ordinance cannot be considered by court.

On writ of error to a judgment fining a street railroad company for discontinuing service on a route, the fact that such service was of no benefit to the public, and that the operation of the cars thereon increased the congestion of the traffic, presents a good reason for the repeal of the ordinance requiring the service by the city council, but does not authorize the court to permit such discontinuance.

Error to Hustings Court of Richmond.

The Virginia Railway & Power Company was fined for discontinuing service on one of its routes in the City of Richmond without consent of the city council, and it brings error. Affirmed.

E. R. Williams, A. B. Guigon, and T. Justin Moore, all of Richmond, for plaintiff in error.

H. R. Pollard, of Richmond, for defendant in error.

BURKS, J. The Virginia Railway & Power Company is the successor in title of the franchise of the street railways in the city of Richmond of the Richmond Traction Company, the Richmond Passenger & Power Company, and the Virginia Passenger & Power Company. It was fined \$100 for discontinuing service on one of its routes in the city without the consent of the city council, and to the judgment imposing such fine the writ of error in this cause was awarded. The proceeding is quasi criminal, but in substance it is a civil proceeding to determine the rights and duties of the respective parties under certain ordinances of the city. This involves a construction of said ordinances.

In 1900 there were two principal street car companies in the city operating under different franchises and occupying different territory. Of these the Richmond Traction Company, whose original franchise was granted in August, 1895, operated on Broad street practically its then entire length, extending from the city limits near Oakwood Cemetery westward along Broad street to First street, and out First street and along that and other streets to Hollywood Cemetery, but had no line on Main street. This line was first known as the Oakwood to Hollywood line, afterwards as the Oakwood-Broad line, and all the cars were designated by the latter name as required by ordinance. The operation of this line was commanded and compelled by the ordinance granting the franchise and the amendments thereof. The

Richmond Passenger & Power Company, whose original franchise was granted in December, 1899, operated on Main street practically from one end of it to the other, but had no line on Broad street, except the Laurel street line, which ran on Broad street a distance of 17 blocks. But the traction company's lines consisted chiefly of the Broad street lines, and the Passenger & Power Company's lines consisted chiefly of the Main street lines. In each of these franchises the city reserved the right to permit either company to run cars on the line of the other under certain terms and conditions.

Shortly before December 7, 1900, the traction company, which was a competitor of the Passenger & Power Company, made earnest efforts before the council of the city of Richmond, under the power which the council had reserved to itself, to secure authority to operate certain of its cars on Main street between First and Eighteenth over and along the tracks of the Passenger & Power Company; the two lines then crossing each other at First and Main. In response to this earnest request, the city council adopted the ordinance of December 7, 1900, "to authorize the Richmond Traction Company to extend its lines, and also to operate its cars upon certain tracks of the Richmond Passenger & Power Company" (see title of ordinance), and it is the construction of this ordinance, in the light of the surrounding circumstances, which constitutes the chief matter in controversy between the parties.

Soon after the adoption of the ordinance, the two lines were connected where they crossed at First and Main streets. The line authorized by the ordinance was constructed along Eighteenth street, and the two lines connected at Eighteenth and Main, and the Richmond Traction Company, with the acquiescence of the Richmond Passenger & Power Company and of the city, began to operate a second line of cars between Oakwood Cemetery and Hollywood Cemetery, traversing Main street from First to Eighteenth, which became known as the "Oakwood and Main line." The two lines were identical at each end—that is, from Eighteenth to Oakwood and from First to Hollywood—and were parallel from First to Eighteenth; one of said parallel lines being on Broad and the other on Main. The two companies continued to be competitors from early in 1901 till June, 1902, when the Virginia Passenger & Power Company became the owner of the majority of the stock of both companies. As stated in the petition:

"From June, 1902, until November, 1917, the operation of the Oakwood and Broad and Oakwood and Main lines continued under unified control. Both lines were always operated as Richmond Traction Company lines—from June, 1902, to July, 1904, by the Virginia Passenger & Power Company, which owned the control-

ling interest in both the companies; from July, 1904, to July, 1909, by the receivers of the United States District Court for the Eastern District of Virginia in charge of and operating the lines of all three companies in receivership proceedings against said companies; and from July, 1909, to November, 1917, by the present company, the Virginia Railway & Power Company, which acquired the properties of all the foregoing companies through foreclosure proceedings in the receivership suits against the above-mentioned companies."

By an ordinance adopted in 1915 the plaintiff in error, then the owner and operator of all the lines aforesaid, was authorized to make "a temporary change in the routing of its * * * Broad and Main line and its Oakwood-Broad line." Under this ordinance the plaintiff in error was permitted to, and did, divert its Oakwood-Broad line from Broad street at Eighteenth street, and followed the latter street to Main, and thence down Main to Ninth and up Ninth to Broad. This diversion made the two lines (Oakwood-Broad and Oakwood-Main) identical from Oakwood cemetery to Hollywood except between Ninth and First streets. Both lines continued thereafter to be operated along the routes indicated until November 1917 when the plaintiff in error discontinued the Oakwood-Main line, without asking or obtaining the consent of the city. The plaintiff in error contends: (1) That the ordinance of December 7, 1900, does not by its terms authorize or require the operation of the cars of the traction company on the Main street line of the Passenger & Power Company between any specific points, and that such requirement cannot be made by implication; (2) that the right, if it exists at all, is merely permissive; and (3) that the intention of the ordinance of 1915, below was to consolidate the two lines, and not to duplicate the service over the route.

An ordinance to authorize the Richmond Traction Company to extend its lines, and also to operate its cars upon certain tracks of the Richmond Passenger & Power Company. Approved December 7, 1900.

Whereas, in the ordinance entitled, "An ordinance to authorize the construction and operation of a street railway within the limits of the city of Richmond by the Richmond Traction Company," approved August 28, 1895, section 7 provides for the use, in whole or in part, of the lines of the Richmond Traction Company by any other company, when authorized by the city council, subject to the terms and conditions of said section.

Whereas, under an ordinance entitled, "An ordinance to authorize the construction and operation of a street railway within the limits of the city of Richmond by the Richmond Passenger & Power Company," approved December 23, 1899, it is provided that the said Richmond Passenger & Power Company shall have the right to operate its cars upon certain tracks on Broad street of the Richmond Traction Com-

pany, under the right reserved in the above-mentioned ordinance of August 28, 1895, and whereas, in the said ordinance of December 23, 1899, the council reserved the power to allow any other company, when authorized by the council, to use, in whole or in part, the tracks of the Richmond Passenger & Power Company:

Now, therefore, be it ordained by the council of the city of Richmond:

(1) That the Richmond Traction Company be, and the same is hereby, authorized to operate its cars upon and along certain of the lines and tracks of the Richmond Passenger & Power Company, and to extend its own tracks at Eighth and Broad streets and Eighteenth and Broad streets, as hereinafter stated, subject to the conditions and provisions hereinafter set forth or referred to.

(a) The Richmond Traction Company is hereby authorized to connect its eastern track on First street with the southern track of the Richmond Passenger & Power Company on Main northern track of the Richmond Passenger & Power Company on Main street.

(b) To construct and operate a double track on Eighth street, between Broad and Main streets, connecting at the corner of Broad street with the tracks of the Richmond Traction Company west of Eighth street, and at the corner of Main and Eighth streets with the tracks of the Richmond Passenger & Power Company; the western track on Eighth street to connect with the southern track of the Richmond Passenger & Power Company, and the eastern track on Eighth street with the northern track of the Richmond Passenger & Power Company on Main street.

(c) And is also authorized to extend its tracks on Eighteenth street southwardly from Broad street to Main street, connecting the said extension at Eighteenth street and Broad street with the tracks of the Richmond Traction Company on Broad street east of Eighteenth street, and connecting the eastern track at Eighteenth street and Main street with the southern track of the Richmond Passenger & Power Company on Main street, and the western track at Eighteenth and Main streets with the northern track of the Richmond Passenger & Power Company on Main street, with the right to the Richmond Passenger & Power Company to use said tracks on Eighteenth street from Grace to Main streets, without paying any compensation to said traction company for the expenses of construction, and only to pay fair compensation for the use of the same, to be determined in the same manner as shall be determined the compensation it shall pay for the use of the tracks of the Richmond Traction Company on Broad street. But if the said Richmond Passenger & Power Company shall prefer to construct its own track from Eighteenth and Grace streets to Eighteenth and Main streets, then the said Richmond Traction Company shall not build or continue from Eighteenth and Grace to Eighteenth and Main streets one of the above-mentioned tracks running from Eighteenth and Broad streets, but may connect the said track at Eighteenth and Grace streets with the said track of the Richmond Passenger & Power Company at that point, and use the same upon compensation to the Richmond Passenger & Power Company, to

be determined as provided in section 2 of this ordinance.

(2) The use of the above-named tracks of the Richmond Passenger & Power Company by the Richmond Traction Company shall be upon such fair and reasonable terms as may be agreed upon between the parties, or, in the event that said companies cannot agree upon the terms, the same shall be settled by arbitration, as provided in section 11 of an ordinance approved December 23, 1899, entitled, "An ordinance to authorize the construction and operation of a street railway within the limits of the city of Richmond by the Richmond Passenger & Power Company."

(3) The privileges herein granted shall continue until the 1st day of January, 1926, unless sooner forfeited, and shall be exercised in accordance with the terms and conditions imposed upon the Richmond Traction Company for the construction and operation of its lines, as provided in an ordinance approved August 28, 1895, entitled, "An ordinance to authorize the construction and operation of a street railway within the limits of the city of Richmond by the Richmond Traction Company," and all lawful amendments thereto, so far as the same may be applicable and not inconsistent herewith. As to the furnishing of service, the committee on streets shall have the same power to require quicker service as it now has over the Broad street route of the traction company by section 3 of the ordinance of that company, approved August 28, 1895. It is further provided that, before the Richmond Traction Company shall exercise any of the rights and privileges granted it by this ordinance, said Richmond Traction Company shall agree, in writing, evidenced by its acceptance of this ordinance, as hereinafter provided, that the city of Richmond shall have the right to put further conditions, restrictions, and regulations as to the use of electricity and requirements as to the manner or system by which electricity may be used by the said Richmond Traction Company, upon any or all of its lines.

(4) The said Richmond Traction Company shall run all of their cars, which operate by virtue of the powers herein granted, upon a schedule of not less than five minutes, under the provisions of their present franchise, and during the hours therein mentioned, and shall also run all of their cars, which operate by virtue of the powers herein granted, continuously from Oakwood to Hollywood and return, and continuously from the reservoir to Chimborazo and return.

(5) The privileges herein granted are given upon the condition that, by accepting this ordinance, the Richmond Traction Company shall concede and agree that its rolling stock shall be taxed by the city of Richmond, whether located in the city or not; but if such rolling stock be also taxed by the county of Henrico, under the ruling of the board of public works, then the amount of the taxes imposed by the city shall be reduced by the amount which the company shall have to pay to said county.

(6) The said Richmond Traction Company shall, within sixty days after said approval of this ordinance, accept, in writing, each and every provision of the same; and, if at the expiration of the said period of sixty days after

said approval of this ordinance the said Richmond Traction Company shall have failed so to accept, in writing, each and every provision thereof, then this ordinance shall be null and void and of no effect.

(7) It is further provided that the privileges herein granted are given upon the condition that the work necessary to be done to make the connections herein authorized for the use of the tracks of the Richmond Passenger & Power Company from First and Main street to Eighteenth and Main street, and from Eighth and Main street to Eighteenth and Main street, and from the other work necessary for the operation of the cars of the Richmond Traction Company over said tracks and the tracks to be constructed on Eighth street and on Eighteenth street, shall be begun within four months from the passage of this ordinance, and shall be completed within six months from said passage.

(8) This ordinance shall be in force from its passage.

[1] Aside from the language of the ordinance, to be presently noticed, the action of the parties affected was a contemporaneous practical construction of the ordinance by them. The fact that the Passenger & Power Company, a competing line with the traction company, permitted the latter, acting under the ordinance, to occupy its lines along Main street from First to Eighteenth and share its business, and that the traction company agreed to pay for the use of said tracks in the manner provided by the franchisees, plainly shows that both companies construed the ordinance as authorizing such use of said tracks. The city also, by its full acquiescence in the conduct of the two companies, manifested a like interpretation of the ordinance and in view of the fact that the ordinance was adopted at the earnest solicitation of the traction company and for the purpose of authorizing the very arrangement which was put into effect by the companies it may well be doubted if the city would not be estopped to deny that interpretation of the ordinance. In section 1242 of Dillon on Municipal Corporations (5th Ed.) it is said:

"If a municipality has the power to grant such right or franchise, and a corporation, believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal authorities, proceeded to exercise the right of franchise, and has constructed, maintained, and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers and representatives in knowingly permitting and acquiescing in the use and occupation of the streets from asserting the invalidity of the grant of the franchise, so far, at least, as concerns its own failure to pass an ordinance or take the steps necessary to effectuate the grant. But the principle of estoppel in such case must be very cautiously applied and restricted to cases where justice manifestly requires its application."

Both routes have been operated by the plaintiff in error and its predecessors in title from the time the Oakwood-Main line was installed in 1901 till November, 1917, when the latter was discontinued, subject to the change made in pursuance of the rerouting ordinance aforesaid of 1915. This practical construction put upon the ordinance by all parties in interest not only at the time of its adoption, but continued through a long series of years, both while the interests of the parties were antagonistic and afterwards when they had become harmonious, is certainly entitled to great weight, even if it does not amount to an estoppel. *Henry v. Mason City, etc., R. Co.*, 140 Iowa, 201, 118 N. W. 310.

[2] Let us return now to the ordinance itself and see if it does not require as well as authorize the operation of the Oakwood-Main line. It must be borne in mind that the traction company was before the city council earnestly beseeching it for authority to operate certain of its cars over and along the tracks of the Passenger & Power Company, a competing company, on Main street between First and Eighteenth streets, and that to accomplish this result it would be necessary to build a line along Eighteenth street from Broad to Main. In response to this request, and intending to comply therewith, the city council adopted the ordinance of December 7, 1900, which is set out in full in the statement preceding this opinion. Only such parts of it will be repeated as are deemed necessary, and italics will be used where desired for purposes of emphasis, though not used in the ordinance.

The title of the ordinance is as follows:

"To authorize the Richmond Traction Company to extend its lines and also to operate its cars upon certain tracks of the Richmond Passenger & Power Company."

Manifestly this title was sufficient to cover what was asked by the traction company and what the city proposed to grant it, to wit, the right to operate its cars upon certain tracks of the Passenger & Power Company. The ordinance then contains two "whereas" clauses. The first recites that the traction company franchise "provides for the use of its tracks by any other company authorized by the council." The second recites that the franchise of the Passenger & Power Company gave to the council power to allow any other company to use its tracks. After the recitals, the ordinance proceeds, "Now, therefore, be it ordained"; that is to say, in consideration of the recitals and for the purpose of carrying out the object expressed in the title, the council ordained, first, "that the Richmond Traction Company be and the same is hereby authorized to operate its cars upon and along certain lines and tracks of the Richmond Passenger & Power Company." This was an unqualified grant of authority

of the traction company to operate its cars upon and along the tracks of the Passenger & Power Company, and it only remained to designate the tracks referred to. In order to accomplish this result the ordinance then adds subsections (a), (b), (c) to section 1. Subsections (a) and (c) designate specifically how the lines of the two companies are to be connected. The two lines cross each other at First street, and subsection (a) provides that the connection at that street shall be made by connecting the eastern track of the traction company on First street with the southern track of the Passenger & Power Company on Main street, and to connect its western track on First street with the northern track of the Passenger & Power Company on Main street. Subsection (b) relates to the construction and operation of a double track on Eighth street and the connections to be made therefrom. Subsection (c) provides for the construction of tracks on Eighteenth street from Broad to Main so as to connect the two lines, and provides that the connection at Eighteenth and Main streets shall be made by connecting the eastern track of the traction company with the southern track of the Passenger & Power Company and the western track of the traction company with the northern track of the Passenger & Power Company. The connection thus authorized was absolutely necessary, in view of the way such cars are operated, for the operation of the traction cars on the tracks of the Passenger & Power Company, and could not admit of any use of said tracks except those on Main street between First and Eighteenth. It is true, as argued for the plaintiff in error, that neither one of these subsections in terms provides for the operation by the traction company of its cars over the lines of the Passenger & Power Company, but, the first paragraph of section 1 having provided for the operation of said cars, the subsections referred to were enacted in order to carry out the provisions of said first paragraph and simply provide how the connections were to be made, which connections, when made, would necessarily refer to the operation of the cars on Main street between First and Eighteenth; the subsections, in effect, more particularly designating the certain lines and tracks of the Passenger & Power Company which were to be traversed by the cars of the traction company. Section 2 of the ordinance then declares that "the use of the above-named tracks shall be upon fair and reasonable terms," and, if agreement is impossible, provides a method of compulsory arbitration. "The above-named tracks" mentioned in section 2 could only refer to the tracks which had been designated as hereinbefore indicated in paragraph 1. Subsections (a) and (c) of paragraph 1 expressly state that these connections are the northern and southern tracks of the Passenger & Power Company at First and Main and at Eighteenth and Main. Sec-

tion 3 of the ordinance then provides that the privileges therein granted shall continue until the 1st of January, 1926. The plain purpose of the ordinance, as admitted in the petition, was to give the traction company the right to use the tracks of the Passenger & Power Company on Main street between First and Eighteenth, so that it would seem manifest that the "privileges herein granted" refer to the privileges which, as has been pointed out, were conferred by section 1. Section 3 also declares that the privileges herein granted "shall be exercised in accordance with the terms and conditions imposed upon the traction company for the construction and operation of its lines as provided in an ordinance approved August 28, 1895, and all lawful amendments thereto." Referring to the latter ordinance, we find that it was there expressly provided that fair service should be rendered to the public upon the routes given the company, and that the company between the hours of 6 a. m. and 12 p. m. "shall not at any time within the said hours cease to do so without the consent of the council by ordinance." That ordinance allowed and provided for a five-minute schedule and that the company should run through cars from Hollywood to the eastern limits of the city. Not only did section 3 subject the traction company to the ordinance of 1895 and all lawful amendments thereto, but the ordinance of 1900 in section 4 expressly provides:

"(4) The said traction company shall run all of their cars which operate by virtue of the powers herein granted, upon a schedule of not less than five minutes under the provisions of their present franchise during the hours herein mentioned, and shall also run all of their cars which operate by virtue of the powers herein granted continuously from Oakwood to Hollywood and return."

The only cars that could be operated continuously from Oakwood to Hollywood and return under the ordinance of 1900 was the Oakwood and Main line, for the Oakwood and Broad line was not operated by virtue of powers granted by the ordinance of 1900, but under the ordinance of 1896. The provisions of sections 3 and 4 are mandatory and clearly establish the duty of the traction company to operate such cars, just as the preceding section of the ordinance gave them the right and privilege to do so. Reading the ordinance as a whole, it cannot be doubted that it was the object and intention of the traction company, as well as of the city, that the new line should be established between Oakwood and Hollywood, which was in fact established, and was called and known as the Oakwood-Main line. The seventh section of the ordinance of 1900 declares:

"The privileges herein granted are given upon the condition that the work necessary to be done to make the connections herein au-

thorized for the use of the tracks of the Richmond Passenger & Power Company from First and Main streets to Eighteenth and Main streets * * * and the other work necessary for the operation of the cars of the Richmond Traction Company over said tracks * * * shall be begun," etc.

This section in terms refers to the operation of the traction company's cars over the tracks of the Passenger & Power Company along Main street from First to Eighteenth. It expressly declares that the connections authorized are for the use of the tracks of the Passenger & Power Company on Main street from First to Eighteenth, and in terms provides "for the operation of the cars of the Richmond Traction Company over said tracks." The ordinance plainly gives authority to the traction company to operate cars on Main street between First and Eighteenth, and compels such operation on a schedule of five minutes continuously from Oakwood to Hollywood and return. This was the privilege sought by the traction company, and this was the privilege granted by the city and accepted by the traction company, and recognized by all the parties interested as the true and proper construction of the ordinance. It is admitted in the petition that—

"The council of the city of Richmond adopted the ordinance on December 7, 1900; evidently intended to grant to the traction company permission to operate certain of its cars on Main street along and over the tracks of the Richmond Passenger & Power Company there stated."

And again:

"Perhaps and even probably the council of the city of Richmond did intend by the ordinance of December 7, 1900, to authorize the traction company to operate its cars on Main street between First and Eighteenth street over the Richmond Passenger & Power Company tracks there stated."

If the traction company was earnestly urging the council to grant it permission to operate its cars on the Main street line of the Passenger & Power Company, and the city did intend by the ordinance to grant their request—that is, to operate the cars on Main street—it would seem clear from what we have said that section 1 of the ordinance of 1900 was not a mere permission to make track connections, but a grant of the right to operate its cars over the line of the Passenger & Power Company on Main street, on the terms and conditions therein set forth.

[3] Notwithstanding the facts hereinbefore recited that the right of the traction company to operate its cars on the Main street line of the Passenger & Power Company from First to Eighteenth streets was earnestly sought of the city council by the traction company, that the ordinance of December 7, 1900, was enacted in compliance with that re-

quest, and that the plaintiff in error admits that the city council did probably intend thereby "to authorize the Richmond Traction Company to operate its cars on Main street between First and Eighteenth over Richmond Passenger & Power Company's tracks there situated," and that such operation of cars on Main street was put into operation soon after the adoption of such ordinance and was continuous from that time till the discontinuance in November, 1917, yet the plaintiff in error contends that it is not bound thereby because "such a franchise right cannot be created by implication, but must be granted expressly." A number of cases are cited by counsel for the plaintiff in error to sustain the proposition that grants and franchises of this nature are to be strictly construed in favor of the public, and that nothing is to be taken by implication. Among them are *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34, 26 Sup. Ct. 224, 50 L. Ed. 353, *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, and *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399. We have no complaint to make of the doctrine enunciated in said cases, nor will it be necessary to further consider them. They were all cases in which the court was announcing the rule for the preservation of the rights in favor of the public, and which the plaintiff in error is now seeking to so apply as to destroy the rights of the public. The rule was adopted for the preservation of the rights of the public, and "serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell v. Grandjean*, 111 U. S. 412, 438, 4 Sup. Ct. 475, 487 (28 L. Ed. 321), or, as put in another form "it is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give; this is one among many reasons why they are to be strictly construed" (*Blair v. Chicago*, 201 U. S. 400, 471, 26 Sup. Ct. 427, 50 L. Ed. 801, quoted with approval in *Cleveland Electric Ry. Co. v. Cleveland*, *supra*).

[4] But even for this purpose the grant is not to receive "a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded." *Perrine v. Ches., etc., Canal*, 9 How. 172, 192 (13 L. Ed. 92). The rule, and the manner of its application are well expressed in the following extract from the opinion of the court in *Blair v. Chicago*, *supra*:

"The rule was laid down with clearness by Chief Justice Taney in the often-cited case of

Charles River Bridge v. Warren Bridge, 11 Pet. 420, and has been uniformly applied in many subsequent cases in this court. In *Perrine v. Chesapeake & Delaware Canal Company*, 9 How. 172, 192, the same eminent Chief Justice, speaking for the court, said: "The rule of construction in cases of this description * * * is this, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained or unusual construction, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded." In the case of *The Binghamton Bridge*, 3 Wall. 51, 75, it was said: "The principle is this, that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state."

[8] But we have already pointed out that the terms of the grant are adequately expressed in the ordinance. It is true that subsections (a), (b), and (c) of section 1 do not in express terms grant the power to operate cars on the Main street line, but that is a necessary conclusion to be drawn from the ordinance read as a whole. It could never have been intended by the courts to hold that, when the rights of the parties to a contract clearly appeared from the contract itself, those rights were not expressed in the contract. What is necessarily implied is in effect expressed, and that is all that is required.

In *Southern Ry. Co. v. Franklin Co.*, 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297, there was a lease of a railroad, which contained no express agreement to operate it during the term of the lease. The lessee was proposing to abandon it, but was enjoined from doing so. This court held, as succinctly stated in the syllabus, that—

"Although courts are careful in inferring covenants and promises not contained in written contracts, yet what is necessarily implied is as much a part of the instrument as if plainly expressed, and will be enforced as such. If the language of the instrument leaves the meaning of the parties in doubt, the court will take into consideration the occasion which gave rise to it, the obvious design of the parties, and the object to be attained, as well as the language of the instrument itself, and give effect to that construction which will effectuate the real intent and meaning of the parties. * * *

"A necessary inference from a written contract of an obligation to do what the parties

actually intended, and what is essential to give effect and validity to it, is not an addition to the contract."

We are of opinion that the grant of the franchise and its terms are adequately expressed in the ordinance of December 7, 1900.

[8] The next contention of the plaintiff in error is that the grant contained in ordinance of 1900 to operate cars on Main street was merely "permissive and was in the nature of a privilege, license, or permit given to meet the competitive conditions then existing between the two companies, but which has not prevailed since June, 1902, and no corresponding obligation was imposed on the Richmond Traction Company to exercise it." This contention seems to overlook the provision of section 3 of the ordinance which provides that "the privileges herein granted * * * shall be exercised in accordance with the terms and conditions imposed upon the Richmond Traction Company for the construction and operation of its lines as provided in an ordinance," etc., and of section 4, which provides, "shall run all their cars which operate by virtue of the powers herein granted upon a schedule of not less than five minutes, * * * and shall also run all of their cars which operate by virtue of the powers herein granted continuously from Oakwood to Hollywood and return."

It is admitted in the petition that—

"Under the provisions of sections 3 and 4. it may well be that if, and so long as, the Oakwood and Main line of cars was operated by the Richmond Traction Company and its successors, including the defendant, the said cars had to be operated in accordance with the terms and conditions of said ordinance."

[7] The acceptance of the ordinance created a contract to operate the cars, which the company could not revoke without the consent of the city, and which the city could enforce. Compare *Southern R. Co. v. Franklin*, supra; *State v. Spokane St. Ry. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739.

In *State v. Bridgeton, etc., Trac. Co.*, 62 N. J. Law, 592, 600, 43 Atl. 715, 718, 45 L. R. A. 837, 841, it is said:

"It became the duty of the respondent company to operate the railway over its entire route under the franchise as acquired by it. * * * It was its duty to construct, maintain and operate a railway on the surface of the street to carry passengers and demand tolls. * * * That a portion is unprofitable, or that a portion is more difficult to operate, are not valid reasons for abandonment. Its application to the city was for the location of its tracks over the whole route. The terms and conditions of the ordinance, and the ordinance passed on the faith of the duty of the company, were to operate its road over the entire route located. * * * It appears clear from the statute and the ordinance that it is the duty of such company organized under

the statutes to operate the roads mentioned in its certificate of incorporation for the benefit of the public, in consideration that it shall have the franchise of transporting the passengers and taking the tolls from them, and that it cannot escape the performance of this duty as a public agent."

Finally it is claimed by plaintiff in error:

"(3) That by the ordinance of March 11, 1915, rerouting the cars on these routes, the Oakwood and Broad line was brought down on Main street between Eighteenth and Eighth streets, and there was thus a consolidation of the Oakwood and Broad and the former Oakwood and Main lines and the clear intention of the council was that the line should be so consolidated and not duplicated, since the only effect of the duplication would be to require the operation of the cars from one end of the city to the other, in order to serve a short district of eight blocks, where there was now an abundant car service, and this would result in congestion and delay to traffic on one of the most important streets in the city."

[8, 9] It does not appear from the facts agreed, which is the only evidence before us, that there is now an abundant car service on Main street between First and Eighth, nor that the continuation of the Oakwood and Main line will "result in congestion and delay of traffic on one of the most important streets in the city," and, even if such be the facts, we cannot take judicial notice of them. If the facts be as stated, it would furnish a strong argument to the city council to induce it to release the plaintiff in error from its obligation to continue the service, but could not authorize this court to compel such release.

Upon the whole case, we are of opinion to affirm the judgment of the hustings court.
Affirmed.

(88 W. Va. 227)

GROSSMAN v. KENNA. (No. 3904.)

(Supreme Court of Appeals of West Virginia.
March 15, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser ⇨272—Relief granted against collection of purchase money, where title questioned and there are covenants of general warranty.

A court of equity will grant relief against the collection of purchase money due on land where the vendee is in possession under a conveyance with covenants of general warranty, if the title to such land is questioned by suit, prosecuted or threatened, or it is clearly shown to be defective.

2. Vendor and purchaser ⇨272—Where defect in title merely possible or probable, vendor will not be prevented from enforcing lien for purchase money.

Where, however, the allegations upon which reliance is had for relief in such case

do no more than to show a possibility or probability that there is a defect in the title, the vendor will not be prevented from enforcing his lien for purchase money.

Appeal from Circuit Court, Kanawha County.

Suit by M. W. Grossman against J. N. Kenna. Decree for complainant, and defendant appeals. Affirmed.

Leo Loeb, of Charleston, for appellant.

D. W. Taylor, of Charleston, for appellee.

RITZ, P. The appellant complains of the action of the circuit court in decreeing to sale a tract of land purchased by him from the defendant M. W. Grossman in satisfaction of a vendor's lien retained in the deed from said Grossman.

It appears that on the 26th day of January, 1918, the plaintiff conveyed to the defendant a certain tract of land for the consideration of \$5,000, and covenanted in said deed to warrant generally the title to said land. Of said purchase money one-third was paid in cash, and the other two-thirds was to be paid in two equal annual installments, which were secured by a lien reserved in the deed. The first deferred installment was not paid when the same became due, and this suit was brought for the purpose of enforcing the lien reserved to secure the payment of the same. The defendant tendered an answer to the bill, in which he admitted the conveyance to him and the reservation of the lien, but claimed that the plaintiff should not be permitted to enforce the same, for the reason: First, that at the time of the making of the deed the plaintiff had agreed with him to secure a mineral interest in the land which was outstanding, and which was excepted from the operation of the deed, and to sell to him, or transfer to him, this mineral interest when he had secured it, and that, having secured this interest, the said plaintiff has declined and refused to transfer the same to the defendant, although he does not say that he has ever offered to pay for it, and does not in his answer offer to do so; and, second, that the plaintiff did not have good title to the land conveyed. The court below held that the answer did not make any defense to the bill, and, the defendant declining to make any further defense, a decree was entered as prayed for.

There is nothing in the first matter of defense set up by the defendant. The deed to him conveyed the land, excepting therefrom a one-half undivided interest in the minerals, and he claims in his answer that the plaintiff agreed to purchase this interest, and transfer it to him for whatever it cost the plaintiff to acquire it; that plaintiff has since purchased it, but has not transferred it to him. This

does not make any defense to the suit to collect the unpaid purchase money for the land conveyed. It is a separate interest—in the same land it is true—but it has no relation to the matter involved in the present suit. If the plaintiff was under any legal obligation to him in regard to this undivided mineral interest, he could, by proper suit and upon tender of the amount paid by the plaintiff therefor, compel its transfer to him. This is a matter, however, entirely foreign to the matter in litigation here.

The defect in the title complained of and set up by the defendant is that Grossman's grantor, George E. Lanham, acquired 66 acres of this land from Clarence Thomas and others, and the remaining 12 $\frac{1}{4}$ acres from R. T. Melton and wife; that the deed from Clarence Thomas et al. for the 66 acres purports to be made by them as heirs at law of Catherine Hutchinson; that in fact, at the time of her death Catherine Hutchinson left two heirs besides those who joined in the deed whose names are unknown to the defendant, and that these said two heirs never conveyed their interest to the said George E. Lanham, for which reason said Lanham only acquired a one-half interest, his deed being from two heirs only; that the said Catherine Hutchinson only had a one-seventh interest in the said tract of land, for the reason that in 1835 a tract of 1,024 acres was conveyed to Catherine Hutchinson and six others, of which the 66 acres is a part; and that the said 1,024-acre tract has never been partitioned, wherefore the interest of Catherine Hutchinson in the 66 acres, part thereof, was only a one-seventh, and Lanham, having acquired a deed from only two of Catherine Hutchinson's heirs, acquired one-half of one-seventh thereof, or one-fourteenth. In regard to the remaining 12 $\frac{1}{4}$ acres acquired from R. T. Melton and wife, it is alleged that R. T. Melton was only the owner of a one-half undivided interest in this 12 $\frac{1}{4}$ acres, that he and Charles A. Melton were the owners of a tract of 125 acres, of which the 12 $\frac{1}{4}$ -acre tract is a part, and that the said Charles A. Melton never conveyed his interest in said tract of 12 $\frac{1}{4}$ acres to M. W. Grossman, or to any person under whom he holds. There is no averment in the answer that anybody is claiming any interest in these two tracts of land adversely to the defendant, or that a suit is threatened or has been brought for the purpose of attacking defendant's title. It may be entirely true that Catherine Hutchinson had four heirs at the time of her death, and that the two who do not join in the deed never conveyed their interest to Grossman's grantor, but there is no showing that the two who did convey had not acquired this title by devise, or by inheritance, or in some other way. The answer avers that the 1,024-acre tract

was never partitioned between Catherine Hutchinson and her co-owners. This may be entirely true so far as any formal partition is concerned, but Catherine Hutchinson may have acquired good title to this 66-acre tract in many other ways. That conveyance was made in 1835, and it is not intimated that there has been any claim adverse to the interest conveyed to the defendant by the plaintiff since that time. The same is true of the 12 $\frac{1}{4}$ -acre tract. The answer does no more than suggest a possibility, or at most a probability, of a defect in the title. There is no clear showing of any such defect, nor any allegation of an adverse claim, or of a pending or threatened suit.

[1, 2] It is very well established in this state that equity will grant relief to a vendee in possession of land under a conveyance with covenants of general warranty, where the title thereof is questioned by suit, prosecuted or threatened, or where it is clearly shown to be defective. *Ralston v. Miller*, 3 Rand. (Va.) 44, 15 Am. Dec. 704; *Koger v. Kane*, 5 Leigh (Va.) 606; *Beale v. Selvey*, 8 Leigh (Va.) 658; *Clarke v. Hardgrove*, 7 Grat. (Va.) 399; *Johnston v. Jarret*, 14 W. Va. 230; *Wamsley v. Stalnaker*, 24 W. Va. 214; *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. 406, 8 Am. St. Rep. 55; *Harvey v. Ryan*, 59 W. Va. 134, 53 S. E. 7, 7 L. R. A. (N. S.) 445, 115 Am. St. Rep. 897; *Smith v. Ward*, 66 W. Va. 190, 66 S. E. 234, 33 L. R. A. (N. S.) 1030; *Smith v. White*, 71 W. Va. 639, 78 S. E. 378, 48 L. R. A. (N. S.) 623; *McClung v. McClung*, 78 W. Va. 486, 89 S. E. 148. In none of these cases, however, did a court of equity refuse to permit the collection of the purchase money unless there was some adverse claim made to the land, either by a suit, prosecuted or threatened, or the title thereto was clearly shown to be defective. In this case the allegations made in the defendant's answer, as before stated, do no more than to show a probability that his title may be questioned in the future. There is no clear showing that the plaintiff did not have good title to the land conveyed by him to the defendant, and where this is the case the vendor will not be prevented from collecting his purchase money. The answer does not ask any abatement from the purchase money because of the alleged defects in the titles; it does not ask rescission of the contract, nor that the vendor be required to make his title good, but simply prays that the bill be dismissed. The defendant refused to make any further defense when the lower court held his answer insufficient, and there was, of course, nothing remaining to be done except to enter a decree in accordance with the prayer of the bill, which was done.

We find no error in this action, and the decree complained of is affirmed.

(88 W. Va. 223)

(106 S.E.)

CROWLEY v. VAUGHAN. (No. 4212.)

(Supreme Court of Appeals of West Virginia.
March 15, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser §44—Burden of proving verbal withdrawal of written offer of sale before acceptance is upon party asserting it.

The burden of proof of a verbal withdrawal of a written offer of sale of real estate, before acceptance thereof, rests upon the party asserting it.

2. Appeal and error §1009(3)—Finding on conflicting oral evidence of parties alone will not be disturbed where credibility not impaired.

A finding against such a withdrawal, upon the conflicting oral evidence of the parties to the transaction, in the absence of any proved or admitted circumstance impairing the credibility of either of them or creating a preponderance of evidence in favor of either, will not be disturbed by the appellate court.

3. Vendor and purchaser §16(1)—Unconditional verbal acceptance of written offer of sale before withdrawal converts it into a contract of sale.

A verbal notification of unconditional acceptance of such an offer, before withdrawal thereof, converts it into a contract of sale.

4. Vendor and purchaser §16(1)—Verbal acceptance of written offer to sell, not requiring payment of money, held converted into a contract.

If such an offer or option does not in terms or by necessary implication require payment of money as a condition or element of acceptance thereof, such notice without any payment converts it into a contract.

5. Frauds, statute of §115(4)—Vendor and purchaser §13—Neither consideration nor mutuality lacking in contract created by verbal acceptance of written offer.

Neither consideration nor mutuality is lacking in a contract so effected.

(Additional Syllabus by Editorial Staff.)

6. Vendor and purchaser §170—Where vendor rejects check in payment because unwilling to convey, no tender of money necessary.

Where vendor declined vendee's payment by check, not because she preferred money, but because she did not intend to accept anything nor to convey the lot contracted for, no actual tender in any form was necessary.

Appeal from Circuit Court, Kanawha County.

Suit by J. E. Crowley against Eva T. C. Vaughan. Decree for complainant, and defendant appeals. Affirmed.

Surber & Edwards and J. E. Springston, all of Charleston, for appellant.

S. L. Flournoy and Murray Briggs, both of Charleston, for appellee.

POFFENBARGER, J. Correctness of this decree enforcing specific performance of an alleged contract of sale of a city lot is challenged on the grounds of invalidity of the contract, by reason of lack of consideration, making it a mere offer of sale, and proof of withdrawal of such offer before acceptance thereof.

[1] On the latter issue, the trial court has found against the appellant, upon evidence so conflicting and evenly balanced as to preclude disturbance thereof. As to the alleged withdrawal of the offer, there are just two witnesses, the appellant and the appellee, the former asserting it and the latter denying it emphatically. No fact or circumstance has been disclosed that can be regarded as having any weight or bearing against the credibility of either of them. The offer was made, wherefore the burden of proof of withdrawal necessarily rested upon the appellant, and the trial court did not see any reason why her word should prevail over that of the appellee. Nor do we.

Mrs. Vaughan gave Miss Crowley a written and sealed option of purchase, dated May 1, 1919, and reciting a consideration of \$1. The time limit fixed by it was 60 days. On the 26th day of June, 1919, Miss Crowley, who was a real estate agent or broker, swears she accepted the option by telephone, and requested Mrs. Vaughan to execute a deed for the lot to her. As to what was said over the telephone they differ; the appellee saying she requested a deed to herself and the appellant, that she said she had an offer on the lot. They agree that Mrs. Vaughan declined to sell it. There is evidence tending to prove that Miss Crowley had either contracted a resale of the property or had a purchaser in view, at the date of her demand. Within an hour after the telephone conversation, attended by a witness, she appeared and tendered a cashier's check of \$834 and her two notes for \$833 each, making \$2,500 the price stipulated in the offer, and demanded execution and delivery of a deed to herself for the lot.

[3] The vigor with which she asserted her demand after the telephone conversation is a circumstance tending to corroborate her testimony to the effect that she had accepted the offer. Her admitted notification by telephone that she had an offer for the lot or an opportunity to sell it, and had "promised the man," tends in the same direction. It could have meant nothing more nor less than notification of an acceptance and a desire to have the deed executed. And, as stated, the appellee's formal demand and tender, made with-

in an hour afterward, has a strong tendency to prove what she meant and intended by the telephone conversation. Moreover, if there was no acceptance or demand, there was no reason for appellant's notification of her refusal to sell. It came in response to what the appellee had said.

As the option was made assignable, by a provision binding the appellant to deliver to the appellee an apt and proper deed conveying the lot to her or to any one she might direct, it is immaterial whether she demanded a deed to herself or to her prospective purchaser. *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150.

[2] Having concluded that the trial court's finding of an acceptance of the offer, before withdrawal thereof, cannot be disturbed, it is necessary to inquire whether lack of consideration for the option, if any, precludes the existence of a contract and right of enforcement. If there had been consideration, the option would have been irrevocable within the prescribed period of 60 days. *Rease v. Kittle*, cited; *Pollock v. Brookover*, 80 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403. If there was none, the offer was revocable at any time before acceptance and notice thereof, but not afterward. *Morris v. Risk*, 102 S. E. 725; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94. Being informal and amounting to a demand for a conveyance of the property, without mention of any conditions or request for modifications, the acceptance must be regarded as having been unconditional. That would be the ordinary and common sense interpretation of such a demand.

[4] Nothing in the option required payment of money to convert it into a contract. In other words, it did not say there should be no contract, unless nor until a certain sum should have been paid, nor that a certain sum must be paid by way of acceptance. Impliedly, it gave the optionee right to elect and thus make it a contract, and then required consummation by payment within the 60-day period. As to what should constitute acceptance, it is open and liberal. Hence acceptance did not include payment, and failure to accompany the demand for a deed with a tender of the purchase money was not an attempt to modify the offer, or effect a partial or conditional acceptance. Unless otherwise provided, payment is performance following the making of the contract.

[5] After acceptance, there were both consideration and mutuality. There was a promise for a promise, and each was consideration for the other. Unenforceability of the contract at the instance of the vendor, by reason of the statute of frauds, if so unenforceable, did not preclude the element of mutuality. That statute does not forbid the

making of verbal contracts for the sale of land. Such a contract possessing all requisite elements, including mutuality, exists, though it may not be so made in writing as to bind both parties, beyond escape. The statute is only a means of avoidance of performance. Though the contract is not signed by the vendee, there is mutuality within the meaning of the law. *Monongah C. & C. Co. v. Fleming*, 42 W. Va. 538, 541, 28 S. E. 201; *Capehart v. Hale*, 6 W. Va. 547.

[8] The tender of payment was not declined on account of its character. The vendor declined to comply with her contract. She rejected the check, because she did not intend to accept anything nor to convey the lot, not because she preferred money. In such case, an actual tender in any form is not necessary. *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812; *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93.

This opinion is not to be taken as having conceded lack of consideration in the option, by reason of proof of nonpayment of the \$1 therein recited. The seal may preclude denial thereof by estoppel or by force of law or under the rules of evidence. Foregoing inquiry as to that question, we have disposed of the cause upon the hypothesis of lack of such consideration, not lack of consideration in the contract effected by acceptance, without having decided against its existence.

Perceiving no error in the decree complained of, we will affirm it.

(88 W. Va. 202)

PECK v. ROBERTS et al. (No. 3974.)

(Supreme Court of Appeals of West Virginia.
March 15, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1094(5)—Supreme Court will examine depositions and records, where conflicting, to determine which of the lower courts it will sustain.

Where there has been a finding of fact in a chancery cause by the court of common pleas of Kanawha county from depositions of witnesses which are conflicting and irreconcilable, which finding has been overruled and disaffirmed by the circuit court on appeal, this court will determine for itself from the depositions and record which of the lower tribunals, if either, it will sustain.

2. Evidence \S 588—Circumstances surrounding two persons who disagree in their testimony as to transactions between them considered.

Where the evidence of two persons totally disagrees as to the intent and purpose of a transaction between them, the facts and circumstances surrounding them and their acts, then and afterwards, with relation to the trans-

action, will be viewed and considered in order to ascertain which, if either, should be sustained.

Appeal from Circuit Court, Kanawha County.

Suit by A. J. Peck, Assignee of the Elk Motor Truck Company, against W. S. Roberts and others. Decree for complainant, and defendant named appeals. Affirmed.

Davis & Davis, of Charleston, and Connor Hall, of Huntington, for appellant.

Henry S. Cato, of Charleston, for appellee.

LIVELY, J. This appeal brings up for review a decree of the circuit court of Kanawha county entered on the 20th day of September, 1919, which reversed a decree of the court of common pleas entered on the 1st day of July, 1919, dismissing the plaintiff's bill. The decree of the circuit court, under review, entered a judgment for the plaintiff for the sum of \$1,032, with interest from the 9th day of March, 1913, and directed a sale of the interest of defendant Roberts in certain real estate for payment thereof. In the year 1911 W. S. Roberts, defendant, formed a corporation, known as the Kanawha Auto Truck Company, for the purpose of manufacturing and selling a truck of his special design, and interested R. G. Quarrier, J. L. Sydenstricker, Geo. Gates, and others. The capital stock was \$50,000, and the par value of each share was \$1. For his design of the truck, services, and time expended in forming the corporation he was voted bonus stock amounting to \$5,000. He was elected president of the company, and was the acting manager and moving spirit. The business of the corporation was unsuccessful, and at a later date the corporate name was changed to the Elk Auto Truck Company, and the shares of stock thereafter issued were at \$100 per share par value. About the time of the reorganization S. A. Moore was selected as the president of the corporation, and Roberts was selected as vice president. On the 22d day of September, 1913, the reorganized corporation made an assignment to the plaintiff, A. J. Peck, trustee, of all its property and assets for the benefit of its creditors. It does not appear at what date Roberts severed his connection with the corporation, but it does appear that he left this state on the night of the 14th of July, 1913. The plaintiff, Peck, trustee, discovered on the records of the company that Roberts had used the sum of \$1,032 of the funds of the company on the 8th day of March, 1913, when the company was in failing circumstances, for the payment of a note given by him and indorsed by R. G. Quarrier for \$1,000, which had been negotiated at the Kanawha Valley Bank, and, conceiving that this constituted a diversion of the funds of the company for the payment of an individual debt, instituted this suit against W. S. Roberts and R. G. Quarrier, and at-

tached the interest of defendant Roberts in certain real estate situate in Kanawha county. Roberts answered the bill, and depositions were taken. In the meantime the suit had been transferred to the docket of the court of common pleas, and that court found for the defendant Roberts and dismissed the bill; and, as above stated, upon appeal, the circuit court of Kanawha county reversed the court of common pleas, and directed a sale of the property attached in satisfaction of the debt. Roberts' defense is based on the theory that this note which he negotiated to the Kanawha Valley Bank on the 30th day of April, 1912, and which was signed by him and indorsed by Quarrier, was made and used for the purpose of raising funds for the corporation, and was not his individual debt. On the other hand, the plaintiff asserts that this note was the individual obligation of Roberts, and that he had no right to use the funds of the corporation for its payment.

It appears that Quarrier had made a written subscription for stock in the corporation, amounting to \$2,000, on which he had paid at various times an aggregate of \$1,000. On April 30, 1912, defendant Roberts approached him for the purpose of getting more money, as he then claimed, for the unpaid balance of stock. Quarrier took the position that the understanding between himself and Roberts was that he should pay only \$1,000 on his subscription, and the other \$1,000 was to be given to him by Roberts out of the \$5,000 bonus stock which had been voted to Roberts for his plans, services, etc. Roberts then seemed to agree with Quarrier, but stated that the stock was good and he would like to have it; thereupon, according to the testimony of Quarrier, the latter proposed that he would assist Roberts in getting the money to pay for the stock, if he so desired, and the note was then executed by Roberts, which Quarrier indorsed. Roberts' theory, as outlined in his evidence, is to the effect that this note was for the purpose of raising money for pressing financial needs of the company, and that the stock of \$1,000 then under discussion, would afterwards be sold and the proceeds used to pay off this note. He testified, using his own words:

"It was my understanding that if we could get this banking accommodation with the note and sell some additional stock that we would relieve Mr. Quarrier, if we could, of his subscription for the other thousand."

The result of this case depends largely upon the testimony of these two witnesses, and their testimony is totally divergent. It is therefore necessary to closely scan and consider the acts of the parties at that time and afterwards, together with the records of the company and the facts and circumstances surrounding the parties. Roberts was the president of the company, and was acting as general manager, and the books were kept in the

office of the Triple State Electric Company, of which Roberts was general manager. It appears from the evidence of Sydenstricker, the bookkeeper, that an entry was made on the subscription account of Quarrier as of the 30th day of April (the date on which this note was given), which closed the subscription account of Quarrier, and on March 18, 1913, the date on which the note was paid out of the company funds, there is an entry, which Sydenstricker testifies to be in Roberts' handwriting, "Unsubscribed stock, K. V. Bk. R. G. Quarrier 51, \$1,000.00 dis. & int. \$32.00." On August 1, 1912, a general statement of the assets and liabilities of the company was made up and sent to the stockholders, which showed that the unpaid stock subscriptions amounted to the sum of \$761. No account seems to be taken in this statement of the \$1,000 note, either as an asset or as a liability. So far as the corporation was concerned, at that time it had no knowledge of this outstanding note. At least it was not treated as an obligation. In that statement the accounts receivable in the assets amounted to \$680.09, and the bills payable in the "liabilities" amounted to \$500 only. When the corporation was reorganized and its name changed to the Elk Auto Truck Company and the par value of the stock changed to \$100 per share, a certificate for 10 shares of stock of the par value of \$1,000 was issued to Quarrier, and the testimony is that these new certificates were to take the place of the outstanding stock in the old company. At that time Roberts was vice president of the company and still in active charge. It is reasonably clear that Roberts acquiesced in the claim of Quarrier that it was the understanding that he should take only \$1,000 in stock in the original company. This is evidenced by what was done on the 30th day of April, 1912, and by the subsequent acts of Roberts, and the acts of the corporation in issuing the new stock to Quarrier. Another most significant fact appears, and that is that after this note had been executed and negotiated several thousand dollars worth of stock in the original company was sold and paid for. Roberts testified that between \$7,000 and \$8,000 worth of stock was sold after that time, and all paid for, with the exception of about \$1,000 worth. If his theory was correct, that the note was given in order to raise money for pressing financial needs, and that this stock in question was to be sold and the note paid from the proceeds, it is not perceived why he did not take the money from the subsequent sale of stock and pay off this obligation for which he was individually liable. Moreover, it is shown, reasonably clearly, that Roberts treated this note as his personal obligation, because in making the renewals thereof he paid the discounts out of his personal funds; and then when he made up the financial statement as of August 1, 1912, no notice whatever is taken of this outstanding

note. It was not treated as an obligation of the corporation. Another circumstance which militates against the claim of Roberts that this additional \$1,000 of stock was afterwards to be sold and the proceeds used to pay this individual note is that several days after the note had been executed he issued two certificates of stock, each for 1,000 shares in the name of Quarrier, and delivered the same to Quarrier. Quarrier's statement in regard to this is positive that the additional certificate of stock for \$1,000, which was handed to him, was for the purpose of securing him as indorser for Roberts on this note, and that he had supposed that Roberts would issue the stock in his (Roberts') name and assign the same to him as collateral security, and did not notice that it was issued in his name at the time, or, if he did notice the irregularity in the issuance, he took the stock nevertheless with that understanding. If Roberts' theory, that he intended to sell this controverted stock in order to pay the note, was correct, it would be most unusual to issue the stock in this way. These circumstances, to our mind, bear out the theory of the plaintiff and the evidence of Quarrier.

[1, 2] On this conflicting evidence the court of common pleas decided for the defendant, and the circuit court decided for the plaintiff, as above stated. It is at once apparent that the question of preponderance of the evidence is difficult to determine. This court has had much difficulty in arriving at a conclusion. What rule should this court invoke for its aid when these two lower courts, each with concurrent jurisdiction and presided over by able, conscientious and learned jurists, have reached opposite conclusions from the very same facts? It is insisted that the finding of the court of common pleas should have prevailed in the circuit court, and should prevail in this court, under the familiar rule that an appellate court will not disturb the findings of the trial court on questions of fact, unless clearly wrong, where the evidence is conflicting. Every rule of law and procedure is based on some good reason. The reason for this rule is that the trial court has the opportunity of observing the witnesses before it and their manner and demeanor in giving their testimony. This rule applies with special force to trials in the lower court by jury, or when a court at law tries in lieu of a jury; but the rule is not invoked strictly in chancery cases where the evidence is brought in by depositions. In such cases the lower court does not have this opportunity for observing the witnesses. However, it is usual for the appellate court to sustain the lower court in chancery cases on findings of fact where the evidence is conflicting or uncertain, on the theory that the lower court is sitting in the neighborhood where the controversy arises, and is closer to the people and may have some peculiar advantage in that regard over the appellate court. Smith

v. Yoke, 27 W. Va. 639. That reason does not apply as between the common pleas court and the circuit court. Both courts sit in the same county at the same courthouse, and this cause was heard upon the same depositions. Both courts are equally near to the people, and neither has any special advantage over the other in that regard. The common pleas court was designed to relieve the circuit court of the enormous congestion of business therein, and has equal jurisdiction, and is made inferior only in order to conform with the Constitution. It could not have been created under the Constitution except as an inferior court to that of the circuit court.

We conclude that equal weight should be given to the findings of these two lower courts on questions of fact deduced from conflicting depositions in a chancery cause. Neither should have preference over the other. We think the true rule to be followed in this case is that invoked where a commissioner in chancery has made a finding of fact, returning with his report all the evidence on which the finding is based, and the lower court overrules and disaffirms his finding. In such instances the appellate court must determine from the record for itself whether it will sustain the commissioner or the circuit court. *Hyre v. Lambert*, 45 W. Va. 715, 31 S. E. 927; *Roots v. Kilbreth*, 32 W. Va. 585, 9 S. E. 927. In some jurisdictions an appellate court will not review the findings of an intermediate court, affirming, modifying, or reversing the trial court on controverted questions of fact, where there is any evidence to support the findings of the intermediate court, and where it correctly applies the law to the conclusions of fact. 4 C. J. § 3071. But as above intimated, we do not follow this rule used in other jurisdictions, but will give equal weight to the findings of the common pleas court and circuit court, and will examine the evidence and pass upon the questions of fact.

We affirm the decision of the circuit court.
Affirmed.

RITZ, P., absent.

(151 Ga. 127)

HAILEY v. McMULLAN.

McMULLAN v. HAILEY.

(Nos. 1964, 1965.)

(Supreme Court of Georgia. Feb. 17, 1921.)

(Syllabus by Editorial Staff.)

1. Boundaries §41—Instruction as to recognition of boundary line held not erroneous.

In an action involving boundary line, court did not err in charging the jury, "If you should believe that the property sued for in this case

was owned and possessed by T. N. M., that he had legal title to the property when he died, and you should further believe that the plaintiff is his only heir at law, then in that event the plaintiff would be authorized to recover the property from the defendant, unless it appears from the evidence in the case that [plaintiff] has parted with her right to possess it, either by conveyance by her deceased husband or by herself, or by loss of title by prescription, estoppel, or by acquiescence in the dividing line between her property and this property, under the instructions which the court will give you," where the defense urged by defendant was that J. M., under whom defendant held title, bought from T. N. M., and that in pursuance of such purchase J. M. went into possession and made valuable improvements, and that the land purchased extended to the line now claimed by defendant, and that this line was appointed by T. N. M. as the dividing line, and that J. M. was in actual possession, and that plaintiff as sole heir at law would be bound by the sale made by her husband.

2. Boundaries §41—Instruction as to effect to be given deeds in boundary dispute held not error.

In an action involving boundary, where court charged the jury that "there are deeds of conveyance, and they convey the property that is referred to in these deeds, they are legally sufficient, and did convey the property that is described," it did not err in further charging, "It becomes necessary for you to take these instructions from the court as to legal effect of the deeds, and then apply the description in these deeds to the facts of the case, and determine whether or not the property sued for in this case was conveyed by these deeds and included in the description contained in the deeds," although there was conflicting evidence as to what lands the deed covered.

3. Boundaries §36(1)—Contract to sell land held to contain sufficient description to be admissible in evidence.

A contract, "I agree to sell J. M. a tract of land, 60 acres more or less, on the waters of Little Cedar creek, 30 acres of the Cordell place and about 30 acres of the Mantz place, adjoining, beginning at the mouth of the branch on the creek, and running across the hill to a post oak on the upper line, including all the land above, for \$600, \$223 already paid down," signed by T. N. M., held to contain sufficient description to be admissible in evidence in boundary dispute by one claiming under J. M.

4. Adverse possession §116(1)—Refusal of charge regarding adverse possession for 20 years in boundary dispute held proper.

In a boundary dispute, where defendant claimed under J. M., court did not err in failing to charge the jury that, "if J. M. went into possession of the land sued for by permission of T. N. M., and remained in possession up to his death, and W. T. J., the administrator of J. M.'s estate, took possession of this land and sold same at public outcry, and the defendant H. bought same and went into possession of said land in good faith, believing that it was a part of the estate of J. M., de-

ceased, and without knowledge of J. M.'s possession of said land being by permission of T. N. M., and you further believe that the possession of J. M. and the possession of the defendant H., when added together, would be a period of 20 years before the filing of the suit by plaintiff, and that possession of defendant H. was adverse, public, continuous, exclusive, uninterrupted, and peaceable, he would have a title by prescription, and you would be authorized to find for the defendant."

5. Adverse possession §116(1)—Charge on seven-year statute in boundary dispute held properly refused.

In a boundary dispute court did not err in refusing to charge on defendant's request, that if the jury believed from the evidence that the defendant bought from the administrator of the estate of grantee of plaintiff's predecessor, under whom defendant was claiming the land sued for, and that he went into possession of the same under a deed duly recorded from the administrator to said land and in good faith, and remained in possession for a period of 7 years before the filing of the suit, and you believe that the defendant's possession was in his own right, and not in another, and that his possession did not originate in fraud, and was public, continuous, exclusive, etc., he would have a title by prescription as against the plaintiff, who was the wife and heir of the adjoining owner, who sold the land to defendant's predecessor.

Beck, P. J., dissenting in part.

Error from Superior Court, Hart County; John D. Humphries, Judge.

Action by Mrs. Amanda McMullan against W. I. Halley. Judgment for plaintiff, and defendant brings error, and plaintiff files cross-bill. Judgment affirmed, and cross-bill dismissed.

Some of the grounds of the motion for new trial were as follows:

Fourth. The court erred in charging the jury as follows: "If you should believe that the property sued for in this case, was owned and possessed by T. N. McMullan, that he had legal title to the property when he died, and you should further believe that the plaintiff is his only heir at law, then in that event the plaintiff would be authorized to recover this property from the defendant, unless it appears from the evidence in the case that she, the plaintiff, has parted with her right to possess it, either by conveyance by her deceased husband or by herself, or by loss of title by prescription, estoppel, or by acquiescence in the dividing line between her property and this property, under the instructions which the court will give you." This charge excluded from the consideration of the jury the defense, urged by movant, that Jack Morrison, under whom movant holds title, bought from T. N. McMullan the land sued for, and that, in pursuance of Morrison's purchase from T. N. McMullan, Morrison went into possession of the land sued for, and while in possession made valuable improvements thereon, and paid the purchase price for said land to T. N. Mc-

Mullan, and that the land purchased from T. N. McMullan by Morrison extended to the line now claimed by movant as the true line between plaintiff and movant, and that this line was pointed out by T. N. McMullan to Morrison as the dividing line between him (McMullan) and Morrison, and that Morrison was in actual possession of the land sued for from the date of his purchase in 1884 to the date of his death, — day of —, and that the plaintiff, as the sole heir at law of T. N. McMullan, would be bound by the sale made by her husband, T. N. McMullan, to Morrison; Morrison at the time having a perfect equity in the tract of land sued for.

Sixth. The court charged the jury: "There are deeds of conveyance, and they convey the property that is referred to in these deeds (referring to the deeds offered in evidence by the defendant), they are legally sufficient, and did convey the property that is described." The court, after giving the above charge, which movant insists was a correct charge, gave the following charge: "It becomes necessary for you to take these instructions from the court as to the legal effect of the deeds, and then apply the description in these deeds to the facts of the case, and determine whether or not the property sued for in this case was conveyed by these deeds and included in the description contained in the deeds." The latter part of the charge was error. The court gave the jury too much latitude in locating or determining what land was conveyed by these deeds. It was error to instruct the jury that they might apply the description in the deeds to the facts of the case. There was conflicting evidence as to what land the deeds covered. It was contended by witness for the plaintiff that the deeds did not cover the land in dispute. It was likewise contended by movant's witness that the deeds conveyed the land in dispute. To charge the jury that they could apply the description in the deeds to the facts of the case did not aid the jury in determining what land was covered by the deeds, nor did the court correctly state the rule, if the description in the deeds were indefinite and uncertain.

Thirteenth. Because the court erred in admitting in evidence for plaintiff, over objection duly made by defendant, the following writing, called a contract between T. N. McMullan and Jack Morrison as to the land in dispute which reads as follows: "I agree to sell J. Morrison a tract of land, 60 acres, more or less, on the waters of Little Cedar creek, 30 acres of the Cordell place and about 30 acres of the Mantz place adjoining, beginning at the mouth of the branch on the creek, and running across the hill to a post oak on the upper line, including all the land above, for \$600, \$223 already paid down. February 14, 1884. [Signed] T. N. McMullan." This evidence was objected to on the ground that it did not contain a sufficient description to admit it as evidence; that it was void for want of description; that it was not a contract between T. N. McMullan and Jack Morrison relative to the land in dispute; that it was only a proposition to sell an indefinite boundary of land, and not accepted by Jack Morrison; that the description in the paper was in conflict with the deed executed by

Amanda McMullan, the plaintiff, to Jack Morrison.

Fourteenth. Because the court erred in failing to charge the jury as follows: "If Jack Morrison went into possession of the land sued for by permission of T. N. McMullan, and remained in possession up to his death, and W. T. Johnson, the administrator of Jack Morrison's estate, took possession of this land and sold same at public outcry, and the defendant, Hailey, bought same and went into possession of said land in good faith, believing that it was a part of the estate of Jack Morrison, deceased, and without knowledge of Jack Morrison's possession of said land being by permission of T. N. McMullan, and you further believe that the possession of Morrison and the possession of the defendant, Hailey, when added together, would be a period of 20 years before the filing of the suit by the plaintiff, and that the possession of the defendant, Hailey, was adverse, public, continuous, exclusive, uninterrupted, and peaceable, he would have a title by prescription, and would be authorized to find for the defendant."

Fifteenth. Because the court erred in refusing to charge the jury, after request being made by defendant so to do: "If you believe from the evidence that the defendant, W. I. Hailey, bought from the administrator of Jack Morrison's estate the land sued for, and that he went into possession of same under a deed duly recorded from the administrator to said land and in good faith, and remained in possession for a period of 7 years before the filing of this suit, and you believe that the defendant's possession was in his own right and not in another, and that his possession did not originate in fraud, and was public, continuous, exclusive, uninterrupted, peaceable, and accompanied by a claim of right, I charge you that he would have a title by prescription as against the plaintiff, and you would be authorized to find for the defendant the premises sued for." This charge should have been given to the jury, because this was an issue raised by the pleadings.

—Statement by Editor.

Skelton & Matheson and J. H. & Emmett Skelton, all of Hartwell, and Grogan & Payne, of Elberton, for plaintiff in error.

J. N. Worley and Tutt & Brown, all of Elberton, and A. S. Richardson, of Hartwell, for defendant in error.

HILL, J. 1. The charge complained of in the twelfth ground of the motion for new trial, when considered in connection with the defendant's plea and his own testimony, does not afford him cause for the reversal of the judgment refusing his motion for a new trial.

[1-5] 2. The other grounds of the motion for new trial, complaining of the admission of evidence and of excerpts from the charge, are without merit.

3. The verdict was supported by the evidence, and the court did not err in refusing to grant a new trial.

4. The judgment on the main bill of excep-

tions being affirmed, the cross-bill is dismissed.

All the Justices concur, except BECK, P. J., dissenting from the ruling in the first headnote.

(151 Ga. 352)

WILLIAMSON v. STATE. (No. 2318.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 1144(14)—Correct charge presumed, when no complaint made.

When there is no complaint that the court did not charge generally on the subject of reasonable doubt, the presumption is that there was a correct charge on that subject.

2. Criminal law \S 828—Failure to give further charge on reasonable doubt without written request not error.

Where there was presumptively a correct charge on the subject of reasonable doubt, a failure to charge further on such subject was not error, in the absence of a written request.

3. Criminal law \S 828—Full charge on justifiable homicide should be requested in writing.

On a trial for murder, if accused desired a more full and complete charge on justifiable homicide, it was his duty to duly request it in writing.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Jim Williamson, alias Collins, was convicted of murder, and he brings error. Affirmed.

W. H. Ennis and F. W. Copeland, both of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., of Rome, E. S. Taylor, of Summerville, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

GILBERT, J. The defendant was convicted of the offense of murder, and, his motion for new trial having been overruled, he excepted. In addition to the general grounds, error is assigned, first, because the court "failed to charge the jury that, if they believed that the defendant did not act in self-defense, nor that he was justified, but was guilty either of the crime of murder or voluntary manslaughter, and if they further believe there was a reasonable doubt as to whether he was guilty of murder or voluntary manslaughter, it would be the duty of the jury, under the law, to give the defendant the benefit of such reasonable doubts and find him guilty of voluntary manslaughter"; second, that the court failed to charge the jury in regard to the right of the accused to justify his defense on the ground that the deceased was about to commit the offense of mayhem on defendant. Held:

[1, 2] 1. There is no complaint that the court did not charge generally upon the subject of reasonable doubt, and therefore the presumption is that there was a correct charge on that subject. That being true, it was not error for the court to fail to charge further upon the subject, in the absence of a written request. *Spears v. State*, 53 Ga. 252.

[3] 2. If the accused had desired a more full and complete charge in respect to the subject of justifiable homicide, it was his duty to duly request the same in writing.

3. The verdict of the jury is supported by evidence.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 328)

BANK OF CUMMING v. WALDRIP.
(No. 2215.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by the Court.)

Public lands — 148—**Sheriff's sale previous to grant from state was void.**

On the trial of a complaint for land in Cobb county, where the plaintiff's right to recover necessarily depended upon the validity of a sale of the land by a sheriff in the year 1837, before the issuing of the grant by the state, the court did not err in rejecting, on timely objection, the deed made by the sheriff pursuant to such sale, and a nonsuit necessarily followed.

Error from Superior Court, Cobb County; D. W. Blair, Judge.

Action by the Bank of Cumming against G. W. Waldrip. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Geo. F. Gober, of Atlanta, and H. L. Patterson, of Cumming, for plaintiff in error.

J. P. Brooke, of Alpharetta, and Bryan & Middlebrooks, of Atlanta, for defendant in error.

GILBERT, J. Bank of Cumming brought a complaint against G. W. Waldrip for the recovery of a lot of land in Cobb county. The abstract of title attached to the plaintiff's petition showed a grant from the state to Isaac Waters, dated November 18, 1842; deed from Isaac Waters to James G. Shinholster, dated February 20, 1837; deed from Daniel May, sheriff of Cobb county, to Abraham Hargraves, dated May 2, 1837; this deed was made pursuant to a sale under a fl. fa. in favor of William Freeman against James G. Shinholster, dated July 27, 1831; then by successive conveyances from Hargraves to the Bank of Cumming. The defendant admitted possession of the land, claimed title thereto, and denied the right of the plaintiff

to recover. During the trial the plaintiff offered as evidence the above-mentioned sheriff's deed, to which the defendant objected, on the ground that under the act of the General Assembly approved December 23, 1833 (Acts 1833, p. 121; Prince's Digest, 565), the sale of the land by the sheriff, previously to the issuing of the grant by the state, was void, and conveyed no title to the purchaser, Hargraves. The court sustained the objection. This deed constituted a necessary link in the chain of the plaintiff's title; and, it having been rejected, the court, on motion, granted a nonsuit. Error is assigned on the rejection of the deed and the resultant nonsuit, and this constitutes the sole issue in the case.

Section 4 of the aforesaid act of 1833 is as follows:

"From and after the passage of this act, sales or mortgages of land in said counties [Cobb and other counties], that may be hereafter made, either by sheriffs, or other person or persons, before the grant for the same shall have issued, shall be void and of no effect, either in law or equity."

It will be observed that the grant from the state to Waters was more than five years subsequent to the execution of the deed from Waters to Shinholster. The levy upon and sale of the land by the sheriff was subsequent to the passage of the act of 1833, and previous to the grant from the state, at which time Shinholster possessed no leviable interest in the land; and under the terms of the act the sale was void. Consequently Hargraves obtained no title by virtue of the sale, and could convey none. *Garlick v. Robinson*, 12 Ga. 340.

Counsel for the plaintiff cite a number of cases dealing with sales of land obtained under grants from the state, where the drawer had conveyed his title before the issuing of the grant. All of the decisions in these cases hold, in substance, that after the draw and before the grant, the equitable title is in the drawer, and the legal title is in the state, for the use of the drawer, on his payment of the grant fee. This equitable title is transferable; when transferred, the legal title in the state becomes a legal title for the use of the transferee, on the payment of the grant fee. Consequently, on the issuing of the grant to the drawer, the legal title passes through him, without stop, into the transferee, by virtue of the statute of uses. *Bivins v. Vinzant*, 15 Ga. 521; *Witzel v. Pierce*, 22 Ga. 112; *Henderson v. Hackney*, 23 Ga. 383, 68 Am. Dec. 529; *Dudley v. Bradshaw*, 29 Ga. 17; *Thursby v. Myers*, 57 Ga. 156; *Parker v. Jones*, 57 Ga. 204; *Pridgen v. Green*, 80 Ga. 737, 7 S. E. 97; *Cannon v. Young*, 92 Ga. 165, 17 S. E. 863. None of these cases, however, deal with the question here at issue, as to the validity of a sheriff's sale of such land previous to the grant by

the state. The sheriff's deed was properly rejected, and the nonsuit necessarily followed.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 331)

WIDNER v. STATE. (No. 2235.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

Criminal Law §958(1)—New trial for newly discovered evidence properly denied when no affidavits presented concerning witnesses' character, etc.

A motion for a new trial for newly discovered evidence was properly denied where no affidavits as to the intelligence of the witnesses who would give such newly discovered evidence, their associates, means of knowledge, character or credibility, were adduced as required by Civ. Code, § 6086, and no facts were shown taking the case out of that section.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Proceeding between the State and Levi Widner. Judgment for the State, and Widner brings error. Affirmed.

Alton B. Cowart and Geo. B. Cowart, both of Colquitt, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, R. R. Arnold, of Atlanta, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

BECK, P. J. 1. One ground of the motion for new trial in this case is based upon alleged newly discovered evidence, and this is furnished by the affidavits of three witnesses; but no affidavits as to the intelligence of the witnesses, their associates, their means of knowledge, their character and credibility, were adduced, in accordance with the provisions requiring this under the statute contained in section 6086 of the Civil Code, and no facts are shown by affidavits or otherwise to take this case out of the operation of the rule. Nor was the judge, under the affidavits submitted, compelled to find that the proper degree of diligence had been used to procure this evidence before the trial.

2. The other grounds of the motion are the usual general grounds that the verdict was contrary to the evidence and without evidence to support it. It does not appear, however, upon examination of the evidence, that the verdict was without evidence to support it.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 341)

WALKER v. STATE. (No. 2296.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

Criminal law §785(8)—Instruction as to considering woman's character in passing on credibility held substantially correct.

In instruction that one might commit rape on a prostitute, but that the character of the alleged victim as to virtue, or her bad character as to being a prostitute, might be taken into consideration by the jury in determining the weight and credit to be given her testimony, etc., held substantially correct.

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Green Walker was convicted of rape, and he brings error. Affirmed.

T. N. Brown and I. L. Price, both of Swainsboro, for plaintiff in error.

Walter F. Grey, Sol. Gen., of Swainsboro, and R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

HILL, J. The defendant was indicted for the crime of rape, and the jury trying him returned a verdict of guilty, with a recommendation that his punishment be from two to four years in the penitentiary. He made a motion for new trial, which was overruled, and he excepted.

1. The court instructed the jury as follows:

"Well, that is the rule; but I have charged them about the weight and credit to be given to the testimony. Gentlemen, I charge you this: The jury may consider every fact and circumstance appearing to illustrate the truth of the transaction. I do charge you in that connection, also, that the mere fact that one may be a prostitute, may be entirely without virtue, does not prevent the commission of the offense of rape. One may be guilty of rape upon a prostitute; but the jury may take into consideration, as a matter of course, the character of the alleged victim as to virtue, her bad character as to being a prostitute, in determining the weight and credit to be given the testimony, and in determining the truth of the transaction. All of those are matters to be considered by the jury in determining the weight and credit of the evidence and the truth of the transaction, in determining whether he be guilty or not guilty, or whether you entertain a reasonable doubt as to his guilt."

It is insisted that the above charge was error, because, while attempting to do so, the court failed to charge that the evidence as to the previous unchaste character of the woman alleged to have been raped might be considered in determining the question as to whether she consented to the sexual intercourse, there being evidence as to the previous unchaste character of the woman. The

charge as given was substantially correct. *Black v. State*, 119 Ga. 746(5), 47 S. E. 370.

2. There was sufficient evidence to support the verdict, and the court did not err in refusing a new trial.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 213)

PEACOCK et al. v. GAULDEN et al.
(No. 1833.)

(Supreme Court of Georgia. March 8, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error §1123—Judgment of divided court stands affirmed by operation of law.

Where the justices are evenly divided on appeal, the judgment of the court below stands affirmed by operation of law.

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action in ejectment by L. H. Peacock and others against W. T. Gaulden and others. Judgment for defendants, and plaintiffs bring error. Affirmed by divided court.

W. H. Long, of Quitman, and W. V. Custer, of Bainbridge, for plaintiffs in error.

M. Baum, Branch & Snow, and Bennet & Harrell, all of Quitman, for defendants in error.

PER CURIAM. This case came before this court upon a writ of error from the superior court of Brooks county, and, after argument had, the case being for decision by a full bench of six Justices, who are evenly divided in opinion, FISH, C. J., and ATKINSON and GEORGE, JJ., favoring a reversal, and BECK, P. J., and HILL and GILBERT, JJ., favoring an affirmance, the judgment of the court below stands affirmed by operation of law.

(151 Ga. 332)

HOLT v. STATE. (No. 2264.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

Master and servant §345—Indictment for enticing servant held bad.

Under Pen. Code 1910, § 125, making it a misdemeanor to entice a servant, cropper, or farm laborer to leave his employer during the term of service, an indictment is fatally defective, where it omits the essential clause, "to leave his employer during the term of service."

Error from Superior Court, Crisp County; O. T. Gower, Judge.

M. H. Holt was convicted of an offense, and he brings error. Reversed.

Whipple & McKenzie, of Cordele, for plaintiff in error.

J. B. Wall, Sol. Gen., and Jesse Grantham, both of Fitzgerald, and Crum & Jones, of Cordele, for the State.

FISH, C. J. Penal Code, § 125, declares:

"If any person shall, by offering higher wages or in any other way, entice, persuade, or decoy, or attempt to entice, persuade, or decoy any servant, cropper, or farm laborer, whether under a written or parol contract, after he shall have actually entered the service of his employer, to leave his employer during the term of service, knowing that said servant, cropper, or farm laborer was so employed, he shall be guilty of a misdemeanor."

An indictment for a violation of this section, which omitted the essential part thereof, viz, "to leave his employer during the term of service," failed to charge any penal offense, and the court erred in overruling the general demurrer attacking the indictment on that ground.

In view of this ruling, the grounds of the demurrer urging the unconstitutionality of the statute upon which the indictment was founded will not be considered.

Judgment reversed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 326)

FLANIGAN v. NOWELL et al. (No. 2184.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by the Court.)

Property §9—Evidence insufficient to show title to money taken from persons arrested.

Under the evidence in the case, the court did not err in directing a verdict for the defendants.

Error from Superior Court, Barrow County; A. J. Cobb, Judge.

Suit by J. R. Flanigan against Calloway Nowell and others. Judgment for defendants, and plaintiff brings error. Affirmed.

John R. Flanigan brought an equitable petition against W. H. Beddingfield, Calloway Nowell, Floyd Lockett, and Courtney Russell, and alleged in substance as follows: The plaintiff had intrusted one of the defendants, Courtney Russell, who was a share cropper with the plaintiff, with certain cotton for the purpose of selling it and returning to the plaintiff the money arising from the sale. Russell sold the cotton for the sum of \$310, and it is charged that Nowell and Lockett inveigled Russell to their home and there gave him whisky until he became

drunk, and when he was thus in a dazed condition Nowell and Lockett took the money and converted it to their own use. When Russell became sober he reported the conduct of Nowell and Lockett to the defendant Beddingfield, who was a policeman, and who arrested and searched Nowell and Lockett, and found upon their persons the aggregate sum of \$326.82; Nowell having \$279.60 and Lockett having \$47.22. The money was deposited by Beddingfield in a bank to the credit of Beddingfield, Nowell, and Lockett jointly, and the money is still on deposit. Nowell and Lockett are young negroes, working for small wages, and neither has any property. Beddingfield does not claim any title or interest in the money, except as a holder for the real owner. Courtney Russell is insolvent and has no property. When the money was deposited in the bank, it was commingled with other funds placed on general deposit, and it would be impossible for plaintiff to identify the money or describe it with such particularity as is required in an action of trover; and for this reason he has no adequate remedy at law, and brings this action, and prays that he may have judgment finding the \$310 to be his property, that by proper decree it be delivered to him, and that until the final disposition of this case he be allowed to give bond and take possession of the \$310 and hold it subject to the order of the court.

In their answer Nowell and Lockett denied that the money taken from them by the policeman belonged to Flanigan. Russell, the cropper, was made a party defendant; but he filed no answer. Beddingfield, the policeman, claimed no interest in the funds, but was a mere stakeholder; and, a bond having been given by the plaintiff, Flanigan, and the money turned over to him, the name of Beddingfield was stricken as a party defendant. After hearing evidence and argument of counsel, the court directed a verdict in favor of the defendants Nowell and Lockett, and the plaintiff excepted.

Lewis C. Russell and Jos. D. Quillian, both of Winder, for plaintiff in error.

G. D. Ross, of Winder, and Shackelford & Meadow and Thos. J. Shackelford, all of Athens, for defendants in error.

HILL, J. (after stating the facts as above). From a careful reading of the evidence in this case, we conclude that the verdict directed by the court was demanded; there being no evidence to show that the money found on the persons of the defendants Nowell and Lockett was the money of the plaintiff, Flanigan. Nor are the circumstances such as would authorize a jury to find that the money was that of the plaintiff. Courtney Russell, the cropper of Flanigan, who claims to have been robbed, did not tes-

tify in the case. Both the defendants, Nowell and Lockett, denied that they had taken or received any money from Russell; and it was shown by two witnesses that one or two days before the alleged robbery one of the defendants was in possession of something over \$210; and while it is true that Nowell admitted that he had been in a gambling game with six other men, including Courtney Russell, there is nothing in the record to show that he won any of Russell's money; and, even if it could be said that any money had been won from Russell, it does not appear that the money belonged to the plaintiff, Flanigan. We think, therefore, that the court properly directed a verdict for the defendants, under the evidence in the case; and so far as appears from the record, no ruling was made or invoked upon the demurrer based upon the ground that there was no equity in the petition, and consequently the question is not presented to this court as to whether or not the suit could be maintained in this form.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 62)

HENDERSON v. CITIZENS' FIRST NAT. BANK OF ALBANY. (No. 1867.)

(Supreme Court of Georgia. Feb. 15, 1921.)

(Syllabus by Editorial Staff.)

Banks and banking §117—Bank liable on note executed by officer and indorsed by bank.

An insolvent bank in the hands of a receiver was liable on notes executed by officers of the insolvent bank, payable to such bank, indorsed by it, and assigned to another bank for a valuable consideration.

Error from Superior Court, Turner County; R. Eve, Judge.

Intervention proceeding by the Citizens' First National Bank of Albany, Ga., against J. W. Henderson, receiver of the Bank of Sycamore. Judgment for intervener, and defendant brings error. Affirmed.

The petition for intervention, as amended, alleged that a receiver was appointed for the Bank of Sycamore, which was indebted to intervener upon a note payable to the order of the Bank of Sycamore, which said note was transferred and assigned by indorsement to the intervener for a valuable consideration by said Bank of Sycamore. The note was executed by officers of defendant bank.—Statement by editor.

A. S. Bussey and T. A. McNicholas, both of Cordele, for plaintiff in error.

Milner & Farkas, of Albany, for defendant in error.

FISH, C. J. 1. The amendment, properly construed, was an elaboration of the matter contained in the original petition for intervention, which was itself a suit on contract. The petition as amended set forth a cause of action.

2. The evidence was sufficient to support the judgment for the intervener, which was rendered by the court without a jury, upon agreed facts and other evidence.

3. The case differs from *Henderson v. National Bank of Tifton*, 146 Ga. 799, 92 S. E. 525. In that case the bank for which the defendant was receiver was not a party to the note sued on, whereas in this case the note was payable to the order of the insolvent bank, which indorsed it to the intervener.

Judgment affirmed.

All the Justices concur.

(151 Ga. 335)

BROOKINGS v. TRAWICK. (No. 2292.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by the Court.)

1. Demurrer properly sustained.

The court did not err in sustaining the general demurrer and dismissing the petition.

(Additional Syllabus by Editorial Staff.)

2. Wills §497(2)—Grandson, reared by testator, held not entitled to rights of child, under gift to "children."

Where a grandson of a testator, reared in the testator's family, was referred to in one item of a codicil as a grandson, and in another by name without other designation, he was not entitled to be regarded as a child, under a provision that, if any legatees died without children, the property given them should go to the living "children" mentioned in the codicil.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Child—Children.]

Error from Superior Court, Hancock County; J. B. Park, Judge.

Suit by J. F. Brookings against K. T. Trawick. Judgment dismissing the petition, and plaintiff brings error. Affirmed.

G. L. Dickens and T. M. Hunt, both of Sparta, for plaintiff in error.

Burwell & Fleming, of Sparta, for defendant in error.

GILBERT, J. [1, 2] Brookings filed complaint against Trawick, for a one-third un-

divided interest in described land. Plaintiff's claim is based upon the terms of the will of his grandfather Frederick Trawick. This will, which is attached to the petition, among other provisions, disposed of the land in question by devising it to Martha W. Franks, a daughter of the testator. Mrs. Franks died without child or children, leaving two sisters, the only children born of the testator. The plaintiff claims that he stands in the position of a child, rather than a grandchild, because in his infancy, and during the time of the absence of his father in the Confederate army, his mother, a daughter of the testator, gave petitioner to his grandfather, Frederick Trawick; that on the return of his father from the army he recognized the gift, and never claimed petitioner as his child; that petitioner was reared in the family of his grandfather as a child, and was always treated as such. The particular part of the will relied upon is the following in the codicil:

"If any of my legatees die without children, the property given or coming to them in this will is to go to the living children mentioned in the codicil."

Another paragraph of the codicil disposes of the personal property of the testator to—

"my son James P. Trawick, my daughters Amanda Brookings, Martha W. and Susan J. Trawick, and John F. Brookings."

The plaintiff contends that under the item first quoted he is entitled to a one-third interest in the land sued for, which was devised to Mrs. Franks. It will be observed that in the disposition of the personal property, as quoted above, the testator names one person as a son and several others as daughters, concluding the list of legatees with the name of John F. Brookings, without calling him either son or grandson. In a previous item of the codicil, however, to wit, the second item, the testator provides as follows:

"I give to my grandson, John Frederick Brookings, one-third of my Buffalo or Perkins plantation"

—thus clearly showing that he regarded Brookings as a grandson and not as a son. The court dismissed the petition on general demurrer, which constitutes the basis of the sole assignment of error. It appears that the ruling of the court was proper, and that the judgment must be

Affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 333)

HILL v. HIXON, Sheriff. (No. 2284.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Attachment \S 191—Defendant not entitled to replevy, when agreeing that officer should sell and hold proceeds.

Where the defendant in an attachment case did not give a replevy bond, under Civ. Code 1910, \S 5113, but it was agreed that the constable should sell the property and deliver the proceeds to the sheriff, to be held until final disposition, defendant was not thereafter entitled to replevy the proceeds on giving bond.

2. Mandamus \S 68—Does not lie against sheriff, holding fund as stakeholder, and not as officer.

Where the parties to an attachment suit agreed that the constable should sell the property and deliver the proceeds to the sheriff, to be held until final disposition of the case, the sheriff held the fund as a mere stakeholder, and, it not being his official duty to accept a replevy bond and pay over the fund to the defendant, he could not be required to do so by mandamus, under Civ. Code 1910, \S 5440, authorizing mandamus to compel performance of official duties.

Error from Superior Court, Greene County; J. B. Park, Judge.

Petition by John Hill against E. C. Hixon, Sheriff. Judgment for the Sheriff, and the petitioner brings error. Affirmed.

M. C. Few, of Madison, for plaintiff in error.

Noel P. Park, of Greensboro, for defendant in error.

FISH, C. J. A constable levied on personally an attachment issued by a justice of the peace, returnable to a city court. In pursuance of an agreement of the parties, made by their attorneys at law, the constable sold the property on a given date and delivered the proceeds of sale to the sheriff of the county, who was also the sheriff of the city court, to be held by him until the final determination of the rights of the parties. Subsequently, and before the term of the city court to which the attachment was returnable, the defendant presented to the sheriff a bond in substantially double the amount of the fund in his hands, with sureties, payable to the plaintiff in attachment, for the eventual condemnation money, and demanded its acceptance by the sheriff and the delivery of the fund in his hands to the defendant. The sheriff refused to comply with such demand. Thereupon the defendant presented to the judge of the superior court his petition against the sheriff, setting forth in substance the facts as above stated, and praying that the judge order the sheriff to show cause why he should not comply with the demand

to accept the bond and to pay over the fund in his hands to petitioner.

[1,2] Upon the hearing set by the judge, which was in term time, the sheriff answered, admitting substantially the allegations of the petition, but contending, among other things, that the prayers of the petition should not be granted. The judge ruled that he had no authority to order the sheriff to pay the fund in his hands to petitioner. Held, that the judge did not err in rendering this judgment. No replevy bond was given by the defendant, as provided in such an attachment case. Civil Code 1910, \S 5113. The agreement between the parties that the constable should sell the property on a given date and deliver the proceeds of sale to the sheriff, to be held by him until the final disposition of the case, controls the rights of the parties, and the provision of the Civil Code just cited, allowing the defendant in attachment to replevy the property, does not apply. Under the agreement the sheriff holds the fund as a mere stakeholder; and it not being, in the circumstances, his official duty to accept the bond and pay over the fund to the defendant in attachment, he could not be required to do so by madamus. Civil Code 1910, \S 5440; Sapp v. DeLacy, 127 Ga. 659 (1), 56 S. E. 754. Judgment affirmed.

All the Justices concur, except GEORGE J., absent.

(151 Ga. 294)

GARRICK et al. v. TIDWELL. (No. 2045.)

(Supreme Court of Georgia. Feb. 16, 1921.
Judgment Adhered to March 5, 1921.)

(Syllabus by Editorial Staff.)

1. Landlord and tenant \S 62(4)—Tenant holding over may set up defense of equitable ownership.

In a proceeding for eviction of a tenant holding over under Civ. Code 1910, $\S\S$ 5385-5388, defendant may repel the charge that he is tenant by proving that he is equitable owner of the land by parol gift from the alleged landlord.

2. Judgment \S 747(1/2)—In proceeding to evict tenant res judicata in action between same parties to recover land.

A judgment of the superior court in a statutory proceeding for the eviction of a tenant holding over, commenced and tried under the provisions of Civ. Code 1910, $\S\S$ 5385-5388, defendant having repelled the charge that he was tenant by proving that he was equitable owner under a parol gift from the landlord, could be pleaded in estoppel in an action or complaint for land between the same parties or their privies.

3. Judgment \S 663—Under review in Court of Appeals cannot be pleaded in estoppel.

A judgment of the superior court in a proceeding for the eviction of a tenant holding

over, commenced and tried under the provisions of Civ. Code 1910, §§ 5385-5388, defendant having repelled the charge that he was tenant by proving that he was equitable owner under a parol gift from the landlord, could not be pleaded as an estoppel while it was under review in the Court of Appeals, until affirmed by that court and the decision of the reviewing court made the judgment of the trial court.

4. Pleading ⚡366—Order striking paragraph of answer setting up judgment from which appeal was pending did not estop amendment of answer after affirmance of judgment.

A judgment, unexcepted to, striking a paragraph of the answer setting up as an estoppel a judgment in dispossession proceedings under Civ. Code 1910, §§ 5385-5388, while that judgment was on review in the Court of Appeals, did not estop defendant from amending the answer in such manner as to set up the judgment in the dispossession proceedings as an estoppel after that judgment was affirmed by the Court of Appeals and the judgment of the reviewing court made the judgment of the trial court, and court erred in striking the amendment.

5. New trial ⚡125—Ground for, should be complete within itself.

A ground of a motion for new trial should be complete within itself, and when such a ground complains of the admission in evidence of an administrator's deed on the ground that the land was held adversely to the administrator at the time of the sale, and the deed does not show such fact, and no evidence is set out in the ground of the motion for new trial showing admission of such fact, the objection to the admission of the deed is insufficient to require its exclusion.

6. Appeal and error ⚡1099(7)—Decision on former appeal as to competency of witness law of case.

Decision on prior appeal as to competency of witness to testify under Civ. Code 1910, § 5858, is controlling, where the record on the subject, while more elaborate, is not substantially different from what it was on the former appeal.

7. Witnesses ⚡159(7)—Making of improvements held to have reference to a transaction with decedent, and incompetent.

In an action involving title to land, instituted by the "personal representative" of a decedent against one who set up a parol gift of the land by the decedent and the making of valuable improvements on the land in pursuance of the alleged gift, testimony of the defendant to effect that during the life of the donor he placed valuable improvements on the land held to have reference to a "transaction" with the decedent, which the latter could have rebutted, denied, or explained if alive, and defendant was incompetent to give such testimony as a witness under Civ. Code 1910, § 5858.

8. Landlord and tenant ⚡285(4)—In action for eviction, ruling on evidence held proper.

In an action by a widow, as sole heir at law, to evict alleged tenants holding over under

Civ. Code 1910, §§ 5385-5388, where defendants claimed a parol gift from decedent and offered testimony of a defendant: "While going from my house to Mr. B.'s, I told her [the plaintiff] about this contract between me and Mr. T. [the decedent]. I told her about the contract me and Mr. T. had; that I was to give six bales of cotton for the place as long as he lived, and she told me she understood it—says, 'Everything is all right.' That is exactly what she told me; that I need not fear narry moment of my life; that it was all right. I told her the whole contract"—court did not err in permitting the witness only to testify that "she told me she understood it; everything is all right; that I need not fear narry moment of my life."

9. Witnesses ⚡159(8)—Court properly refused testimony as to transactions with decedent.

In an action by the sole heir at law of a decedent to evict a tenant holding over under Civ. Code 1910, §§ 5385-5388, defendants claiming a parol gift from the decedent under a contract that they should give to decedent during his life six bales of cotton per year, court did not err in refusing to permit a defendant to testify that "as long as he [decedent] lived I paid him six bales of cotton per year, according to the contract."

10. Evidence ⚡471(27)—Testimony held not inadmissible as conclusion.

In an action by a widow as sole heir to evict alleged tenants holding over under Civ. Code 1910, §§ 5385-5388, where defendants claimed under a parol gift whereby they were to own the land on the death of decedent on giving him six bales of cotton per year during his life, the court did not err in refusing to rule out testimony of plaintiff that defendants "were living on that land as tenants; he had been my husband's tenant on that land somewhere between 25 and 30 years; he paid six bales of cotton a year for that land"—as against an objection that it was irrelevant, immaterial, and a conclusion.

11. Trial ⚡29(1)—Remarks of court, in absence of jury, held not error.

Remarks of the court, made in the absence of the jury: "The law that applies in this case, that permits parties to enforce a parol contract of land, where the donor or grantor is dead, is in my opinion a bad law, and should be abolished and repealed by the Legislature. There was a bill introduced in the Legislature to do so, but it failed to pass. While I am personally opposed to the law, I think that I can give you a fair trial"—held not to show that the court was unconsciously prejudiced by reason of the fact that he was unfriendly to the law that governed the case.

Beck, P. J., and George, J., dissenting in part.

Error from Superior Court, Meriwether County; John D. Humphries, Judge.

Action by Mrs. Claudia Tidwell against George W. Garrick and another. Judgment for plaintiff, and defendants bring error. Reversed.

The grounds of motion for new trial were in part as follows:

(4) Because upon the trial of said case the court erred in illegally withholding from the jury against the demand of the movants the following material evidence offered by them, to wit: The testimony of George W. Garrick as a witness, as follows: "While going from my house to Mr. Bowers' I told her [Mrs. Claudia Tidwell, plaintiff] about this contract between me and Mr. Tidwell. I told her about the contract me and Mr. Tidwell had; that I was to give six bales of cotton for the place as long as he lived, and she told me she understood it—says: 'Everything is all right.' 'That's exactly what she told me; that I need not fear narry moment of my life; that it was all right. I told her the whole contract.'" The court then and there permitted this witness to testify in this connection to the following disjointed, as movants contend, sentences and phrases, covered in the above recital of this witness: "She told me she understood it. Everything is all right; that I need not fear narry moment of my life." All the remaining portion of said testimony was excluded and rejected by the court, which was illegal and error. The court permitted this witness to testify in this connection what Mrs. Tidwell said and stated in the conversation referred to, but refused and rejected that portion of the testimony which consisted of statements made by the witness Garrick to Mrs. Tidwell in the conversation, and in so ruling and holding the court committed error, and made it impossible for the disconnected statements made by Mrs. Tidwell in the conversation to show any intelligence or to convey any information to the court and jury, and in so rejecting the statements made by Garrick, the witness, completely destroyed the sense, force, and effect of said testimony. This examination was by defendant's counsel.

(5) Because the court committed error in refusing to allow the witness George W. Garrick, introduced by the defendants, to testify as follows: "I have built barns and stables; I think about eight stables, cribs, smokehouse, and grain and seed houses; two-story building, where I could put it up stairs, at my own expense. I set out the orchard. I did all that was done about the terrace. I terraced on the place all that it needed. I put all the ditches there. I have cleared up all the land I have got, from a one-horse farm to close to a four-horse farm. I cleared it up at my own expense and labor." * * *

(6) Because the court committed error in refusing to allow the witness George W. Garrick, introduced by the defendants, to testify as follows: "When we first went there, where Tidwell placed me in possession, he told us if we would go on that place—it was all dilapidated; there wasn't any buildings hardly that we could live in—said if we would go there and take possession of the lands, and pay him six bales of cotton a year until his death, that the place should be ours. I was to improve it, and put any buildings there that I decided to put there, whatever the cost might be. About the clearing I was unlimited." * * *

(7) Because the court committed error in refusing to allow the witness George W. Garrick, one of the defendants, introduced by the

defendants, to testify as follows: "As long as he [J. A. J. Tidwell] lived I paid him six bales of cotton per year according to the contract." Movants insist that the aforesaid testimony was material, and the court rejected and withheld the same from the jury against the demands of movants, and in so doing the court committed error, and said ruling was illegal.

(8) Because the court committed error in refusing to allow the witness George W. Garrick, one of the defendants, introduced by defendants, to testify as follows: "Nobody has made any improvements on that place since I went there, but myself. Since I have been there I have borne all of the expense." * * *

(10) Because, during the progress of the trial, movants moved the court to rule out the following material evidence, testified to by Mrs. Claudia Tidwell, and introduced by the plaintiff, to wit: "Mr. Garrick and his wife were living on that land as tenants. He had been my husband's tenant on that land somewhere between 25 and 30 years. He paid six bales of cotton a year for that land." And movants did then and there urge the following grounds of objection to said evidence: That it was irrelevant, immaterial, and a conclusion—which said objection the court then and there overruled, and allowed the evidence to remain before the jury, which rulings movants insist were error. * * *

(13) Because upon the trial of said case the court erred in the following point and particular, to wit: During the trial of the case, at the request of plaintiff's counsel, the jury was sent from the courtroom, and arguments were made to the court by counsel during the absence of the jury, and in connection with such argument the court, referring to the law governing the case then on trial, used the following language from the bench: "The law that applies in this case, that permits parties to enforce a parol contract of land, where the donor or grantor is dead, is in my opinion a bad law, and should be abolished and repealed by the Legislature. There was a bill introduced in the Legislature to do so, but it failed to pass. While I am personally opposed to the law, I think that I can give you a fair trial." While movants concede the honesty and integrity of the court, yet they insist that this language of the court clearly implies and warrants the conclusion that their case was unconsciously prejudiced in the mind of the court by reason of the fact that the court was unfriendly to the law that governed their case, and by reason of this fact the court, with honest intentions, but with erroneous judgment, construed this law too strictly against movant, and likewise weighed and judged the evidence in the case unfavorable against them. * * *

—Statement by editor.

N. F. Culpepper and Hatchett & Hatchett, all of Greenville, R. W. Freeman, of Newnan, and Troutman & Freeman, of Atlanta, for plaintiff in error.

H. A. Allen, and R. R. Arnold, both of Atlanta, for defendant in error.

ATKINSON, J. [1, 2] 1. A judgment of the superior court in a statutory proceeding for the eviction of a tenant holding over, com-

menced and tried under the provisions of Civil Code, §§ 5385-5388, providing for summary eviction of tenants holding over, failing to pay rent when due, or tenants at will or sufferance refusing to deliver possession when the same is duly demanded, is conclusive between the parties and their privies in estate. In such a case the defendant may repel the charge that he is tenant, by proving that he is equitable owner of the land under a parol gift from the alleged landlord. When that is done, and the issue as to title is actually decided, the judgment based on such issue may be pleaded in estoppel in an action of complaint for land between the same parties or their privies. *Tomlinson v. Driver*, 53 Ga. 9; *Hammond v. Thornton*, 107 Ga. 259, 33 S. E. 183; *Irvin v. Spratlin*, 127 Ga. 240, 55 S. E. 1037, 9 Ann. Cas. 341, and cases cited. If the decision in *Jordan v. Jordan*, 103 Ga. 482, 30 S. E. 265, is in conflict with that in the case of *Tomlinson v. Driver*, supra, it must yield to the older decision, which has been followed by other decisions of this court.

[3] 2. A judgment of the superior court in a proceeding under the statutes mentioned in the preceding division cannot be pleaded as an estoppel while it is under review in the Court of Appeals. But where such a judgment has been carried for review to the Court of Appeals, and affirmed by that court, and the decision of the reviewing court made the judgment of the trial court, the judgment so reviewed may then be pleaded as an estoppel in other cases between the same parties involving the same question.

[4] (a) The judgment, unexcepted to, striking paragraph 10 of the original answer setting up as an estoppel the judgment in the dispossessory proceeding while that judgment was on review in the Court of Appeals, will not estop the defendant from amending the answer in such manner as to set up the judgment in the dispossessory proceeding as an estoppel, after that judgment has been affirmed by the Court of Appeals and the judgment of the reviewing court made the judgment of the trial court.

(b) It was erroneous to strike the amendment to the plea setting up the judgment in estoppel, after it was affirmed by the Court of Appeals and the judgment of the reviewing court had been made the judgment of the trial court.

[5] 3. A ground of a motion for new trial should be complete within itself. When such a ground complains of the admission in evidence of an administrator's deed, on the ground that the land was held adversely to the administrator at the time of the sale, and the deed does not show such fact, and no evidence is set out in the ground of the motion for new trial showing the fact, the objection to the admission of the deed is insufficient to require its exclusion.

[6] 4. When this case was before the Supreme Court on a former occasion (*Tidwell*

v. Garrick, 149 Ga. 290, 99 S. E. 872), it was held in effect that the plaintiff was the "personal representative" of her deceased husband, within the meaning of Civil Code, § 5858, relating to the competency of witnesses to testify, and that the defendants were incompetent to testify in their own behalf as to "transactions and communications" with the decedent. The record on that subject, while more elaborate, is not substantially different from what it was on the former trial; and the decision above mentioned is controlling. It is argued in the briefs of counsel for the plaintiffs in error that the record is substantially different, but this contention is not borne out by comparison of the records of file in this court. The motion for rehearing, which was denied by this court, stressed the same facts and reasons which are now relied on for a different ruling.

[7] 5. In an action involving title to land, instituted by the "personal representative" of a decedent against one who sets up a parol gift of the land by the decedent and the making of valuable improvements on the land in pursuance of the alleged gift, testimony of the defendant, to the effect that during the life of the donor he had placed valuable improvements on the land, had reference to "a transaction" with the decedent, which the latter could have rebutted, denied, or explained if alive, and the defendant was incompetent to give such testimony as a witness. Civil Code, § 5858; *Zellers v. Orr*, 147 Ga. 607, 95 S. E. 8; *Hill v. Merritt*, 146 Ga. 307, 91 S. E. 204; *Chamblee v. Pirkle*, 101 Ga. 790, 29 S. E. 20.

(a) The case of *Walker v. Neil*, 117 Ga. 733 (3), 45 S. E. 387, refers to improvements made after the death of the donor.

(b) The case differs on its facts from *Nugent v. Watkins*, 129 Ga. 382, 53 S. E. 888, in which there was no question as to a gift or other transaction between the deceased and the witness, and where it was held that independent physical facts, which do not involve any communication or transaction with the decedent, are not within the rule excluding such communications and transactions.

[8-11] 6. Other grounds of the amended motion for new trial, relating to admissibility of evidence, and certain remarks of the court made out of the presence of the jury, show no error, and are not of such character as to require elaboration.

7. As the judgment of the trial court will be reversed on account of the ruling striking the amendment to the defendants' answer, no ruling will be made as to the sufficiency of the evidence to authorize the judge to direct a verdict for the plaintiff.

Judgment reversed.

All the Justices concur, except BECK, P. J., and GEORGE, J., who dissent from the ruling in fifth headnote [fifth division of the opinion].

(151 Ga. 128)

JONES v. HARRIS. (No. 1973.)(Supreme Court of Georgia. Feb. 17, 1921.
Rehearing Denied Feb. 28, 1921.)*(Syllabus by Editorial Staff.)***1. Ejectment §64—Premises should be fully described in pleading.**

In an action for the recovery of land, the premises should be so fully described as to enable the sheriff to execute the writ of possession.

2. New trial §117(3)—Indefinite verdict may be set aside on motion during term.

A verdict in a civil case, which is too indefinite for enforcement, may be set aside on proper motion for that purpose, made during the term at which the verdict was rendered, though subsequent to its reception by the court and its entry upon the minutes.

3. Judgment §358—May be set aside for insufficient description of premises in petition to recover land.

A defendant, who passes over without demurring to a petition in an action for land, which is fatally defective, in that it does not set forth a sufficient description of the premises sued for, may, after verdict and judgment against him, in addition to other available remedies, duly move to set the judgment aside.

4. Ejectment §64—Petition held to describe premises insufficiently.

Where, in a petition in an action for land, the naming of adjoining owners is relied on as a necessary part of the description of the land, and the plaintiff is alleged to be the adjoining owner on one side of the land, and the defendant is alleged to be the owner on two sides of the land, the land not being a definite quantity, and no data being given locating the dividing lines between the tract in question and other lands of the parties, such description is fatally defective.

5. Pleading §403(2)—Defective description of land in petition not cured by answer.

A petition in an action for land, naming adjoining landowners as a necessary part of the description of the land, plaintiff being alleged to be the adjoining owner on one side, and the defendant being alleged to be the adjoining owner on two sides of the land, the land not being a definite quantity, and no data being given locating the dividing lines, held not cured by allegations in the answer.

6. Ejectment §111(1)—Verdict held too indefinite.

A verdict in an action for land, "We, the jury, find for plaintiff, so say we all," was too indefinite, and the court erred in overruling a motion to set it aside, where the pleadings were defective, in that they did not sufficiently describe the land in controversy.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by M. H. Harris against R. D. Jones to recover land. Judgment for plaintiff, and defendant brings error. Reversed.

The petition described the land in controversy as being bounded as follows:

"On the west and north by lands of R. D. Jones, on the east by lands of M. H. Harris, on the south by lands of E. Widincamp, containing about fifteen hundred (1,500) square yards, same being, in part, a part of the field that had been cultivated annually for the last forty years, or more, by your petitioner, until about January, 1917, at which time your petitioner removed his worm rail fence and stretched a wire fence inside of his field for a distance of about two hundred yards, attaching same to his lot fence, where he keeps his stock, and has so kept them for the last forty years."

The answer and plea filed by the defendant was as follows:

"(1) Defendant admits possession of said land described in the petition and that he is a resident of said county, but denies the other allegations of paragraph 1 of the petition. * * *

"Defendant, further answering said petition, says that the land sued for in said petition is the land of petitioner; that, instead of petitioner being in possession of the land of plaintiff, said plaintiff is in the possession of one acre, more or less, of land of defendant described in about the manner as the lands described in the petition; that said disputed lands being differences in the true land line between the true lands of plaintiff and defendant. Where the land line of plaintiff is straight, the plaintiff has attempted to change the straight line so as to make it bend westward and include about two acres, part of which said Harris now claims possession, and the other part being the part of land sued for in the petition. Defendant therefore files his cross-action and prays a judgment of the court for the recovery of that portion of said land lying westward of such north and south straight line of which said plaintiff is in the possession; defendant claiming title thereto in fee simple.

"Defendant claims title from E. Widincamp by warranty deed covering said disputed lands.

"The plaintiff obtained possession of that portion of said land of which he is possessed under lease from said E. Widincamp, and has never surrendered such possession to him since said term of tenancy began."

The verdict was as follows:

"We, the jury, find for plaintiff, so say we all.
July 11, 1919. Mike Collins, Foreman."

—Statement by editor.

J. V. Kelley, of Reidsville, for plaintiff in error.

W. T. Burkhalter, of Reidsville, for defendant in error.

ATKINSON, J. [1] In an action for the recovery of land, the premises should be so fully described as will enable the sheriff to execute the writ of possession. *Harwell v. Foster*, 97 Ga. 264, 22 S. E. 994; *Hicks v. Brinson*, 100 Ga. 595, 28 S. E. 380; *McCullough v. East Tenn., Va. & Ga. Ry. Co.*, 106 Ga. 275 (3), 32 S. E. 97; *Crosby v. Mc-*

Graw, 133 Ga. 560, 66 S. E. 897; Williams v. Perry, 136 Ga. 453, 71 S. E. 886.

[2] 2. A verdict in a civil case, which is too indefinite for enforcement, may be set aside on proper motion for that purpose, made during the term at which the verdict was rendered, though subsequently to its reception by the court and its entry upon the minutes. *Abbott v. Roach*, 113 Ga. 511, 38 S. E. 955. This case differs from *Brown v. State*, 150 Ga. 585, 104 S. E. 428, which was a criminal case.

[3] 3. A defendant, who passes over, without demurring to, a petition in an action for land, which is fatally defective, in that it does not set forth a sufficient description of the premises sued for, may, after verdict and judgment against him, in addition to other available remedies, duly move to set the judgment aside. *Kelly v. Strouse & Bros.*, 116 Ga. 872 (5a), 43 S. E. 280.

[4-6] 4. Where, in a petition in an action for land, the naming of adjoining landowners is relied on as a necessary part of the description of the land, and the plaintiff is alleged to be the adjoining owner on one side of the land, and the defendant is alleged to be the adjoining owner on two sides of the land, the land not being a definite quantity, and no data being given locating the dividing lines between the tract in question and other lands of the parties, such description is fatally defective. *Huntress v. Portwood*, 116 Ga. 351 (3), 42 S. E. 513; *Marshall v. Carter*, 143 Ga. 526 (2), 85 S. E. 691. The defective description in the petition was not cured by allegations made in the answer. The verdict against the defendant, construed in connection with the pleadings, was fatally defective, and the judge erred in overruling the motion to set aside the verdict and judgment.

Judgment reversed.

All the Justices concur.

(26 Ga. App. 540)

GATE CITY COFFIN CO. v. PAULK. (No. 12062.)

(Court of Appeals of Georgia, Division No. 2.
March 18, 1921.)

(Syllabus by the Court.)

Sales §77(2)—Invoice and accompanying statement of terms held not to authorize deductions of freight charges nor to present ambiguity.

The terms of the invoice and of the "term sheet" attached and made a part of it being explicit and unambiguous as to the payment of freight, there was nothing for the jury to consider, and the court erred in submitting the construction of the invoice and term sheet to the jury.

Error from Superior Court, Atkinson County; A. B. Lovett, Judge.

Action by the Gate City Coffin Company against Henry Paulk. Judgment for defendant, and plaintiff brings error. Reversed.

Levi O'Steen, of Douglas, and F. A. Hooper & Son, of Atlanta, for plaintiff in error.

E. R. Smith, of Willacoochee, for defendant in error.

HILL, J. This is a suit upon account, brought in the superior court of Atkinson county. The plaintiff sold to the defendant some undertaker's supplies, and the defendant paid him his bill with the exception of \$8.81, for which this suit was brought. There is no conflict in the testimony. The whole case turns on the construction of the invoice and what is called the "term sheet," which accompanied the invoice and was made a part of it. This invoice is in the following language:

"Gate City Coffin Company, Manufacturers of Coffins, Caskets, and Undertaker's Supplies.

"Atlanta, Georgia, Jan. 13, 1919.

"Terms: 2% 30 days. 60 days net. See attached terms.

"Sold to Henry Paulk, Willacoochee, Ga.

1 01380E 6-3 Black Crepe and Complete.....	\$ 38.00
1 01381 6-0 White L. S. and Complete.....	33 50
1 01382 6-3 Black Broadcloth and Complete..	40 00
1 506 Black Robe	3 00
1 6542 Black Suit	9 60
1 2172 Lady's White Silk Dress.....	9 25
Jan. 15, 1919.	
¼ Hrs 94 Thumb Screws.....	\$4.95 2 48
¼ Hrs 94 Thumb Screw Plates.....	5.55 2 78
¼ Hrs Name Plate Screws.....	.70 70
	\$145 07"

The term sheet referred to is as follows:

"Kindly note our terms. If you discount the inclosed invoice: (1) Deduct such part of the freight as the invoice allows. (2) Do not deduct that part of your freight bill that is added for war tax. The government expects you to pay your part of the war, and if it is deducted from our bill the settlement will be returned to you. (3) After deducting the freight, then take off 2 per cent. for cash discount if you pay within 30 days from the date of invoice. (4) Return to us your paid freight bill with your remittance."

On receipt of the invoice and the term sheet, the purchaser, after deducting \$8.81 for freight charges and 2 per cent. for discount allowed for cash payment, sent his check. The seller insisted that the purchaser pay the entire freight charges, according to the explicit terms set out in the term sheet. The trial judge thought the term sheet and the invoice were ambiguous as to this, and submitted the question to the jury.

We cannot agree with him that the contract was ambiguous. The invoice expressly refers to the term sheet for the terms, and

this term sheet specifically says, in the very first paragraph, that only such part of the freight should be deducted from the bill as the invoice allows, and by reference to the invoice it will be seen that no freight whatever is allowed. It follows, therefore, necessarily that the purchaser was to pay the freight. We conclude that in holding that the contract was ambiguous, and in referring its proper construction to the jury, the court committed an error, as in our opinion the express terms of the contract demanded a verdict for the plaintiff. The order overruling the motion for a new trial was erroneous.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 419)

ROUNTREE v. STATE. (No. 11992.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 1064(4)—Motion for new trial complaining of admission of evidence should give name of witness.

A ground of a motion for a new trial which complains of the admission of specified testimony must state the name of the witness whose testimony is complained of.

2. Criminal law \S 784(4)—Failure to give charge on circumstantial evidence more comprehensive than statute not error.

The failure to charge a quoted extract from an opinion of the Court of Appeals on the law of circumstantial evidence, which was more comprehensive than Pen. Code 1910, \S 1010, held not error, especially in the absence of a timely and proper written request.

3. Criminal law \S 935(1)—Motion for new trial for refusal to direct verdict is without merit.

There is no merit in a ground of a motion for a new trial which complains of the refusal of the court to direct a verdict.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Henry Rountree was convicted of an offense, and he brings error. Affirmed.
See, also, 106 S. E. 557.

Lee J. Langley, of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., of Rome, and E. S. Taylor, Sol. Gen., of Summerville, for the State.

BROYLES, C. J. [1] 1. A ground of a motion for a new trial which complains of the admission of specified testimony must state

the name of the witness whose testimony is complained of. *Adams v. State*, 22 Ga. App. 252, 95 S. E. 877, and cases cited. Under this ruling the fourth ground of the amendment to the motion for a new trial cannot be considered.

[2] 2. The fifth ground of the amendment to the motion for a new trial, after alleging that the evidence was wholly circumstantial, does not aver that the court failed to instruct the jury upon the law of circumstantial evidence, or failed to charge section 1010 of the Penal Code 1910, but merely complains that the court failed to charge "this rule," and then the ground sets forth as "this rule" a quoted extract from the opinion (written by Russell, J.) in *Thomas v. State*, 8 Ga. App. 95, 68 S. E. 522, wherein it is said what the lower court, under the particular facts of that case, should have charged upon the law of circumstantial evidence. This extract is not in the language of section 1010 of the Penal Code, and is much more comprehensive. Under the facts of the instant case, it was not error, especially in the absence of a timely and appropriate written request, for the court to fail so to charge.

[3] 3. Under repeated rulings of this court and the Supreme Court, there is no merit in a ground of a motion for a new trial which complains of the refusal of the court to direct a verdict.

4. The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 420)

ROUNTREE v. STATE. (No. 11993.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 1064(4)—Motion for new trial complaining of admission of testimony must give name of witness.

A ground of a motion for a new trial complaining of the admission of specified testimony must state the name of the witness whose testimony is complained of.

2. Criminal law \S 753(1)—Refusal to direct verdict not error.

The refusal to direct a verdict is never error.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Henry Rountree was convicted of an offense, and he brings error. Affirmed.

See, also, 106 S. E. 557.

Lee J. Langley, of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., of Rome, and E. S. Taylor, Sol. Gen., of Summerville, for the State.

LUKE, J. [1] 1. A ground of a motion for a new trial which complains of the admission of specified testimony must state the name of the witness whose testimony is complained of. *Adams v. State*, 22 Ga. App. 252, 95 S. E. 877, and cases cited. Under this ruling the fourth ground of the amendment to the motion for a new trial cannot be considered.

2. There is no merit in the complaint that the court failed to instruct the jury upon the law of circumstantial evidence, since an examination of the court's charge (sent up in response to an order from this court) shows that the jury were properly instructed upon that subject.

[2] 3. A refusal to direct a verdict is never error.

4. The corpus delicti, including the breaking and entering, was sufficiently established by the evidence, which authorized the verdict, and for no reason assigned did the court err in overruling the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 506)

BIBB MFG. CO. v. HEWELL. (No. 11792.)

(Court of Appeals of Georgia, Division No. 2. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Parent and child \Rightarrow 7(3)—Employer putting minor in dangerous employment without parent's consent liable for loss of services from injury.

Where the father, or, in case of his death, the mother, hires a minor son to an employer to do certain work, and the employer, without such parent's consent, puts the minor in a more dangerous employment in which he is injured, the employer is liable to the parent for the consequent loss of the minor's services.

2. Parent and child \Rightarrow 7(10)—Minor's contributory negligence not defense to parent's action, where minor put in dangerous employment without consent.

Where an employer, hiring a minor from the parent to do certain work, put the minor in a more dangerous employment without the parent's consent, the minor's contributory negligence was not a defense to the parent's action for loss of services from an injury, and no issue of the minor's negligence was involved.

Error from Superior Court, Newton County: Jno. B. Hutcheson, Judge.

Action by Mrs. F. D. Hewell against the Bibb Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Rogers & Tuck, of Covington, and J. C. Knox, of Monroe, for plaintiff in error.

King & Johnson, of Covington, for defendant in error.

HILL, J. [1, 2] The plaintiff, a widow, sought to recover damages, on account of injuries to her minor son. She alleged that the defendant corporation knowingly put him to work without her consent, in a different position from that in which, under the contract between her and the defendant, he was to be employed, and that he received his injuries as a consequence of such change of work. This issue was correctly presented to the jury, under the charge of the court, there being a conflict in the evidence, and the jury decided the issue in favor of the plaintiff. Held: Where the father, or in the case of the father's death, the mother, hires a minor son to an employer to do certain work, and the employer, without such parent's consent, puts the minor to a different and more dangerous employment, and the minor is injured in such employment, the employer is responsible to such parent for the consequent loss of the minor's services. In such case the gravamen of the action is the alleged wrong of the defendant in putting the minor to work at the dangerous employment without the parent's consent. Therefore contributory negligence of the minor is no defense to such action, and no issue of the minor's negligence is involved. *Braswell v. Garfield Cotton Oil Mill Co.*, 7 Ga. App. 167, 66 S. E. 539; *Hendrickson v. L. & N. R. Co.*, 137 Ky. 562, 126 S. W. 117, and note to this case in 30 L. R. A. (N. S.) 311. It is not necessary to decide the other assignments of error; the case being entirely controlled by the question above decided.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 515)

CORKER v. SIMMONS. (No. 11807.)

(Court of Appeals of Georgia, Division No. 2. March 16, 1921.)

(Syllabus by Editorial Staff.)

Brokers \Rightarrow 82(1)—Petition in action for commissions held not to state cause of action.

Under Civ. Code 1910, § 3587, providing that placing property in the hands of a broker does not prevent the owner from selling, and that commissions are earned when the broker finds a purchaser ready, able, and willing to buy, etc., a petition alleging efforts by a broker to sell property, and that he interested certain persons and by his efforts created a demand for the property, making it possible for

the owner to sell to one not alleged to have been interested by the broker, did not state a cause of action.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by E. G. Simmons against F. G. Corker. Judgment overruling a demurrer to petition and defendant brings error. Reversed.

Simmons sued for a sum alleged to be due him as a commission on the sale of certain real estate owned by the defendant, Corker, in Dublin, Ga., alleging:

That Corker employed him as an agent to negotiate the sale of this real estate and to assist in disposing of it at named prices, and agreed to pay him stipulated commissions for his services; that, "in pursuance of said contract, he immediately went to work, in good faith and for the promised consideration, to sell said property and approached some prospects, chief among whom were T. A. Curry and F. J. Schiff, and succeeded in interesting said prospects in the purchase of said property, thus creating, by his efforts under the contract, a demand for said property, making it possible to sell the same on account of petitioner's negotiations and experience in the sale of real estate in the city of Dublin"; that "as a direct result and consequence of his personal negotiations" Corker "did consummate a trade for the sale of said property to Dr. W. R. Brigham," and that the sale of said property by Corker to Brigham was "a result of the efforts of agitation and conduct of your petitioner in seeking to sell said property, and that as a result * * * Corker got the immediate benefit of petitioner's labors in the sale of said property to Brigham, as it required no effort on the part of the said Corker to sell said property to the said Brigham, but was merely the consummation of a contract and deal resulting directly and immediately from labors performed by your petitioner pursuant to the contract with the defendant to sell said property, the said labors performed being negotiations with the said Curry and the said Schiff and others, and thus creating a demand for said property, the demand thus created having interested the said Brigham, the said Brigham having become interested as a direct result of the demand thus created."

A general demurrer to the petition was overruled.

Larsen & Crockett, of Dublin, and L. C. Hopkins, of Atlanta, for plaintiff in error.

J. S. Adams and R. Earl Camp, both of Dublin, for defendant in error.

HILL, J. By authority of the decision of this court in Moore v. May, 10 Ga. App. 198, 73 S. E. 29 and section 3587 of the Civil Code of 1910, the judgment overruling the demurrer to the petition is reversed.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

HINES, Director General of Railroads, v. BELLAH. (No. 11420.)

(Court of Appeals of Georgia, Division No. 2. March 3, 1921.)

(Syllabus by Editorial Staff.)

1. Railroads \S 482(2)—Evidence insufficient to show sparks caused fire.

In action for damages caused by sparks emitted by defendant's engine, a verdict for plaintiff was unauthorized, where the undisputed testimony showed that engine was equipped with good spark arrester and there was no affirmative evidence, either positive or circumstantial, that any sparks ever escaped from the engine.

2. Railroads \S 453—Petition counting on personal injuries from fire states cause of action.

A petition counting on personal injuries to plaintiff, an adjoining landowner, whose clothing caught fire when she attempted to stamp out fire alleged to have been started by sparks from defendant's locomotive, states a cause of action.

3. Railroads \S 5½, New, vol. 6A Key-No. Series—Director General liable for personal injuries by fire.

Under Act Cong. March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Supp. 1919, \S 3115½a-3115½p), the liability of Director General is not limited to claims growing out of a breach of duty to safely transport freight and passengers, but includes liability for injuries to adjoining landowner from being burned while attempting to stamp out fire started by sparks from locomotive.

Error from Superior Court, Henry County; W. E. H. Searcy, Jr., Judge.

Action by Mrs. N. I. Bellah against W. D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed.

The petition counted on a cause of action for personal injuries to plaintiff, an adjoining landowner, caused by plaintiff's clothing catching fire when she attempted to stamp out fire alleged to have been started by sparks from defendant's locomotive. Demurrer to petition, which was overruled, was based on "no cause of action." A motion to dismiss, which was overruled, was grounded on contention that under Act March 21, 1918, liability of Director General was limited to cases where carrier is sued under laws and liabilities of common carriers—Statement by editor.

Harris, Harris & Witman, of Macon, for plaintiff in error.

Reagan & Reagan, of McDonough, for defendant in error.

STEPHENS, J. [1] 1. In a suit against a railroad company to recover for damage al-

leged to have been caused by the emission of sparks from a passing engine of the defendant, where the undisputed evidence shows that the defendant's engine was, at the time it is alleged the sparks were emitted, equipped with a proper spark arrester in good condition, and there being no affirmative evidence, either positive or circumstantial, that any sparks ever escaped from the engine, a verdict for the plaintiff is unauthorized. *Gainesville, Jefferson & Southern R. Co. v. Edmondson*, 101 Ga. 747, 29 S. E. 213.

[2, 3] 2. The questions raised on the general demurrer to the petition and in the motion to dismiss the petition are settled by *Hines v. Zellner*, 25 Ga. App. 272, 103 S. E. 97, and *Wilson v. Central of Georgia Railway Co.*, 132 Ga. 215, 63 S. E. 1121.

Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 524)

CROAKE v. WARE et al. (No. 11856.)

(Court of Appeals of Georgia, Division No. 2. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. *Replevin* §8(1), 10—Plaintiff's title and defendant's possession are essential elements.

The things essential to a right of recovery in a suit in trover are plaintiff's title and defendant's possession.

2. *Appeal and error* §1005(2)—Refusal of new trial affirmed, when verdict supported by evidence.

Where a verdict was not wholly unsupported by evidence, though the evidence was exceedingly weak, and there was no special assignment of error of law, the refusal of a new trial must be affirmed.

Error from Superior Court, Tallapoosa County; B. F. Walker, Judge.

Action by J. G. Ware and others, by next friend, against Mary Croake. Judgment for plaintiffs, and defendant brings error. Affirmed.

Alvin G. Golucke, of Crawfordville, for plaintiff in error.

L. D. McGregor, of Warrenton, for defendants in error.

HILL, J. [1, 2] This was a suit in trover. Two things are essential to show a right of recovery: Title in the plaintiff, and possession in the defendant. Of these essentials the first was admitted. The evidence as to the second consisted of an implied admission of the defendant; and, while the evidence on

this point is exceedingly weak, this court cannot say that there was no evidence whatever to support the verdict, and, in the absence of any special assignment of error of law, the refusal of the trial court to grant a new trial must be affirmed.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 554)

STOUFER v. MISSENHEIMER.
(No. 11776.)

(Court of Appeals of Georgia, Division No. 2. March 26, 1921.)

(Syllabus by the Court.)

1. *Certiorari* §53—Answer subject to exceptions when pleadings and other parts of record not certified and sent up.

It is the duty of a justice of the peace or other tribunal or person whose decision is sought to be reviewed upon certiorari, when answering the writ of certiorari, to certify and send up all of the proceedings in the cause to the superior court as directed in the writ of certiorari. Civil Code 1910, § 5183. The judge of the superior court therefore erred in overruling the exceptions to the answer of the trial judge upon the ground that copies of the pleadings and other parts of the record were not certified and sent up with the answer.

2. *Certiorari* §59—Assignment of error in petition held insufficient to require admission or denial.

An assignment of error in a petition for certiorari that the trial judge expressed an opinion upon the facts, without reciting what opinion was expressed, but merely reciting, "the exact evidence that the court stated being disclosed in the stenographic report," is insufficient and presents no question for determination. It was therefore not error to overrule an exception to the answer upon the ground that the answer fails to either admit or deny the allegations of fact contained in the assignment of error.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between W. B. Stoufer and R. J. Missenheimer. Judgment for the latter, and the former brings error. Reversed.

Morris, Macks, J. O. Wood, and Saml. A. Massell, all of Atlanta, for plaintiff in error. McCallum & Sims, of Atlanta, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(181 N. C. 494)

(106 S.E.)

CAMPBELL v. PEARCE et al.

PEARCE et al. v. HOLT et al. (KELLY et al., interveners).

(No. 282.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Jury \S 28(1)—No right to trial by jury where reserved right waived.

Where reservation to interveners of right to jury trial was expressly made in the original order of reference, but later to expedite the hearing the interveners and all others expressly waived their right to a jury, and agreed that the matters at issue should be heard and determined by the judge, there was no error by way of denial of jury trial to the interveners.

2. Reference \S 48 — Referee's powers held measured by second and further order of reference.

Though original order for reference in proceedings brought by an administrator to sell lands gave the referee only power to take and state an account, but such cause and another were consolidated, and the further order of reference of the two causes was broad enough to hear and decide all pertinent issues, the referee did not act in excess of the powers conferred upon him in so doing, despite the character of the first order.

3. Reference \S 100(7)—Objection referee acted in excess of powers waived by attending hearings, etc.

Where interveners attended hearings before the referee without protest, and presented all of the testimony relative to their claims, also filed their special exceptions to the report, and consented that they be heard and determined first by one judge, than by another, their objection that the referee acted in excess of his powers conferred upon him by the order of reference should be considered as waived.

4. Executors and administrators \S 59—Evidence held to support finding as to ownership of intervening heirs.

In consolidated proceedings by representatives of decedents to sell land to make assets, evidence held to support the referee's finding in support of the ownership of the heirs of one decedent.

Appeal from Superior Court, Cumberland County; Allen, Judge.

Actions by Archie Campbell, administrator of Burton McArthur, deceased, against Warren Pearce and others, and by Laura Pearce, administratrix of Pettigrew Pearce, deceased, and others, against Rachel Holt and others, in which Robert Kelly and others intervened. From the judgment confirming the reports of the referee, interveners appeal. Judgment affirmed.

Pending the controversy, Robert Kelly, and other children, and their descendants, heirs at law of Isabella McArthur, second wife of

Burton McArthur, and born to her prior to her marriage to Burton, were allowed to intervene and claim title to the land in controversy as against the alleged ownership of the original parties, children and their descendants and heirs at law of Burton McArthur, deceased. The referee, among other things not excepted to, reported in favor of the original parties—heirs at law of Burton McArthur, and against the claim of Robert Kelly et al.—children, etc., heirs at law of Isabella. After hearing the cause, the court gave judgment confirming the report of the referee, and the interveners excepted and appealed.

A. M. Moore, of Fayetteville, for appellants.

Nimocks & Nimocks and Sinclair & Dye, all of Fayetteville, for appellees.

PER CURIAM. From a perusal of the record it appears: That Burton McArthur died in 1900, leaving several children as his heirs at law, the facts and findings being to the effect that these children and their descendants were heirs at law under rule 13 of our canons of descent. That he died seized and possessed of a tract of land in controversy, having continuously occupied and possessed same under a deed conveying property to him of date in 1872; that Archibald Campbell, having qualified as his administrator in 1902, filed a petition before clerk to sell the land to make assets in due administration of the estate. On issue joined, cause was transferred to superior court, and in February term, 1915, cause was referred to H. L. Brothers to state an account between estate of Burton McArthur, etc., the order providing that on coming in of report either side may demand a jury trial. That in January, 1918, Robert Kelly et al., children and descendants of Isabella McArthur, second wife of Burton McArthur, born to her prior to her marriage to Burton, made affidavit, alleging that the land in question belonged to them as heirs at law of Isabella, and making averment further that said Isabella had bargained for the land, and she and her children had paid for it. On this affidavit said applicants were made parties to the proceedings. That, one of the heirs of Burton McArthur having died, his widow and other descendants and heirs at law of Burton McArthur, without being advertent to the original petition, instituted a suit for sale of the land for division among the heirs at law of Burton, etc. That, this cause having been transferred to superior court at March term, 1919, before his honor, W. P. Stacy, judge, an order was made consolidating the causes and confirming the order of reference previously made, and directing said referee to hear and determine said causes after due notice, etc. The referee having fully heard and considered the evidence, made

a full report thereon; the same, among other things, being against the claim of the interveners and in favor of the heirs at law of Burton McArthur.

In order to expedite the hearing, the parties having waived the jury trial, Judge Calvert at October term entered on hearing, and, being unable to complete same, the hearing was continued before his honor, O. H. Allen, Judge, at February term, 1920, and his honor, as stated, confirmed the findings of the referee both of fact and law, and gave judgment for the original parties and against the interveners who have appealed to this court.

Appellants object to the disposition made of the case:

[1] First, that they have been denied a jury trial, expressly reserved to them in the original order of reference. An inspection of the record shows that such a reservation was made. But it further appears that later in the proceedings, in order to expedite the hearing, the interveners and all others both before Judge Calvert and Judge Allen, expressly waived their right to a jury trial, and agreed that the matters on issue should be heard and determined by the judge.

[2, 3] Appellants object further, that the referee acted in excess of the powers conferred upon him by the order of reference. An examination of the record, however, will show that, while the original order in the first cause gave only the power to take and state an account, after the causes were consolidated the further order of reference of the "two causes" seems to be fully broad enough to hear and decide on all pertinent issues, and, if it were otherwise, the appellants having attended the hearings without protest and presented all of the testimony relevant to their claims, filed their specific exceptions to the report, and consented that the same be heard and determined first by Judge Calvert and then by Judge Allen, this objection should be considered as waived.

[4] The further objection that findings of the referee in support of the ownership of the heirs of Burton McArthur are without evidence to support them cannot at all be maintained, it appearing, among other testimony, that Burton McArthur occupied and possessed the land under a deed purporting to convey the absolute title from 1872 to his death in 1900, and that the original parties to this controversy, his children and heirs at law, continued in possession thereafter to this present time.

As a matter of fact there is very little, if any, valid testimony tending to support the claim asserted by the interveners, and the ownership of the original parties, upheld both in the rulings of the referee and the judge must be affirmed.

Judgment affirmed.

STACY, J., not sitting.

(181 N. C. 184)

RALEIGH TIRE & RUBBER CO. v. MORRIS et al. (No. 252.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Fraudulent conveyances §47—Bulk Sales Act is valid.

The Sales in Bulk Act (C. S. § 1013), making the sale in bulk of a stock of merchandise prima facie fraudulent unless the statutory requirements are complied with, is a valid exercise of the police power of the government.

2. Fraudulent conveyances §47, 276—Bulk sale void where statute not complied with and prima facie fraudulent notwithstanding compliance with statute.

Sales coming within the operation of the Sales in Bulk Act, made without compliance with the provisions for notice and an inventory, are void as against creditors, and, where those requirements have been met, such a sale is prima facie fraudulent.

3. Fraudulent conveyances §237(1) — Stock fraudulently sold in bulk may be seized on execution.

When the sale of a stock of merchandise is void as to creditors of the seller by reason of failure to comply with the requirements of the Sales in Bulk Act, the goods can be made available by direct process of levy and sale in the hands of the original purchaser.

4. Fraudulent conveyances §182(1) — Purchaser of stock in bulk liable for value after resale.

Since the purchase of a stock of merchandise in bulk is out of the ordinary course of business, the buyer is thereby affected with notice and may be held liable for the value of the goods if the requirement of the Sales in Bulk Act is not complied with, even after the goods have been disposed of by him.

5. Fraudulent conveyances §47 — Purchaser of stock of "merchandise" liable under Bulk Sales Act, though he is not merchant.

A stock of automobile tires and tubes sold by one who was admittedly a dealer in auto supplies is a stock of merchandise, which is defined as including all those things which merchants sell either at wholesale or retail; whatever is conveyed, sold, or bought in trade or market or by merchants; so that the buyer is liable for the value of the stock where the Sales in Bulk Act was not complied with, even though the buyer was not the merchant of the goods, but merely disposed of them to customers who brought their cars to him for repairs (quoting Words and Phrases, Merchandise).

Appeal from Superior Court, Wake County; Kerr, Judge.

Action by the Raleigh Tire & Rubber Company against E. W. Morris and another, trading as the Morris-Divers Company and J. P. Matthews and another, trading as the Matthews Auto & Electric Company. Judgment for the plaintiff against defendant E. W.

Morris, but in favor of the defendants J. P. Matthews and another, and plaintiff excepts and appeals. New trial.

The action is to recover of Morris-Divers Company a balance due for goods sold and delivered, and to hold defendant the Matthews Auto Electric Company and its members, J. P., and C. T. Matthews, liable by reason of having bought the stock of goods of the debtor, in violation of plaintiff's rights and when the statute applicable to sales in bulk of such stock had not been complied with. There were facts in evidence tending to show that defendant the Morris-Divers Company was a partnership in Lillington, N. C., engaged in the business of selling auto supplies, etc., and in July, August, and September, 1919, they bought of plaintiffs tires and tubes for resale in their business to the amount of \$1,040; that they had paid on said account \$400 and an additional \$50 since suit started, leaving a balance due of \$590; that while said company was so indebted they sold out their entire stock of goods to the amount of \$800 and more, including some of those bought of plaintiff, to defendant the Matthews Company, a partnership composed of defendants J. P. and C. T. Matthews, and without inventory made or notice given or otherwise complying with the statute appertaining to sales in bulk. Consolidated Statutes § 1013. There was also testimony on part of plaintiff permitting the inference that the goods were placed with the Morris Company on consignment to sell at retail and render an account of proceeds to plaintiff at the end of each month, and that at least \$200 of the goods in question were on hand at the time of the sale to the Matthews Company.

There was evidence for defendant tending to show that the Morris-Divers Company had bought the goods outright from the plaintiff company, and there was a balance due of \$590.60. There was further evidence to the effect that C. T. Matthews alone composed the Matthews Company, and that J. P. Matthews was only an employee, otherwise having no interest in the business; that defendant bought the stock of the Morris Company, paying them about \$800 therefor, and that there was included in the stock about \$200 of goods sold to the Morris Company by plaintiff; that the Matthews Company ran a garage and dealt in oils, gas, tires, tubes, etc., but these last were only sold to customers or patrons who had their machines repaired at the shops, and as required for properly carrying on the work of such business. During the progress of the trial it appeared that there had been no service of process on Mary Divers, and a nonsuit was taken as to her.

On an issue submitted the jury found the amount due plaintiff from E. W. Morris to be \$590.60, and, the court being of opinion that the sale to the Matthews Company did not properly come within the provisions of the

Sales in Bulk Law, and that no other reason for liability had been shown, on motion the case against the Matthews Company was dismissed, and judgment entered against Morris for the balance of plaintiff's debt as declared in the verdict. Plaintiff excepted and appealed.

Evans & Eason, of Raleigh, for appellant.
Ross & Salmon, of Lillington, for appellees.

HOKE, J. (after stating the facts as above). [1,2] The Sales in Bulk Act (1 Consolidated Statutes, § 1013) provides in general terms that "the sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the sellers' business, shall be prima facie evidence of fraud, and void as against the creditors of the seller," unless a specified notice is given to creditors and inventory made within seven days before the contemplated sale. The statute contains provision also that, if the vendor shall before the sale execute to a trustee a good bond available to creditors to an amount equal to the cash value of the goods, in such instances the law shall not apply. In several cases where the question was directly presented and considered this has been approved as a valid exercise of the police powers of government, and these and other authorities also hold that sales coming within the effect and operation of the statute and without compliance with the provisions as to the notice and inventory are void as against creditors, and where these requirements have been met such a sale is to be regarded as prima facie fraudulent in the trial of an issue as to its validity. *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8, 7 A. L. R. 1581; *Armfield Co. v. Saleeby*, 178 N. C. 298, 100 S. E. 611; *Whitmore v. Hyatt*, 175 N. C. 117, 95 S. E. 38; *Gallup v. Rozier*, 172 N. C. 283, 90 S. E. 209; *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417, Ann. Cas. 1915D, 77.

[3,4] And when avoided as to creditors of the vendor by reason of failure to comply with the statutory requirements, the goods can be made available by direct process of levy and sale in the hands of the original purchaser, and, being out of the usual course of business and so affecting him with notice, such purchaser may be held liable for their value when they have been disposed of by him under the principles recognized and applied in the well-considered case of *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 8 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827, and either remedy may be pursued by the creditors of the vendor as against subsequent purchasers as long as the goods can be identified or until they pass into the hands of a bona fide purchaser for value and without notice. *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522. In *Sprinkle v. Wellborn* the principle is stated as follows:

"The remedy of the vendor is not defeated where a fraudulent vendor has sold the property to an innocent purchaser, for in such case the proceeds of the sale are as available as the property itself. The fraudulent vendee becomes chargeable with the proceeds received from the innocent purchaser, but the property itself is not, and a personal judgment may be obtained."

And in *Summers' Case*, supra, it was held, among other things:

"That when property has been obtained by actionable fraud it can be followed as long as it can be identified and traced, and the right attaches not only to the wrongdoer himself, but to any one to whom it has been transferred otherwise than in good faith and for valuable consideration."

[5] These being the recognized principles pertinent to the inquiry, it appears from the facts in evidence that the firm of Morris & Divers, dealers in automobile supplies, have sold their entire stock to the Matthews Company, and in our opinion such a sale comes directly within the provision of the statute; that the same is void as against plaintiff as creditor of the vendor, and the defendant purchasers are liable for the value of the goods included in the "stock of merchandise" of the vendors.

It is urged for defendant the Matthews Company that they are proprietors of a repair shop and were not dealers in supplies generally, but only sold to customers whose machines were taken to them for repair, and that they could not properly come within the effect and operation of the statute, citing the recent case of *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8, 7 A. L. R. 1581, in support of their position. But, apart from the testimony tending to show that these defendants sold tires and tubes and gas and oil, the question here is not what Matthews the purchaser has done and proposed to do with the goods, but what was the business of the vendors who sold to them, and there seems to be no dispute that this company, the original debtor, was a dealer in auto supplies. The character of the bill bought of plaintiff would of itself well-nigh suffice to establish the nature of their business, and there seems to be no dispute about it in the record. The case cited for defendant, *Swift v. Tempelos*, was the sale of supplies held for the purpose of a restaurant, which were not usually disposed of directly to customers, but only used for the purpose of making their food acceptable to their individual patrons in the ordinary run of their trade and occupation, and, while a bulk sale of such an enterprise was excluded from the effect and operation of the statute, it was treated as an exception coming very near to the border line, and in the well-considered opinion of Associate Justice Walker, the inclusive character of the terms used

in the statute "a stock of merchandise" was fully recognized. In the original series of 5 Words and Phrases, p. 4478, Webster's definition of Merchandise is said to be "objects of commerce; whatever is usually bought and sold in trade or market or by merchants; wares, goods, commodities." And, citing several decided cases, the term is further there defined as including "all those things which merchants sell either at wholesale or retail, as dry goods, hardware, groceries, drugs," etc. And again the definition is given as "commodities or goods to trade with," saying that the word came into use as designating the goods and wares sold at fairs and markets. And in the decision referred to and much relied on by defendants, and also in *Gallup v. Rozier*, the supplies ordinarily sold in a garage are expressly recognized as coming within the statutory terms.

The question of the liability of J. P. Matthews as one of the purchasers or a member of the firm, etc., must be determined under the principles ordinarily applicable to his case as presented in the pleadings and evidence, but on the record we are of opinion, as stated, that this transaction between the Morris-Divers Company and the Matthews Auto Electric Company comes within the provisions of the statute governing sales in bulk, that the purchaser must account for the value of the goods, etc., and for the error indicated plaintiff is entitled to a new trial of the cause; and it is so ordered.

New trial.

(181 N. C. 499)

COBLE v. LEGG. (No. 329.)

(Supreme Court of North Carolina. April 6, 1921.)

Appeal and error. \Rightarrow 1002.—Verdict on conflicting evidence conclusive.

Where the controversy was almost entirely one of fact, presenting no serious question of law, and the evidence was conflicting on the issues in the case which were fairly submitted to the jury, a judgment rendered on the jury's special findings will not be reversed.

Appeal from Superior Court, Alamance County; Allen, Judge.

Action by John M. Coble against M. F. Legg. Judgment for the plaintiff, and defendant appeals. No error.

This was an action to recover \$452.50 alleged to be due as commissions on the sale of three motortrucks for defendant under a verbal contract. There was conflict in the evidence which was fairly submitted to the jury. The defendant pleaded a counterclaim of \$45 paid by him for freight on another truck which he alleged the plaintiff should have paid and \$10 paid by him for

lettering on a truck which he alleges the plaintiff had agreed to have done. The court submitted two issues:

(1) Is the defendant indebted to the plaintiff? If so, how much? To which the jury responded, \$452.50.

(2) Is the plaintiff indebted to the defendant? If so, how much? To which the jury responded, \$55.

And thereupon the court rendered judgment in favor of the plaintiff for the difference, \$397.50.

Hicks & Son, of Henderson, for appellant.

Parker & Long, of Graham, and W. S. Coulter and A. H. King, both of Burlington, for appellee.

PER CURIAM. Upon examination of the record and assignments of error, it is apparent that the controversy was almost entirely one of fact, and no serious question of law is presented. There are three exceptions to the evidence which do not require discussion. There are also exceptions to the failure to nonsuit, and refusal to charge that there was no evidence as to certain facts, and for submitting the matter to the jury, and for refusal to set aside or modify the verdict because against the weight of the evidence, and to the charge; but upon careful consideration of the whole case we see no sufficient ground to disturb the result.

No error.

(181 N. C. 491)

INGRAM v. ATLANTIC COAST LINE R. CO.
(No. 292.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Master and servant \Rightarrow 137(3) — Railroad held not negligent in failing to keep lookout for brakeman on tender of backing engine.

A railroad company was not negligent in failing to keep lookout for a brakeman crushed between the engine and cars left by him on a storage track so that they were too near the track on which the engine was backing, while he was riding on the tender and giving signals to the engineer following them as his duty required.

2. Master and servant \Rightarrow 236(9)—Brakeman held guilty of contributory negligence barring recovery under federal act.

Where a brakeman in charge of placing cars on a storage track not equipped with a "jackknife" or a derailler to indicate clearance could easily see that he had left them too near a passing track, with the result that he was crushed between the backing engine and the cars while he was riding on the tender and giving signals to the engineer, recovery under the federal Employers' Liability Act was barred by contributory negligence as the sole cause of the accident.

Appeal from Superior Court, New Hanover County; Kerr, Judge.

Action by Nellie Ingram, administratrix, against the Atlantic Coast Line Railway Company. There was a judgment of nonsuit, and plaintiff appeals. Affirmed.

This is an action to recover damages for the death of the intestate of the plaintiff, caused, as the plaintiff alleges, by the negligence of the defendant, in that: (1) The defendant failed to keep a proper lookout down the track; (2) that the defendant failed to have a jackknife or derailler or other appliance on its storage track at Warsaw.

On the 9th day of March, 1908, at about 8:30 o'clock of a dark, rainy night, the intestate of the plaintiff was brakeman on a freight train going from Wilmington to Rocky Mount. As the train approached Warsaw it ran into a pass track for the purpose of letting a passenger train pass on the main line. After the passenger train passed the freight train backed onto the main line, and there the engine and tender and three cars were cut off for the purpose of placing the three cars in the storage track at Warsaw. The engine and the three cars then passed through the pass track and backed into the storage track, where the three cars were left.

The intestate of the plaintiff was in charge of this movement of the cars, and it was his duty after the three cars were placed in the storage track to pass down the cars on the storage track, there being then 26 or 27 cars on the track, and see that the cars were coupled together, and that the cars on the track were in the clear, by which is meant that they were to be far enough from the pass track that there would be no danger to cars or persons passing on the latter track.

It was the duty of the intestate to see that the cars were in the clear, and this duty was not imposed upon any other employee of the train, and it was the duty of the engineer to observe the signals of the intestate and follow them.

The evidence is that the intestate went to the end of the cars on the storage track, and that he then signaled the engineer to back down the pass track, and he, the intestate, got up on the tender of the engine, and as the engine backed the intestate was crushed and killed between the tender and cars on the storage track, which had been left by the intestate too close to the pass track.

The intestate was an experienced brakeman and familiar with the conditions at Warsaw and knew that there was no jackknife or derailler there.

It was also in evidence and uncontradicted that, without a jackknife or a derailler or any marker, an employee could easily tell whether a car was in the clear; that he could do so by standing on the rail of the pass track and reaching out, and if his hand

did not touch the car on the storage track it was clear and in a place of safety, or he could observe the curvature of the storage track as it left the pass track, and, if it was beyond the curve, it was in the clear.

A derailer is an appliance on the top of the rail, and a jackknife one that when operated separates two rails so that the ends do not come together. The principle purpose of each is to prevent cars on side tracks from running out on the main line, although they may also operate to indicate the point of clearance.

The evidence shows that, when cars were being placed in a track, it was the duty of the employee in charge of the movement where the derailer or jackknife was located, if there was one in use, to place them so that, if a car reached that point, it would not be derailed or thrown from the track, but would pass over the derailer or jackknife, and, after the movement or operation was completed, to go to the point and place the derailer or jackknife so that it would derail a car instead of letting it pass along the track.

It was also in evidence that at Warsaw there were three tracks, a main track, a pass track, and a storage track, and that the storage track was higher at both ends than in the middle; also that, when a track was built with both ends higher than in the middle, derailleurs, jackknives, etc., were not in use, although one witness stated that he had known these appliances to be used in four or five side tracks on the Seaboard system.

It was also in evidence that at one time clearance posts were in use, but that these had been abolished upon petition of the employees because dangerous to them in the operation of trains.

At the conclusion of the evidence his honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

E. K. Bryan, of Wilmington, for appellant.
Rountree & Carr and Carl H. Davis, all of Wilmington, for appellee.

PER CURIAM. [1] There is no evidence to sustain the first allegation of negligence, as it was the duty of the engineer only to keep a lookout for the signals of the intestate, who was then in charge of the movement of the train, and to follow his signals, and all of the evidence shows that he performed this duty.

[2] Nor do we think that the failure to have a derailer or jackknife had anything to do with the death of the intestate, who knew that there was no derailer or jackknife in the storage track, and whose duty it was to place the cars and see that they were clear of the pass track, and the responsibility for the performance of this duty rested solely on him.

If a derailer or jackknife had been in the track, and he had performed his duty, before pushing the cars into the storage track, he was required to set the appliances so that the cars would pass over them, and their use would not have prevented the cars from reaching the place where the intestate left them. He also could easily see where the cars were as they were much more easily perceived than the appliances referred to, and, according to the evidence, he could have ascertained definitely that the cars were not in the clear when he signaled to the engineer to move backward.

It appears, therefore, that the death of the intestate was caused solely by the failure on his part to perform the duty which had been intrusted to him alone, and under such conditions a recovery cannot be sustained under the Employers' Liability Act, which controls this decision, because the intestate was engaged in interstate commerce.

In *Railroad v. Skaggs*, 240 U. S. 68, 36 Sup. Ct. 249, 60 L. Ed. 528, an authority relied upon by the plaintiff, the plaintiff, a brakeman, was crushed between two cars because one had been left too near the track, and a recovery was sustained, but upon the ground that there was another brakeman connected with him in the operation of the train, and that the evidence supported the contention of the plaintiff that his injury resulted from the negligence of a fellow servant, but the court says in the course of the opinion:

"The statute does not contemplate a recovery by an employee for the consequences of action exclusively his own."

The syllabus in *Railroad v. Wiles*, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732, is as follows:

"There is no room for the application of the rule of comparative negligence established by the Employers' Liability Act of April 22, 1906 (35 Stat. at L. 65, c. 149; Comp. Stat. 1918, § 8657), where the rear brakeman of a parted freight train, disregarding his duty to protect the rear of his train by going back a short distance and giving the warning signals which the carrier's rules required, remained in the caboose and was killed there when a passenger train, which he knew was closely following, ran into the standing train, since his was the causal negligence, even if negligence could be imputed to the carrier from the pulling out of the drawbar which caused the train to break in two, there being no claim that the passenger train was negligently run."

In *Baughan v. Railroad*, 241 U. S. 237, 36 Sup. Ct. 592, 60 L. Ed. 977, the facts were much more favorable to the plaintiff than in this action, and it was held that the plaintiff had assumed the risk, and could not therefore recover.

Affirmed.

(181 N. C. 497)

**HOLMES et ux. v. ATLANTIC COAST
LINE R. CO. et al. (No. 289.)**(Supreme Court of North Carolina. April 6,
1921.)**1. Carriers ⇐281—Duty to render assistance
in alighting to passenger requiring it.**

Where a passenger was old and weak and had been ruptured, and the conductor was notified that she needed help in alighting, it was his duty to render her such assistance in alighting as was reasonably necessary in her condition.

2. Appeal and error ⇐930(1)—Verdict assumed supported by the facts.

The Supreme Court must assume that the verdict is supported by the facts, where there is nothing authorizing its impeachment.

3. Carriers ⇐319(2)—Evidence held to justify punitive damages for misconduct of conductor toward alighting passenger.

Evidence that a conductor, though notified that a passenger required assistance in alighting, because old and weak, refused to furnish a step box or permit a boy to get one, and was rude and rough and used insulting language, and threatened to carry her if she could not get off, tended to show inexcusable conduct justifying punitive damages.

4. Damages ⇐91(1)—When punitive damages allowable stated.

Punitive damages may be allowed when there is any element of fraud, malice, such degree of negligence as indicates reckless indifference to consequences, oppression, insult, rudeness, mere caprice, willfulness, or some other element of aggravation in the act or omission causing the injury.

5. Trial ⇐85—General objection to evidence good in part insufficient.

Where some of the evidence objected to is competent, the objection should be specific, and designate the parts supposed to be incompetent, and, when it is general, the exception cannot be sustained.

6. Carriers ⇐320(3)—In action for refusal to assist passenger, nonsuit properly refused.

In an action against a carrier for injuries sustained in alighting because of the refusal of the conductor to furnish the passenger necessary assistance, evidence held sufficient to justify the refusal of a nonsuit, and a peremptory instruction requested by defendant.

Appeal from Superior Court, Columbus County; Daniels, Judge.

Action by W. G. Holmes and wife against the Atlantic Coast Line Railroad Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Rountree & Carr, of Wilmington, for appellants.

Donald MacRackan, of Whiteville, and S. Brown Shepherd, of Raleigh, for appellees.

PER CURIAM. [1] The feme plaintiff was a passenger on the train of the defendant railroad company August 19, 1919, traveling from Wilmington, N. C., to Bolton, N. C. She was very old and feeble, and so informed the conductor, requesting him, at the time, to assist her in alighting from the train and to have a box for the purpose, which was not done. A boy who was standing near the train, when it stopped at the station, offered to go for a box, which was near by, but the conductor refused to let him do so, and threatened to "carry her on, if she could not get off," and was rude and rough to her, using insulting language. She sat on the floor of the platform and slid, or bumped, down the steps after the conductor had said, "Are you coming off or not?" to which she replied, "Well, if I have to get off without any help and expose myself and hurt myself I will have to do so." She added, "He could not have talked meaner to me." She further testified that it was too far from the ground for her to step from the car, and she was severely injured, in attempting to do so, that she had been ruptured, and "her ruptures were torn loose"; that she nearly fainted, and had to lie down for ten days and suffered great pain. The jury returned a verdict for the plaintiff assessing the compensatory damages at \$400 and the punitive damages at \$100. Judgment thereon, and the defendant appealed. The two instructions requested by the defendant were sufficiently covered by the charge. The real question was whether the jury believed the plaintiff or the conductor, and they believed the former. It was the duty of the defendant's conductor to render her such assistance for alighting from the car as was reasonably necessary in her weak physical condition. She was very old and had been ruptured. The conductor was notified that she needed help; he was put on his guard, but says he forgot it. The plaintiff was entitled to proper assistance, as she was aged and feeble, or infirm, which, if not apparent to the conductor, was made known to him by the son of the plaintiff, and by her before she alighted. *Morarity v. Durham Traction Co.*, 154 N. C. 586, 70 S. E. 938; *Moore on Carriers*, 682; *Hinshaw v. Railroad*, 118 N. C. 1052-1055, 24 S. E. 426; *Railroad v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308. This controversy would not have arisen if conductors would always treat their passengers with proper consideration. Courtesy and politeness are cheap commodities, costing little in the beginning but paying well in the end, while rudeness never pays, and often proves to be very expensive. It is

the conductor's duty to see that his employer does not suffer by his omission of duty and especially by his lack of civility and proper attention to those who because of apparent or known feebleness cannot help themselves or alight safely from the cars. *Lanier v. Pullman Co.*, 180 N. C. 406, 105 S. E. 21.

[2] The verdict may not be supported by the facts, but we must assume that it is, as there is nothing to authorize us to impeach it, and we have proceeded on the hypothesis of its correctness in what we have said. There was evidence here that step boxes were seen on the train, and the use of one of them would have saved the company a vast deal of trouble and annoyance, not to speak of the money loss.

[3, 4] The ruling of the judge as to punitive damages was correct in every particular. There was evidence tending to show inexcusable conduct on the part of the conductor, and such treatment of this old and feeble woman as justified the imposition of punitive damages, which may be allowed when there is an element of fraud, malice, such a degree of negligence as indicates reckless indifference to consequences, oppression, insult, rudeness, mere caprice, willfulness, or some other elements of aggravation in the act or omission causing the injury. *Holmes v. Railroad Co.*, 94 N. C. 318-323; *Thompson on Carriers of Passengers*, 157; 3 *Sutherland on Damages*, 270; *Ammons v. Railroad Co.*, 140 N. C. 198, 52 S. E. 731; s. c. 138, N. C. 559, 51 S. E. 127, 3 Ann. Cas. 886; *Wilson v. Railroad Co.*, 142 N. C. 340, 55 S. E. 257; *Stanford v. Grocery Co.*, 148 N. C. 427, 55 S. E. 815; *Stewart v. Lumber Co.*, 146 N. C. 47, 59 S. E. 545; *Hansley v. Railroad Co.*, 115 N. C. 607, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474; *Lanier v. Pullman Co.*, 180 N. C. 406, 105 S. E. 21. The other exceptions are without substantial merit.

[5] The objection to evidence is general, whereas some of it, at least, is competent. The exception, therefore, cannot be sustained. The objection should, in such a case, be specific, and designate that part of the evidence supposed to be incompetent. *State v. Ledford*, 133 N. C. 714, 45 S. E. 944; *Kennedy v. Trust Co.*, 180 N. C. 225-229, 104 S. E. 464; *Lanier v. Pullman Co.*, 180 N. C. 406, 105 S. E. 21.

[6] The charge of the court submitted the case to the jury pointedly and fully, and properly refused a nonsuit, and the peremptory instruction requested by the defendant. The verdict, as we have said, may be wrong, but we have to accept it as right, unless there was some error in law for which it should be set aside, and we have found none which justifies a reversal.

No error.

(181 N. C. 196)

COSTIN v. TIDEWATER POWER CO.
(No. 288.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Railroads ⚡312(13)—Warning of approach to crossing required.

It was the duty of a railroad company to give such signal by ringing a bell or blowing a whistle as would be reasonably sufficient to warn persons on the highway of the approach of cars, and the failure to give such signal is evidence of negligence, especially where the view at the crossing was obstructed.

2. Railroads ⚡320—Care to avoid injury required.

It was the duty of a railroad company, after a truck stopped on the track and a collision was probable, to stop its car if it could do so by the exercise of ordinary care in time to avoid striking the truck.

3. Railroads ⚡309—Neglect of duty actionable if proximate cause of injury.

The failure of a railroad company to perform its duty to ring the bell or blow the whistle for a crossing or to stop its cars when a truck has stopped on the track is negligence and gives a right of action if such negligence was the proximate cause of the injury.

4. Railroads ⚡350(7, 12, 32)—Issues of negligence in not warning and discovering automobile truck held for jury.

Evidence held to make questions for jury as to whether any signal was given of a car's approach to a highway crossing and whether the dangerous position of plaintiff, whose truck stopped on the track, could have been discovered in time to avoid the injury, and whether the failure to give the signal or stop was the proximate cause of the injury.

5. Railroads ⚡327(1)—Traveler required to use senses.

It was the duty of a traveler to exercise ordinary care as he approached a railway crossing and to use his senses of sight and hearing to the best of his ability under the surrounding circumstances.

6. Railroads ⚡335(5)—Unwarned traveler using faculties at obstructed crossing not negligent.

Where a traveler's view at a crossing was obstructed by a building, if no warning was given of the approach of a train, and, induced by this failure, he approached the crossing and was struck, having used his faculties as best he could under the surrounding circumstances to ascertain if there was any danger, negligence will not be imputed to him, but to the railroad company; the failure to warn being regarded as the proximate cause of the injury.

7. Railroads ⚡350(16)—Contributory negligence held question for jury.

Evidence as to whether plaintiff automobile truck driver looked and listened for cars as he approached a railroad crossing held to make a question for the jury as to his freedom from contributory negligence.

8. Appeal and error \Leftrightarrow 1051 (3)—Expression of opinion as to matter practically admitted by defendant's motorman not reversible error.

It was not reversible error to permit a witness who saw the danger of a collision between a railroad car and a motortruck and threw up his hand as a signal to testify that the car could have been stopped in time to avoid the injury, where the evidence showed the car was then 150 to 200 feet from the crossing, and the motorman practically admitted that he could at that time have stopped the car.

9. Evidence \Leftrightarrow 490—Nonexpert knowing conditions may express opinion as to distance in which car can be stopped.

One who is not an expert, but who knows the conditions, may express an opinion of the distance in which a car can be stopped, or the jury may form its own opinion from the evidence.

Walker, J., dissenting.

Appeal from Superior Court, New Hanover County; Daniel, Judge.

Action by A. H. Costin against the Tidewater Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover for alleged negligence in striking plaintiff while he was in an automobile truck crossing the tracks of the defendant, at Seagate (or Greenville Sound) station, and for damage to the truck. The allegations of negligence are:

"First. That defendant had a wooden building or structure on the side of its road near Seagate station to the east of the public road, which he alleges obstructed the view of the cars on the defendant's line coming from Wrightsville Beach to Wilmington to such an extent that persons riding in automobiles were unable to see the cars until they entered upon the track.

"Second. That as plaintiff entered on the track in an automobile truck he was struck by a street car, and that the conductor was negligent in not keeping a proper lookout and in not blowing his whistle.

"The defendant denied the allegations of the complaint as alleged, and set up that the plaintiff saw or could have seen the train before attempting to cross the crossing if he had stopped, looked, and listened at the proper place and time, and set up that the plaintiff was guilty of contributory negligence."

The public road crosses the track of the defendant at Seagate almost at a right angle. On the east of the road and between it and the track there is an icehouse or freight station with a platform on the side next to the track.

Mr. Gillette, a witness for the defendant, testified, among other things, as follows:

"The freight station is a small inclosure, with a platform. The edge of this house or platform is 18 feet from the center of the hard surface road—that is, the western edge. The

distance from the northern edge of the platform to the railroad track, the south rail, is 6 feet. The northern edge of the platform is next to the railroad, and the freight shed is on the south side of the track and on the east side of the county road. The freight station is shown on the map as an icehouse. The northern end of that freight station is a platform, a portion of which is inclosed and a portion not inclosed. The uninclosed portion is the north edge of the platform. Half of it, 5 feet 1 inch, is not inclosed. From the inclosed portion of that platform to the rail is 11½ feet of unobstructed view. The county road coming from the south to the railroad going towards Wilmington has about 1 per cent. down grade towards the track. The platform is 3 feet 10 inches from the ground level to the top of the platform. * * * I should say a person standing at the platform, point C, could see a train coming up the track eastward at least 300 feet. Standing at C, he could see to the point marked T-2, at least three hundred feet. * * * The ice house and platform combined, from north to south, is twenty eight feet four inches long. The ice house itself is eighteen feet two inches long. * * * If this machine was beyond the platform, he could probably be seen as far from a motorman on a car as the car could be seen at least 200 feet."

The point C referred to by the witness is marked on the map introduced by the defendant as 10 or 11 feet from the track.

The plaintiff testified in his own behalf as follows:

"On the 10th of August, 1917, my wife and myself boarded the train at Atkinson on our way to Wrightsville Beach. We arrived in Wilmington in time to catch the 11 o'clock car out to the Beach. When I purchased my ticket, I purchased a ticket to Seagate only, intending to get off there and go out to a little farm I owned on the turnpike road to the left of the track going toward the Beach and to later join my wife on the Beach. The car stopped at Seagate, and I got off on the right-hand side near the little station house. The car passed on, and I noticed, standing in the western edge of the Seagate road, a truck which was about 25 or 30 feet, I suppose, from the track on the same side of the track that I got off. This truck was operated by Mr. Ben Harper, who lived with his father out on my place. I inquired for Mr. Harper, didn't see him around there anywhere, and I was told he was over to a cold drink stand about 40 or 50 yards from the station, and I walked over there and spoke to Mr. Harper and asked him if he was going over to my place, and he said that he was. I told him I wanted to go with him; so in a very short time we walked on back toward the station. We were all the while in full view of the track below this building toward the Beach down to the creek. There was no car there. No car whistle blew. Didn't hear the roar of any car, so we passed on, and just before going behind the building to the truck I again looked, but there was no car there and no car whistle blew. I didn't hear the roar of any car. We walked on to the truck, and I spread out a newspaper

on the seat to protect my clothes and got up on the seat. Mr. Harper walked around to crank the truck, and while he was going around I again looked and listened. There was no car whistle blew, didn't hear the roar of any car, didn't see any car, and he immediately cranked up the truck, and we felt it perfectly safe to cross the track. Other people were going and coming, and he immediately proceeded to cross the track slowly and in low gear, and just as the front wheels of the car entered the first track I noticed that the truck came to a stop at once throwing me forward, and I looked up and saw Mr. Harper was busily engaged trying to get the car off the track, and then I immediately looked down the track and saw this car coming from behind the building at a distance of 25 feet, running slowly, slightly up grade. It ran on up slowly and bumped our truck suddenly, jarring it forward a distance of 2 or 3 feet, and then immediately came against it with tremendous force, everything flying up with a terrible crash, and at this point I was hit in the back. The car hit me in the back, knocking me off into the sand, and I fell into the sand. The truck was then drug ahead of the car a distance of about 20 feet towards Wilmington. The building that stood at the junction between the car line and the Seagate road is a dilapidated looking affair and it has a platform in front of it. The platform stands about 12 inches, I suppose, from the end of the cross-ties; has an open space over it which readily enabled the motorman on that car, in the elevated position that he was, to see the radiator on that truck at least 40 or 50 feet before he reached it. While we were sitting back on the seat of the truck we were not able to see the car until it was within a much closer distance to us."

There was other evidence that the defendant gave no signal or notice of the approach of its car to the crossing and that the crossing was much used.

G. V. Larsen, a witness for the defendant, testified as follows:

"I was at Seagate the date of this accident. I left the house, and just as I came out of the door the passenger car was going down. I walked on down the middle of the road, and just before I got to the station, when I was about 150 or 180 feet from it, I heard a whistle blow, sound like it was on the other side of Bradley's Creek, a station blow; blowed one time; didn't blow for any crossing at all, just blowed one time; and I went on a little further, and about that time I seen a car come around the curve, and Mr. Costin and Mr. Hanby and Mr. Harper was in the car. I hollered to them, but the machine was making a lot of noise, and they didn't hear me. When I hollered the second time they had started off, and I hollered a third time. I hollered the third time, and Mr. Hanby looked around. I threw up my hand to the motorman, and Mr. Hanby rolled off; didn't jump off, but rolled off. The car hit plaintiff's truck just at the wind shield; drug him up the road a distance of about 20 feet right at the crossing; drug him up the road a distance of about 20 feet right at the crossing; drug him a distance of about 20 feet. I didn't see the driver of the truck turn his

truck at all. He drove out on the road and started on the track. The car hit him about where the windshield belonged. The driver jumped out of the seat over the door on the left-hand side, and Mr. Costin was mashed down between the steering wheel and the work car. He was not thrown out. Mr. Hanby took him out. I hollered at them three times. I stuck my hand out to the motorman. Nobody paid any attention to me. * * * The motorman didn't seem to pay any attention to me when I waved. He was looking out the door at me, and couldn't help but see me. He said he saw me. He did not stop his car until after they hit. I think the street car was going somewhere between 8 and 10 miles when I first saw it, just as it came around the curve. I couldn't say whether the signal I heard was made by the freight car; it was too far off. It might have been made by a passenger car. It was a station blow. It wasn't a crossing signal. Never heard any signal given for the crossing, horn blown, or bell rung by the street car. * * * I wasn't waving at the men on the truck. I was waving at the fellow on the car. When I threw up my hand Mr. Hanby looked around and rolled off the truck. When I waved my hand Mr. Costin and the driver of the truck were not looking in my direction. They were kinder faced away from me. I was at right angles to them. I was in the middle of the track when I threw my hand up, about 180 feet from where the crossing was, looking straight down the track to the approaching car. The motorman was standing in the door looking straight down the track toward me. He was looking in my direction when I threw up my hand and hollered. Q. I will ask you, Mr. Larsen, if that motorman had applied the brakes to his car at the moment when he saw your signal or the moment you threw up your hand and hollered, if he could have stopped that car before it reached the crossing and struck the truck? A. He could."

Defendant excepted.

The motorman testified that he blew for the crossing, and, among other things:

"Just before I got to this little station you could see up and down the road each way, and I looked out and saw that the road was clear each way, and just as I got near the crossing was when I saw Larsen. He threw up his hand, but didn't realize there was anything standing behind the icehouse. or anything of the kind behind the station. I shut off my current then. I was going very slow, and just about the time that I got to the crossing I saw the truck, and supposed that he saw me. He turned that way, and there was a colored man I had on the line car that was sitting right on the south corner of the line, and when he turned that way he hit just back behind, possibly a foot or 2 behind where this man was sitting, and turned and ran on the side of the road a distance of possibly 15 or 18 feet. When I saw the truck I immediately applied the brakes and stopped in 15 or 18 feet. I would judge my car was going about possible 10 or 12 miles an hour. Brakes were in good condition. There was nothing I could have done right at that time when I saw this truck coming toward the track. * * * At the time of the acci-

dent I was looking out of the window. I saw Mr. Larsen when he threw up his hand. I possibly could have stopped the car at that time before the accident."

The curve referred to by witness Larsen is 150 or 200 feet from the crossing.

There was other evidence sustaining the contentions of the plaintiff and defendant.

At the conclusion of the evidence the defendant moved for judgment of nonsuit upon the ground: (1) That there is no evidence of negligence on the part of the defendant; (2) that upon the whole evidence the plaintiff is guilty of contributory negligence. The motion was overruled, and defendant excepted. The same point is presented by several prayers for instruction.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

George Rountree and Thomas W. Davis, both of Wilmington, for appellant.

J. H. Stringfield, of Atkinson, and McClammy & Burgwin, of Wilmington, for appellee.

ALLEN J. The exception chiefly relied on by the defendant is to the refusal to enter judgment of nonsuit, the defendant insisting that there is no evidence of negligence, and that upon the whole evidence plaintiff was guilty of contributory negligence.

The principles determinative of the questions raised by this exception are so well settled and they have been discussed so recently in several cases that it is only necessary to state them.

[1] It was the duty of the defendant as it approached the crossing to give such signal as would be reasonably sufficient to warn persons on the public road, which crossed the track, of the coming of the car by ringing the bell or blowing the whistle, or both, if necessary and the failure to give such signal would be evidence of negligence, and this duty was more insistent because the view of the motorman and of the plaintiff was obstructed by the icehouse or freight station.

[2] It was also the duty of the defendant, after the truck stopped on the track, if a collision was probable, to stop its car, if it could do so by the exercise of ordinary care in time to avoid striking the truck.

[3] If it failed to perform either duty, it was negligence, and if there is evidence that such failure of duty was the proximate cause of the injury, the action can be maintained. *Bagwell v. Railroad*, 167 N. C. 615, 83 S. E. 814; *Norman v. Railroad*, 167 N. C. 533, 83 S. E. 835, Ann. Cas. 1916E, 508; *Goff v. Railroad*, 179 N. C. 219, 102 S. E. 320; and *Perry v. McAdoo*, 180 N. C. 290, 104 S. E. 673.

[4] Is there evidence that the defendant did not give notice of the approach of the car to the crossing or that the truck stopped on the track, and that by the exercise of ordinary care the defendant could have dis-

covered the danger of a collision in time to stop and avoid the injury?

The plaintiff testified that as he was approaching the track he was listening, and that he heard no signal from the approaching train, and there was other evidence to the same effect. He also testified that the truck stopped when it reached the track; that the head of the truck could have been seen by the motorman when he was 40 feet from the crossing; that he himself saw the car when it was 25 feet from the crossing; and that the truck had then stopped.

The witness Larsen evidently saw that a collision was imminent, because, when he saw the truck approaching the crossing and the car coming, he got in the middle of the track, threw up his hands, and called out three times to attract the attention of the motorman, and that when he first saw the car and threw up his hand the car was about the curve 150 or 200 feet from the crossing. He also states that the motorman saw him.

The witness Gallette testified that at a point about 11 feet from the track you could see up the track in the direction the car was coming about 200 feet.

* The motorman testified that when he applied his brakes he stopped the car in 18 or 20 feet.

Upon this evidence the jury could well find that no signal of the approach to the crossing was given; that the car, which was running at 8 or 10 miles an hour, could have been stopped in 18 or 20 feet; that the motorman was put on notice by Larsen when 150 or 200 feet away that there was some danger at the crossing; that in any event the motorman could have seen the truck as it approached the crossing when 40 feet away, and that he could have seen the truck after it stopped on the track 25 feet away; that the car could have been stopped in 18 or 20 feet, and, if so, there was evidence to support the contention of the plaintiff that the defendant was negligent in failing to give the proper signals, and also that it could have discovered the dangerous position of the plaintiff after the car stopped in time to stop its car and avoid injury to the plaintiff.

It was also a reasonable inference to be drawn from the evidence that, if the whistle had been blown, it would have been heard and the truck would have been stopped before it reached the track of the defendant, and that the real and proximate cause of the injury was the failure to give the signal or the failure to stop after the dangerous position of the plaintiff could have been discovered.

[5, 6] It was also the duty of the plaintiff to exercise ordinary care as he approached the crossing and to use his sense of sight and hearing to the best of his ability under the surrounding circumstances, but, as his view was obstructed by the icehouse, which was in

part on the right of way of the defendant and a part of it used by the defendant, if the defendant failed to warn him of the approach of its train and to give the proper signals as its car approached the crossing, and, induced by this failure of duty, the truck approached the crossing and was struck, and the plaintiff injured, he having used his faculties as best he could under the circumstances to ascertain if there was any danger ahead, negligence will not be imputed to him, but to the defendant; the failure to warn him being regarded as the proximate cause of any injury he received. *Johnson v. Railroad*, 183 N. C. 443, 79 S. E. 690, Ann. Cas. 1915B, 598, approved in *Goff v. Railroad*, 179 N. C. 220, 102 S. E. 320.

[7] The plaintiff testified that after he reached Seagate he found a truck standing 23 feet from the track which he recognized as one used on his farm, which was within a short distance of the station; that he inquired for the driver of the truck and found that he was at a cold drink stand about 50 yards from the track; that he went to the drink stand and found the driver, who said he would take him to his farm on the truck; that he then started towards the truck; that upon leaving the cold drink stand he could see down the track towards the beach; that he looked down the track at that time and saw nothing; that as he was going towards the track he looked two or three times and saw no car nor did he hear any whistle blow; that he got on the truck, but that his view was then obstructed by the icehouse; that as the driver walked around to crank the truck he looked and listened, and that he heard no car whistle nor did he hear the roar of the car; that he looked down the track just before going behind the building going to the truck; that the truck started, and it proceeded to cross the track slowly and in low gear, and as it reached the track it stopped.

If this evidence is true, and its credibility was for the jury, the plaintiff was doing all that he could under the circumstances for his own safety, and it cannot be declared as matter of law that he was guilty of contributory negligence.

[8] The exception to the expression of opinion by the witness Larsen that, "if that motorman had applied the brakes to his car at the moment when he saw your signal or the moment you threw up your hand," the car could have been stopped before it reached the crossing, is without merit.

According to the evidence the car was 150 or 200 feet from the crossing when Larsen first threw up his hand, and the motorman practically admits that he could at that time have stopped the car in time to avoid the injury, so that the evidence was about a matter that was really not in dispute.

[9] If, however, it was otherwise, it has

been held that one who is not an expert and knows of the conditions may express an opinion of the distance in which a car can be stopped, and indeed that the jury may form its own opinion from the evidence. *Deans v. Railroad*, 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902.

We have examined the parts of the charge excepted to and find that they conform to the opinions of this court.

No error.

WALKER, J., dissents for the reasons stated in his opinion filed in *Perry v. McAdoo*, at the last term, 180 N. C. 290, at 299, 104 S. E. 873, in regard to the duty to stop, look, and listen.

(115 S. C. 515)

Ex parte COLEMAN et al.

Petition of WALLACE & BARRON et al.

(No. 10593.)

(Supreme Court of South Carolina. March 22, 1921.)

Interest \Leftrightarrow 22(9)—Interest not allowable on judgment for counsel fees not entered.

Where a judgment for attorney's fees was not entered and enrolled as the law provides, so as to make it a money judgment, and was not a decretal order upon which an execution could issue, interest may not be allowed thereon.

Appeal from Common Pleas Circuit Court of Union County; Thomas S. Sease, Judge.

In the matter of William Coleman and another as executors of the estate of Anna E. Rice, deceased. Petition of Wallace & Barron and Geo. S. Moyer, for counsel fees. From an order of the common pleas circuit court sustaining an order of the probate court allowing interest on attorney's fees, the executors except and appeal. Exceptions sustained, and order reversed.

See, also, 111 S. C. 484, 98 S. E. 538.

John Gary Evans, of Spartanburg, for appellants.

Wallace & Barron, of Union, for respondents.

WATTS, J. This is the third appeal in this cause. This is an appeal from an order of his honor, Judge Sease, sustaining an order of Probate Judge W. W. Johnson, wherein interest was allowed on attorneys' fee, due to Wallace and Barron and Geo. S. Moyer, Esqs. The exceptions must be sustained. There was no entry and enrollment of the judgment, as the law provides for, so as to make it a money judgment. "A decretal order upon which an execution may be taken out is a final decree." *Haskell v. Raoul*, 1 McCord, Eq. 32. "It must be a de-

cree upon which an execution could be issued." Ex parte Farrars in Re Garrett v. Dial, 13 S. C. 254.

Exceptions sustained, and order appealed from reversed.

GARY, C. J., and FRASER and COTH-RAN, JJ., concur.

(115 S. C. 506)

STATE v. BING et al. (No. 10589.)

(Supreme Court of South Carolina. March 19, 1921.)

1. Jury \S 131(4)—Held not error for the court to refuse to ask juror from what part of the county he came.

In a criminal prosecution, it was not error for the court to refuse to ask each juror what part of the county he was from, because requested by defendants' counsel to do so, on the ground that there was a prejudice against defendants in certain parts of the county.

2. Criminal law \S 696(2)—Witnesses \S 337 (6)—Defendant must move to strike out objectionable answer; asking defendant witness about former conviction held proper to test credibility.

Under Cr. Code 1902, \S 64, in a prosecution for burglary, it was proper to ask one of defendants, a witness, if he had been convicted for housebreaking prior to such time, and for the court to rule such testimony admissible for testing the witness' credibility; and if defendants' counsel regarded the answer as inadmissible or not responsive to the ruling he should have moved to strike it.

3. Criminal law \S 531(3)—Confession held inadmissible because obtained by threats and violence.

In a prosecution for burglary, evidence held to show that defendant's confession was extorted by threats and violence, so that the presiding judge erred in ruling that the confession was voluntary.

Appeal from General Sessions Circuit Court of Hampton County; I. W. Bowman, Judge.

Tom Henry Bing and others were convicted of breaking into a store and stealing money therefrom, and they appeal. New trial granted.

T. Hagood Gooding, of Hampton, for appellants.

George Warren, Sol., of Hampton, for the State.

GARY, C. J. The following statement appears in the record:

"There were two indictments for the alleged breaking into a store in this county and stealing money therefrom. One indictment was against the defendants Tom Henry Bing,

Franklin Gordon, and Horton Gordon, and the other against the defendant Joe Williams; both indictments charging burglary.

"The state relied principally upon alleged confessions of the defendants, and the defendants pleaded that the alleged confessions were obtained under duress.

"Counsel for defendants made a motion for a directed verdict, upon the ground that it was conclusively shown that the alleged confessions were made by defendants under the fear of losing their lives, induced by severe whippings administered by arresting parties, and other circumstances showing duress. Motion was refused.

"At the conclusion of the testimony the solicitor stated that he would not ask for a conviction of burglary, but only of grand larceny. The jury found the defendants, with the exception of Franklin Gordon, guilty of grand larceny. Thereupon counsel for defendants gave notice of a motion for a new trial, upon the grounds that the testimony showed that the alleged confessions were made under duress, and upon the further ground that the defendant Joe Williams was allowed to answer, in response to the solicitor's cross-examination, that he had been on the chain gang before. The motion for a new trial was refused."

[1] The defendants, with the exception of Franklin Gordon, were sentenced by the court, and appealed upon exceptions, the first of which is as follows:

"Because his honor, the presiding judge, erred in refusing the request of counsel for the defendants that each juror be asked upon presentation what part of the county said juror was from, and holding and deciding that this was the preliminary work of counsel for the defense and not a matter to be asked on the trial of the cause; whereas, it is respectfully submitted that such question on the part of the court was proper at this time to fully protect the interests of the defendants, inasmuch as the testimony shows that there was strong feeling in the neighborhood of the alleged robbery against the alleged robbers, and citizens from this part of the county were highly incensed over same, and the refusal of his honor to put this question at the request of the defendants was prejudicial to their rights and their constitutional guaranty of a fair and impartial trial."

The question presented by this exception thus arose:

"Mr. Gooding: Before we proceed with the case, I would like to ask the court to ask each juror what part of the county he is from.

"The Court: What say you to that, Mr. Solicitor?

"Mr. Warren: That is not a proper question here. Counsel ought to find that out ahead of time.

"The Court: I think so. That is preliminary work of counsel, and is not a matter to be asked here, on the trial of this case."

The admissibility of testimony must, necessarily, be left in large measure to the dis-

cretion of the presiding judge; and it has not been made to appear that it was erroneously exercised.

[2] The second exception is as follows:

"Because his honor, the presiding judge, erred in allowing the state, upon cross-examination of the witness Joe Williams, to question said witness as to an alleged former conviction for housebreaking over the objection of the defendant's counsel; whereas, it is respectfully submitted that such questions were irrelevant and incompetent, in that the defendant had not put his good character in issue, and same could not be attacked by the state, and such questions and the testimony adduced therefrom could have no other effect than to prejudice the jury against the said defendant."

On the cross-examination of the defendant Joe Williams, the record shows that the following took place:

"Q. You have been in court before? A. Yes, sir.

"Q. What did they have you up for?

(Mr. Gooding: That has nothing to do with this case, and I object to it, if the court please. Mr. Warren: It has something to do with the credibility of the witness. The Court: He may test his credibility, Mr. Gooding.)

"Mr. Warren (continuing): They had me up for housebreaking, and the jury convicted me, and I went on the chain gang."

Section 64 of the Criminal Code of 1902 is as follows:

"In the trial of all criminal cases, the defendant shall be allowed to testify (if he desires to do so, and not otherwise), as to the facts and circumstances of the case."

If he testifies in his own behalf, he may be cross-examined as to such facts and circumstances as affect his credibility, but not his general character. *State v. Knox*, 98 S. C. 114, 82 S. E. 278; *State v. Peterson*, 35 S. C. 279, 14 S. E. 617; *State v. Mills*, 79 S. C. 187, 60 S. E. 664; *State v. Kennedy*, 85 S. C. 146, 67 S. E. 152.

The ruling of his honor, the presiding judge, that the credibility of the witness might be tested, was in accordance with these decisions. At the time of the ruling it did not appear how the credibility of the witness was to be tested. Therefore the defendants' counsel should have made a motion to strike out the answer of defendant, if he regarded it as inadmissible and not responsive to the ruling of his honor, the presiding judge. A similar question arose in the case of *State v. Mills*, 79 S. C. 187, 60 S. E. 664, in which this court thus ruled:

"When this objection was made, there was nothing to show that the transaction inquired about was not one tending to affect the credibility of the witness. The circuit judge was not in error, therefore, at the time in admitting the question. Had the objection been made or renewed when it subsequently appeared the transaction did not tend to affect the credibil-

ity of the witness, it would have been error to allow the examination to continue. * * * But the objection was not made at that time, and must therefore be considered waived."

[3] The third exception is as follows:

"Because his honor, the circuit judge, erred in refusing defendants' motion for a new trial upon the ground that the alleged confessions were obtained under duress, it being respectfully submitted that all of the testimony showed that the alleged confessions were obtained from the defendants through the application of bodily violence and threats of death, the testimony being borne out by the physical condition of the defendant Franklin Gordon, and the testimony of the state on this point, by their several witnesses, being that 'the whipping was not done while they were there,' or 'not that they knew of,' and in excluding defendants' motion for a directed verdict, on the same grounds."

Dr. C. A. Rush, a witness for the defense, says:

"I am a practicing physician and surgeon at Hampton. I know this negro, Franklin Gordon. I was called to the jail to examine him and found him suffering considerably with contusion of the posterior surface, that is, right down the side here (indicating to the jury); that extending from right along here (indicating to the jury) to down about here, and it had every appearance that he had been hit with some blunt instrument, and he was considerably bruised and swollen, and there was one place along about here (indicating) that was blistered, and also on his arm there was a sign of that. I think that the left arm was worse than the other one. Also the left testicle was badly swollen. He had some fever when I examined him. I gave him some medicine to relieve the pain, soreness, and suffering. He had the appearance of having been whipped.

"Cross-Examination.

"By Mr. Warren: Q. In fact he had been whipped, had he not, Dr. Rush? A. Yes, sir; he had."

The testimony of the defendant Franklin Gordon is supported by physical facts, and the only reasonable inference from the testimony is that confessions were extorted from the other defendants likewise by threats or violence.

A confession is not admissible unless it is voluntary, and the question whether it is voluntary must be determined, in the first instance, by the presiding judge; but if the only reasonable inference is that it was extorted by threats or violence it should be excluded. *State v. Rogers*, 99 S. C. 504, 83 S. E. 971.

His honor, the presiding judge, erred, therefore, in refusing to exclude the confessions from the consideration of the jury.

New trial.

WATTS, FRASER, and COTHRAN, JJ., concur.

(151 Ga. 332)

FORD v. STATE. (No. 2238.)

(Supreme Court of Georgia. March 16, 1921.)

*(Syllabus by Editorial Staff.)***Criminal law** \Leftrightarrow 1160—Refusal of new trial affirmed, when verdict authorized by evidence.

The judgment refusing a new trial will be affirmed, when the verdict is authorized by the evidence.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Shorty Ford, alias Julius Brown, alias Lemon Wright, was convicted of crime, and brings error. Affirmed.

A. R. Lawton, Jr., and A. P. Adams, both of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

BECK, P. J. No error is assigned upon any of the court's rulings made pending the trial; but the motion contains only the usual general grounds, that the verdict is contrary to the evidence and without evidence to support it. Upon an examination of the brief of evidence contained in the record, it appears that the verdict is not unauthorized by the evidence, and the judgment of the court below refusing a new trial is affirmed.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 336)

BOWDEN v. STATE. (No. 2293.)

(Supreme Court of Georgia. March 16, 1921.)

*(Syllabus by the Court.)***1. Criminal law** \Leftrightarrow 531(3)—Evidence held not to show confession involuntary.

The record does not disclose any evidence of compulsion used to elicit the statement made by the accused in response to the question as to why he killed the decedent; nor does it appear that he was induced to make the statement by the hope of any benefit to be derived from making it.

2. Criminal law \Leftrightarrow 400(7)—Homicide \Leftrightarrow 316—

Testimony that accused gave witness checks cashed by decedent incompetent as secondary; admission not ground for new trial where other testimony of same witness showed motive.

Testimony that the accused produced two or three checks for stated amounts; and handed them to the officer who had him in charge, was objectionable and should not have been admitted over the objection that no ground had been laid for the introduction of secondary evidence; but this evidence was not of such materiality as to require the grant of a new trial, in view of other evidence in the case.

3. Criminal law \Leftrightarrow 570(2)—Defendant has burden of proving insanity to reasonable certainty.

The court did not err in instructing the jury, upon the subject of the defense of alleged insanity of the accused at the time of the homicide, that, "when the defendant sets up this plea, the burden is upon the defendant to satisfy the minds of the jury to a reasonable certainty."

4. Criminal law \Leftrightarrow 48, 805(1)—Charge as to weakness of mind substantially correct; not error because of failure to charge on delusional insanity in connection therewith.

The court instructed the jury, in substance, that a person of weak mind would not be exempt from criminal responsibility if he had sufficient mental capacity to distinguish between right and wrong and to "understand that his act [the one he is charged with committing] is against the criminal laws of the state of Georgia, * * * and that he is liable to be punished and held responsible therefor." Such a charge is not error. Nor was the charge error because it did not contain in immediate connection therewith a charge upon the subject of delusional insanity, especially as the evidence did not distinctly raise the issue as to this form of insanity.

5. Criminal law \Leftrightarrow 516, 781(2)—Statement of reasons for killing decedent constituting confession justified charge thereon.

There is evidence in the case to authorize the charge upon the subject of confession.

6. Homicide \Leftrightarrow 294(1)—Failure to charge on delusional insanity held not error.

Under the evidence in the case the court did not err in omitting to charge upon the subject of delusional insanity. The charge upon general insanity was sufficient.

7. Sufficiency of evidence.

There is evidence in the record to support the verdict.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Dave Bowden was convicted of murder, and he brings error. Affirmed.

Davidson, Callaway & De Jarnett, of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

BECK, P. J. Dave Bowden was tried under an indictment charging him with the offense of murder, and the jury trying the case returned a verdict of guilty, without recommendation. He was thereupon by the court sentenced to be hanged. A motion for a new trial was made and overruled.

[1] 1. A. J. Walton, sheriff, testified as follows:

"I was sheriff at the time this man [the accused] was in my charge. There was no hope

of reward held out to him at the time by me, or any one else, to make a statement to me. I asked him why he killed the woman, what the trouble was, and he gave me his pocketbook, with three checks, one for \$30, one for \$10, and one for \$8, that had been cashed by Cindy Jackson, and he said he had been giving her a good deal of money, and she had promised to meet him several times, and she had never done it, and he couldn't let her treat him that way. And I think the next day I approached him again; and he told me he wouldn't say anything else; he would wait and make his statement in the courthouse. His mental condition seemed to be all right. Yes; he was locked up and in my charge and under my authority. When I told him to tell me what happened, if he hadn't I wouldn't have done anything to him. I don't know whether he knew that or not."

This evidence was objected to on the ground that it appeared from the testimony of the witness himself that the statement made by the prisoner was not voluntary, and that the witness, the sheriff, induced the defendant to make this statement, and, moreover, that the prisoner "did not know what the sheriff would do to him if he did not make the statement to him after being asked to do so, and, further, because the evidence does not show that it was not induced by the slightest hope of benefit or the remotest fear of injury," and for the further reason that the introduction of the evidence was an attempt upon the part of the state to prejudice and bias the minds of the jury on the idea that a confession had been made by the accused. There is no merit in the objections stated. So far as the record discloses, the statement made by the defendant was voluntary. The accused had the privilege of further examination of the witness in order to adduce any circumstances showing inducement or compulsion used to elicit the statement made by the defendant.

[2] 2. The testimony that the accused handed to the sheriff three checks, one for \$30, one for \$10, and one for \$8, that had been cashed by Cindy Jackson, the decedent, should not have been admitted over the objection that the three checks were the highest and best evidence, and that testimony in reference to them was inadmissible, as no ground for introducing secondary evidence had been laid. But we do not think that this evidence was of such materiality as requires the grant of a new trial, although it was of some materiality. The other evidence given in this connection, which was unobjectionable, shows, if credible, that the defendant claimed that he had been giving Cindy Jackson, the woman whom he killed "a good deal of money, and she promised to meet him several times and she never done it, and he could not let her treat him that way." If the giving of the checks to the woman and her failure to comply with her promises of meeting the accused tended to show motive, motive of that character, as far as it could explain the homicide, was

shown by the testimony which was perfectly competent, coming from the mouth of the same witness, that the accused "had given her a good deal of money."

[3] 3. The defendant in the case admitted the fact of the shooting and killing, but set up the defense that he did not have sufficient mental capacity to render him responsible for the act under the criminal law; and the court, in reference to this contention, charged the jury, that—

"When the defendant sets up this plea, the burden is upon him to satisfy the minds of the jury to a reasonable certainty that the defense is true."

Movant assigns error upon this charge, contending that it required a higher degree of proof than that required by law, and that the court should in this connection have imposed upon the defendant no other burden than that of establishing this theory of the defense by a preponderance of the evidence. A similar question to the one here raised has been discussed in prior decisions made by this court, and it has been held that charges substantially the same as the one here criticized were not error. In the case of *Beck v. State*, 76 Ga. 452, it was said:

"There was no error in charging that the law presumes every person to be of sound mind, and the burden is upon the defendant to satisfy the jury, by evidence, to a reasonable certainty, that he was not of sound mind at the time of the commission of the act."

And in the case of *Hobbs v. State*, 8 Ga. App. 53, 68 S. E. 515, it was held:

"There is no merit in the exception to the instructions of the trial judge upon the subject of insanity. As every person is presumed to be sane, the burden of proving insanity or idiocy rests upon the defendant, and the insanity or idiocy need not be established beyond a reasonable doubt, but only to the reasonable satisfaction of the jury."

[4] 4. The court charged the jury further upon the subject of insanity and criminal responsibility:

"If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, and has sufficient mental capacity at the time to understand such act is wrong and in violation of the criminal laws of the land, and he will be punished for the commission of such an act, then he would be criminally responsible for such an act: that is, the law does not say, except to give the jury the definition of where a man would be responsible, and where he would not be responsible. Although a man may have a weak intellect, although his mind may not be very strong, yet the law says that, if he has sufficient mental capacity to distinguish between right and wrong and to understand the act he is about to commit is against the criminal laws of the state of Georgia, and if he comprehends at the time that such act is wrong and against the laws of the state of Georgia, and if he commits an act of that kind he is liable to be

punished and held responsible therefor, under those circumstances the law says he would have sufficient mental capacity to be responsible for his mental acts."

The charge in itself was substantially correct and applicable to the issues of the case; and the fact that the court did not charge some other principle of law in connection therewith is not a valid ground of criticism upon the charge as actually given.

[5] 5. Error is assigned upon the charge of the court relating to confessions, upon the ground that there is no evidence authorizing a charge upon that subject. The sheriff of the county, A. J. Walton, testified:

"I asked him about the killing, what caused the killing, and why he killed the woman, and he said he had given her a lot of money, and he gave me three checks, one for \$30, one for \$10, and one for \$8, and he said she had promised to meet him several times and had never done it, and he couldn't stand to be swindled out of his money in such way. After I asked him, he made that statement to me voluntarily. I didn't tell him it would be best for him to make it or hold out any inducement to him to make it. I didn't make any threats against him; he just answered my questions voluntarily. * * * He didn't mention it until I asked him about it. He was in jail, and I had him locked up in a cage. I asked him why he did it, and he told me. * * * I was sheriff at the time this man was in my charge. * * * I asked him why he killed the woman, and what the trouble was."

And this is followed by a statement which is substantially repetitions of the preceding answer of the accused to this question. The admissibility of this evidence has been ruled upon above; and it was held that it was admissible. With this evidence in, the court was authorized to charge upon the subject of confession. When the witness asked the defendant why he killed the woman, and he answered that he did it for certain reasons, stating them, this amounted to a confession. *Jones v. State*, 130 Ga. 274, 60 S. E. 840; *Thompson v. State*, 147 Ga. 745, 95 S. E. 292. It follows that a charge upon the subject of confession was proper; especially as it contained the usual caution that the jury would not consider the evidence unless they found that it was freely and voluntarily made, without being induced by another by the slightest hope of reward or the remotest fear of punishment.

[6] 6. The court did not err in this case, especially in the absence of a written request, in failing to charge upon the subject of delusional insanity. We have carefully examined the record and the testimony of all the witnesses, and the evidence does not raise the distinct issue of delusional insanity or show that the defendant was afflicted with that form of insanity at the time of

the homicide, or that he had been laboring under that form of insanity in the past. There is some evidence of his general insanity, and upon that subject the court charged.

[7] 7. There is some evidence to support the verdict.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 342)

CALLAWAY v. STATE. (No. 2304.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 511(2), 829(10)—Instruction on corroboration of accomplice held correct and requested instruction properly refused.

Upon the subject of the necessity of corroborating evidence and circumstances where the testimony of an accomplice with corroboration is relied upon by the state for conviction, the court instructed the jury, in substance, that the corroborating evidence must be such as tends to connect the defendant with the perpetration of the crime and to show his participation therein. This was a correct charge upon this subject; and the court did not err in refusing to give a charge, requested in writing, which stated a rule upon this subject correctly (if properly considered), but with less precision and exactness than the rule stated in the charge.

2. Criminal law \S 778(11)—Evidence held to warrant instruction on flight.

There was sufficient evidence on the subject of the flight of the accused to authorize a charge upon that subject.

3. Instruction not misleading.

The other part of the charge excepted to states a principle of law substantially correct; and, while the language employed is somewhat inapt, it did not obscure the meaning of the court, nor could it have misled the jury.

4. Homicide \S 250—Evidence held to support conviction of murder.

The evidence in the case was sufficient to authorize the verdict.

(Additional Syllabus by Editorial Staff.)

5. Criminal law \S 784(7)—Instruction on circumstantial evidence held correct and complete.

An instruction that where the evidence adduced to show guilt was circumstantial the jury could not convict unless the proven facts were not only consistent with the hypothesis of guilt, but exclude every other reasonable hypothesis, and that, in other words, where circumstantial evidence alone was relied on, if there was any reasonable conclusion to be drawn from the evidence consistent with his innocence, it was the duty of the jury to acquit, was correct and complete.

6. Criminal law \Rightarrow 780(4)—Instruction too favorable to accused if requiring circumstances corroborating accomplice to lead conclusively to inference of guilt.

A requested instruction that corroborating circumstances must be such as, independently of the testimony of the accomplice, would lead to the inference of guilt, and must in some way connect defendant with the criminal act, if meaning that the corroborating circumstances must lead conclusively to the inference of guilt, was too favorable to accused.

7. Criminal law \Rightarrow 780(4)—Requested instruction as to sufficiency of circumstances corroborating evidence held erroneous.

An instruction that, whether offered as the sole proof of guilt or in corroboration of an accomplice, the evidence, when alone relied on, must be sufficient to satisfy the jury of the guilt of accused to the exclusion of every other reasonable supposition, was properly refused as requiring that the corroborating evidence be in itself sufficient to exclude every reasonable hypothesis other than that of guilt.

Error from Superior Court, Fulton County; John D. Humphries, Judge.

Marvin Callaway was convicted of murder, and he brings error. Affirmed.

H. A. Allen, of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., of Atlanta, and R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

BECK, P. J. Marvin Callaway was convicted of the murder of Mack Herndon, and was recommended to life imprisonment in the penitentiary. He made a motion for new trial, which was overruled, and he excepted.

[1] 1. On the trial of the case the state relied upon the testimony of the accomplice who had been convicted of the crime with which the defendant was charged, and upon corroborating evidence; and the defendant's counsel at the trial in due time submitted to the court the following request to charge:

"Corroborating circumstances must be such as, independently of the testimony of the accomplice, would lead to the inference of the guilt of the accused, and must in some way connect the defendant with the criminal act. While it is true that the sufficiency of circumstances offered for the purpose of corroboration is a matter for determination by the jury, and the law cannot lay down a rule to measure the extent of corroboration necessary, still, where the only witness in a felony case is confessedly an accomplice, the corroborating circumstances are not sufficient to dispense with another witness, unless they are such as to connect the defendant with the crime. It is not sufficient for a witness to corroborate as to time, place, and circumstances of a transaction, if there is nothing except the statement of the accomplice to show any connection of the prisoner therewith; and facts which merely place upon the defendant a grave suspicion of guilt are not sufficient. Whether of-

fered as the sole proof of guilt, or in corroboration of an accomplice, the general rule applies that, where circumstantial evidence alone is relied upon, it must be sufficient to satisfy the jury of the guilt of the accused to the exclusion of every other reasonable supposition."

The court refused to give this charge, but did charge as to the necessity of corroborating evidence as follows:

"Usually the testimony of a single witness is sufficient to establish a fact. There are certain exceptions in law to this rule. One of these exceptions obtains in cases of felony; and this is a felony charged against the defendant in this case. The jury would not be authorized to convict upon the testimony of an accomplice alone, unless that accomplice's testimony is corroborated by other evidence in the case, either direct or circumstantial. While it is true that the sufficiency of the circumstances for the purpose of corroboration is a matter for determination of the jury and the law cannot lay down a rule to measure the extent of corroboration necessary, still, where the only witness is an accomplice, the corroborating circumstances referred to must be such as to connect the defendant with the perpetration of the crime and tend to show his participation therein."

[5] This charge of the court states completely and accurately the rule as to the necessity of corroborating evidence where the testimony of an accomplice, with corroboration, is relied upon for conviction. The court had already charged the jury that where the evidence adduced by the state to show guilt was circumstantial in its character, before the jury would be authorized to convict "the proven facts must not only be consistent with the hypothesis of guilt, but should exclude every other reasonable hypothesis save that of the guilt of the accused."

* * * In other words, where circumstantial evidence alone is relied on for conviction if there is any reasonable conclusion to be drawn from such evidence consistent with his innocence it is the duty of the jury to give the defendant the benefit of such conclusion and acquit him." This charge of the court upon the subject of circumstantial evidence and the necessity for corroborating evidence before the jury could convict on the testimony of an accomplice, stated both rules correctly and completely.

[8] If the rule upon the subject of corroborating evidence, that "corroborating circumstances must be such as, independently of the testimony of the accomplice, would lead to the inference of the guilt of the accused, and must in some way connect the defendant with the criminal act," is a stronger rule in favor of the defendant and means more than the rule laid down by the court in the charge actually given, then the charge given by the court is the better rule. Because, if the expression "corroborating cir-

cumstances must be such as, independently of the testimony of the accomplice would lead to the inference of the guilt of the accused," means that they must be such as to lead conclusively to the inference of the guilt of the accused, then that rule is too strong in favor of the accused. It is probable that where the Court of Appeals and the Supreme Court have used and approved that part of the charge embodied in the written request, and now under consideration, they meant by it to state in different language the rule laid down in the court's charge; because, upon this subject, the case of Childers v. State, 52 Ga. 106, lays down the rule that has been followed in other decisions where the same subject is involved. There it is said:

"The rule is, and ought to be, that some facts must be shown by other witnesses tending to show the guilt of the person on trial."

And in the headnote in that case it is said:

"In a case of felony, where the only witness implicating the prisoners in the crime was himself avowedly guilty, the corroborating circumstances necessary to dispense with another witness must be such as go to connect the prisoner with the offense, and that it is not sufficient that the witness is corroborated as to the time, place, and circumstances of the transaction, if there be nothing to show any connection of the prisoners therewith, except the statement of the accomplice."

The opinion in that case was agreed to by two Justices. Chief Justice Warner dissented, and in the course of an elaborate dissenting opinion he said:

"The statute does not require that the corroboration of the accomplice's testimony shall be restricted to any particular points in the case, and to what particular points shall the court restrict it? What shall be the extent of the corroborating circumstances? Shall the court confine it to the corpus delicti, or to the identity of the parties charged, or to the main elements which constitute the offense? If so, then there would be no necessity for introducing an accomplice in any case; the facts could be established without his testimony."

[7] But the rule laid down by the majority has obtained and now prevails. The language employed by Judge McCay in the Childers Case in stating the rule is sometimes varied, but the language of that case is the best statement of the rule. And any language that is more favorable to the accused than that used in the Childers Case is stating a doctrine more favorable to the accused than is sound. Besides, the court might well have refused to give the written request in charge, because it is in part clearly erroneous. In the request is embodied the following proposition of law:

"Whether offered as the sole proof of guilt or in corroboration of an accomplice, the general rule applies that where circumstantial evidence alone is relied upon it must be sufficient to satisfy the jury of the guilt of the accused to the exclusion of every other reasonable supposition."

Such a charge would have been manifest error, for it would have required that the corroborating evidence, if circumstantial in its nature (as it was here), should in itself be sufficient to exclude every other reasonable hypothesis than that of the defendant's guilt.

[2] 2. The court charged the jury upon the subject of the flight of the accused shortly after the commission of the crime charged. The correctness of the charge as a rule of evidence is not challenged, but its applicability is denied; movant contending that no evidence adduced upon the trial authorized the instructions upon this subject. The record does not support this contention, for it contains testimony of two police officers showing that on the day after the killing of Herndon search was made for the defendant in or near the city of Atlanta, and that he was not found. It was also discovered that on the day after the homicide he had gone to the naval recruiting office, where he had previously made application to be allowed to enlist, and there learned that his application had been refused; that shortly thereafter it was learned that the defendant was in Monroe, Va., and a member of the police force of Atlanta went to Monroe and returned with the accused on September 13th, two weeks after the homicide. The officer testifying as to these facts testified further:

"I asked him how many days it took him to make it over, and he said he made it pretty quick on account of some peach train, or cattle train; made it across pretty quick; that he was on that; while he was in jail he got out of his cage twice, he told me. * * * Said he took a piece of steel out of his shoe here; told me how he done it. * * * Said he made a key to the door, there was a padlock on it, and unlocked the door and came out."

There was sufficient evidence on the subject of flight to authorize a charge on that subject. The weight of the circumstances was for determination by the jury.

[3] 3. The other part of the charge excepted to states a principle of law substantially correct: and, while the language employed is somewhat inapt it did not obscure the meaning of the court nor could it have misled the jury.

[4] 4. The ground of the motion for new trial raising the contention that the evidence was insufficient to authorize the conviction is strongly urged in the brief and argument of counsel. The testimony of the accomplice was, in part, that on the same day as that on which the homicide was committed he

saw Callaway in the neighborhood of the factory, the exact situation being described by references to certain streets and bridges near the factory; that while he and the accused were waiting there they were joined by another person, Charles Powers; that the defendant handed the witness a piece of iron pipe, instructing him to strike an iron tank on a flat car as a signal if any one approached; that Callaway said he and Powers were going up to the factory to get a little money from the watchman, this place being about 40 feet from the factory in which the decedent was watchman; that upon leaving the witness the accused and the other person went up the railroad to the end of the Southern Furniture Company's building (the building in which the murder was committed); and that they took the inside of a fence near the factory and went to a certain window, and then went in. The witness states they were to give him a dollar apiece for watching. After they effected an entrance through the window, some one in the building holloed, and the witness ran. Some one in the building said, "O, Lordy," and the witness ran up Marietta street. The meeting of the three was about half past 5 or 6 o'clock in the evening. There was evidence to authorize a finding that the homicide took place between 6 and 8 o'clock p. m. Witness saw the accused afterwards that evening at a show, and he had two five-dollar bills and five ones in money. In substance, his testimony was that he was an accomplice; that the accused met him at a place near the factory at about 6 o'clock in the evening; that he entered the factory building of the Southern Furniture Company with the express purpose of robbing the night watchman there; that soon after the accused and another party entered the factory through a window a voice was heard crying out, and that shortly thereafter the defendant was seen by the witness, the accomplice, to have a stated sum of money—\$15. Such facts proved by another than an accomplice would have authorized a conviction of the accused. But before the accused could be convicted upon this testimony, inasmuch as the witness was already proved to be an accomplice, corroborating evidence was necessary; and we must look to the testimony of other witnesses not connected with the crime to find this.

It is shown by the testimony of other witnesses in the case that the accomplice, Berryhill, and the accused, Callaway, had both been employed in the factory of the Southern Furniture Company. They had left that employment some time before the commission of the homicide for which Callaway was on trial. Herndon was killed on the evening of Friday, August 29th; on Thursday before the homicide he was seen in the factory, according to the testimony of a witness intro-

duced by the state making inquiries as to whether certain acquaintances of his were still in the factory or not, and making remarks which seem to have no particular significance; but he also inquired who was night watchman at that time, and was informed that it was Mack Herndon, a negro man, who is referred to in the evidence by some of the witnesses as "old man Mack," or "old man Mack Herndon." One of the witnesses testified that he was in his 60's or 70's; another witness stated that he was 50 or 60 years of age. The jury were authorized to find that he was an old negro man. On Friday evening the employes of the factory were paid off, and the jury might have inferred from this that the accused knew that this was the day on which the employes received their pay, and that therefore the night watchman would be in possession of some money.

There was other evidence tending to show that the accused contemplated leaving the city, had made application for enlistment in the navy and went on the morning after the homicide to the recruiting office to know whether his application had been acted on, and there found that it had been refused. There is evidence of search made by police officers for the accused; that he could not be found about the city; his home was in the suburbs, and they went to his home, but were informed that he was not there. About ten days or two weeks after the homicide it was learned that he was in Monroe, Va. He had stolen a ride on a freight train, and in that way made the trip to Virginia. He had a piece of iron in his shoe, according to his own statement, that he could use to pick a lock and escape from a jail. One witness stated that he saw the accused in the factory on Thursday before the crime was committed, and when the accused saw him, the witness, he turned back into another door. The statement of the accused is very meager. In the brief of counsel he is referred to as a 15 year old boy. One of the witnesses testified that he was 16 or 17 years of age. At any rate, he was a mere youth. This fact, and the fact that the accused may have been laboring under embarrassment and excitement at the time of making his statement, may be considered in reading his statement. That statement in full is as follows:

"Gentlemen, I used to live in Baxter, Ga., and I came from Baxter to Atlanta, and then my father had been dead seven years and I never have been to school much in my life; and this statement from Francis Berryhill, he said I would kill him if he swore against me. I didn't tell him nothing of the kind. Gentlemen, I didn't have anything to do with this killing, none whatsoever. Gentlemen, I am innocent of this crime. My aunt Claudia gave me \$20, and I started for Washington and I got as far as Monroe, Va., and they caught me for hobnobing and locked me up and kept me un-

til the officers come and got me and brought me back to Atlanta. Gentlemen, that is all I have got to say."

It is pertinent to observe that there is nothing in the statement to account for the whereabouts of the accused at the time the crime with which he was charged was committed. It will also be observed that he says in his statement that his aunt had given him \$20, and he started for Washington and got as far as Monroe, Va. There was no evidence offered to show that the aunt referred to had actually given him the sum of money stated. The facts relied upon as corroboration may be trifling when viewed by themselves and separately from the entire case; but the jury had the right to consider all the facts and to consider them in their relations one to another, and to determine whether or not, considering the facts and comparing them in their proper setting, under the evidence adduced, they tended to connect the defendant with the commission of the crime and were a sufficient corroboration of the evidence of the accomplice to authorize a conviction of the accused under the law as given them by the court.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(26 Ga. App. 496)

COLLIER v. SCHOENBERG. (No. 11772.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by the Court.)

1. Evidence \S 121(2)—Principal and agent \S 22(2), 23(1, 2)—Agency may be established by principal's declarations; agent's declarations not admissible of themselves; may be proved by circumstances, apparent relations, and conduct; agent's declarations may be admissible as *res gestæ*.

The fact of agency may be established by declarations of the alleged principal. *Taylor v. Young & Co.*, 21 Ga. App. 40(1a), 93 S. E. 558. Declarations of an alleged agent are not by themselves admissible to prove agency, but it may also be established by proving circumstances, apparent relations, and the conduct of the parties; and where the extraneous circumstances, independently of and without regard to the declarations of the agent himself, clearly tend to establish the fact of his agency, his declarations, though inadmissible if standing alone, may, as a part of the *res gestæ* of the transaction, be considered. *Williams & Bro. v. King Hardware Co.*, 25 Ga. App. 680, 104 S. E. 454, and cases cited; *Cable Co. v. Walker*, 127 Ga. 66, 56 S. E. 108; *Martin & Hicks v. Bridges & Jelks Co.*, 18 Ga. App. 24 (2), 88 S. E. 747; *White Sewing Machine Co. v. Horkan*, 7 Ga. App. 283(3), 285, 66 S. E. 811; *Heitmann v. Commercial Bank of Savannah*, 7 Ga. App. 740, 743, 68 S. E. 51; *Small v. Williams*, 87 Ga. 681(2), 13 S. E.

589; *Hall v. Mize*, 142 Ga. 395(2), 83 S. E. 92; *Fowler v. Parks*, 138 Ga. 786(2), 76 S. E. 85; *Hood v. Hendrickson*, 122 Ga. 795(2), 50 S. E. 994; *Napier v. Strong*, 19 Ga. App. 401, 409, 91 S. E. 579. Applying the foregoing principles of law to the evidence in this case, the jury were authorized to find that the fact of agency had been established.

2. Master and servant \S 332(4)—Instruction held to state servant's acts must be within scope of master's business.

The judge charged the jury that if the person in charge of the defendant's car at the time of the injury was driving it "as the servant or agent of the defendant," the defendant would be responsible for any negligence of which the driver might be guilty. He did not amplify this statement by adding that such alleged acts of negligence by the servant must have been done in the prosecution of or within the scope of the master's business. *Held*, that such a charge cannot be accounted as reversible error, for while a master is bound by the acts of his servant only when the latter is acting within the scope of his authority (Civil Code of 1910, \S 3593, 4413), still, since the charge limited the accountability of the master for the negligence of the servant to his acts when done "as the servant or agent of the defendant," this should be taken as the equivalent of a statement that the acts must have been done within the scope of the master's business. *Fielder v. Davison*, 139 Ga. 509, 511, 512, 77 S. E. 618.

3. Evidence \S 32—Municipal corporations \S 706(1)—Trial \S 252(8)—Ordinance not pleaded, admitted, or proved should not have been charged; ordinance held not sufficiently pleaded; ordinance of Savannah cannot be judicially noticed.

The court erred in charging the provisions of a municipal ordinance of the city of Savannah, which had not been sufficiently pleaded or admitted by the defendant, or in any wise proved by the evidence.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by L. Schoenberg against H. M. Collier. Judgment for plaintiff, and defendant brings error. Reversed.

Shelby Myrick, of Savannah, for plaintiff in error.

Morris H. Bernstein and Simon N. Gazan, both of Savannah, for defendant in error.

JENKINS, P. J. [1-3] In regard to the city ordinance referred to in the third headnote, the court charged the jury as follows:

"There is a valid municipal ordinance of the city which requires that any person or persons operating or driving any vehicle upon the streets and lanes of this city, when turning into a street to the right, shall keep close to the right curb, and, when turning into the street to the left, shall swing wide of the left curb, passing beyond the center of the intersecting street. To violate that ordinance he would be

guilty of negligence as a matter of law, and if by reason of such a violation of the ordinance and such negligence a plaintiff or person is hurt or his property is injured, then there is a liability on the part of the person who did it, or whose employee did it."

It is contended that this was error, because the ordinance referred to was not set out or admitted by the pleadings or introduced in evidence, and that consequently it was harmful error for the judge, as a matter within his judicial cognizance, to charge it. The court, in the order overruling the motion for a new trial, stated that this ordinance was sufficiently pleaded for the court to take cognizance of it under section 4872 of the Code of Georgia 1882 (Code of Savannah 1918, § 131), which provides:

"All ordinances, by-laws, rules and regulations of said city, published by authority of said mayor and aldermen, and promulgated as such by said authority, shall be evidence in all the courts of this state to the same extent that laws of the state, as published by authority, shall be evidence of such laws; and when, in any case, an exemplification of any such ordinance, by-law, rule or regulation, minute of council, or any paper of file in any of the departments of the government of said city may be required, the same may be authenticated under the official signature of the mayor, or acting mayor, and the seal of said city."

In the pleadings the only reference to the ordinance is a meager statement in the petition that the defendant's agent or servant was negligent "in making a short turn as he was about to turn west in crossing Drayton street, when he was running north, in violation of the city ordinance requiring a long turn under those circumstances." This allegation was denied by the defendant's answer, and there was no proof offered by either party as to the existence of any such ordinance.

The general rule is that courts cannot take judicial cognizance of municipal ordinances. *Funk v. Browne & Leacy*, 145 Ga. 828 (2), 90 S. E. 64; *Taylor v. City of Sandersville*, 118 Ga. 63, 44 S. E. 845. That the general rule has application to the ordinances of Savannah would seem to be necessarily and clearly implied by the following cases: *Pounds v. Central of Ga. Ry. Co.*, 142 Ga. 415, 417, 83 S. E. 96; *Mayor & Aldermen of Savannah v. Jordan*, 142 Ga. 409, 414, 83 S. E. 109, L. R. A. 1915C, 741, Ann. Cas. 1916C, 240; *McDermott v. Mayor & Aldermen of Savannah*, 18 Ga. App. 308, 309, 89 S. E. 348. We think, therefore, that the court erred in charging the unpleaded and unproved ordinance.

Judgment reversed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 522)

MOBLEY v. HANSEN. (No. 11850.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by Editorial Staff.)

Trial ~~€~~426—Verdict in dispossession proceeding held cured by admissions of counsel on motion in arrest.

In a proceeding under a dispossessionary warrant under Civ. Code 1910, §§ 5385, 5386, if a verdict finding for plaintiff for \$420 was defective for failure to find on the eviction issue, the defect was cured by the admissions of defendant's counsel on motion in arrest of judgment, recited in the order overruling the motion, that defendant had vacated the premises, and that the amount of the verdict was double the amount of rent.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Dispossessionary proceeding by F. J. Hansen against A. L. Mobley. Judgment for plaintiff, and defendant brings error. Affirmed.

Myer Goldberg, of Fitzgerald, for plaintiff in error.

D. E. Griffin, of Fitzgerald, for defendant in error.

HILL, J. This was a proceeding under a dispossessionary warrant and a counter affidavit. Civil Code of 1910, §§ 5385, 5386. The verdict was as follows:

"We the gentlemen of the jury find in favor of the plaintiff entitled to recover \$420.00. July 6th, 1920."

On this verdict the court rendered the following judgment:

"The above-stated case having come on in its regular order for trial on the 6th day of July, 1920, and the uncontradicted evidence having shown that the defendant's term of rental had expired on the 31st day of December, 1919, and that demand had been made on him for the premises, and it further appearing that notice to vacate on December 31, 1919, said premises was personally served on the 10th day of September, 1919, and further that the reasonable rent of the said premises was \$40 per month, the same having been rented for this year and next, from January 1, 1920, at \$40 per month, and the court having directed that the jury find in favor of the plaintiff against the defendant the possession of the premises, and having directed the jury that they consider what would be reasonable rental for the premises, and double said amount and turn same into court, the jury having returned the following verdict, to wit: 'We the gentlemen of the jury find in favor of the plaintiff entitled to recover \$420.00, July 6th, 1920'—whereupon it is considered, ordered, and adjudged by the court that the premises in dispute, and the lot upon which the same is located, and all said premises in the city of Fitzgerald, in the county of Ben Hill, state of Georgia, be awarded to F. J.

Hansen, the plaintiff, and that the clerk of this court do issue a writ of possession accordingly. Ordered further that the plaintiff do recover of the defendant as principal, and W. R. Luke and Jehue Harper as securities, \$420 and costs to be taxed by the clerk of this court. This 14th day of July, 1920."

During the term at which the verdict and judgment were rendered the defendant filed a motion in "arrest of said verdict and judgment," on the following grounds: That the said verdict "is too vague, indefinite, and uncertain to support a judgment or the judgment" rendered in the case; "that there were two issues, both of which should have been covered by the said verdict, viz., the eviction issue, or whether or not the defendant was holding over and beyond his term of rental, and then the question or issue of reasonable rent," and the verdict failed to cover the eviction issue; "that an adverse finding against the defendant on this issue was necessarily a condition precedent before the jury could find double rent against" the defendant; and, the jury having failed to find on the eviction issue, the verdict "is entirely void" and so insufficient that a "judgment cannot be legally based thereon, and therefore the judgment" rendered in said case ought as a "matter of law" to "be arrested." On the hearing of the motion in arrest the court "overruled and denied the same. * * * counsel for plaintiff in error admitting that the plaintiff in error had vacated the premises from which he was * * * sought to be evicted, and had voluntarily surrendered the possession of same over to the defendant in error," and "having admitted that the verdict as found by the jury was double the amount of rent." Held: There was no error in overruling the motion in arrest. If the verdict was insufficient, as set out, the defect was fully cured by the admissions of the defendant, made in court and recited in the order overruling the motion in arrest.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 516)

McKALE v. HINES, Director General of Railroads. (No. 11814.)

(Court of Appeals of Georgia, Division No. 2. March 18, 1921.)

(Syllabus by Editorial Staff.)

1. Master and servant §106(1)—Master liable for defects in instrumentalities temporarily made part of plant.

A master is answerable, as owner pro tempore, for defects in instrumentalities tempo-

rarily taken over from the owner and made a part of his own plant.

2. Master and servant §106(1)—Third person's electric trucks left for recharging held no part of employer's plant.

A railroad company, operating electric trucks and maintaining a charging station, and, by agreement with a compress company, recharging its trucks but making no use of them, and having possession only for the purpose of recharging them, did not take over and use as a part of its plant a truck left in a shed near the charging station for recharging.

3. Master and servant §106(1)—Master not liable for defect in electric truck of third person left for recharging without actual knowledge.

A railroad company, operating electric trucks and maintaining a charging station at which, by agreement with a compress company, it recharged the trucks of such company, without making any use of them or having any possession of them except for the purpose of recharging them, was not the temporary owner of a truck so left for recharging, and was not charged with constructive knowledge of the defective condition of the brake, and, in the absence of actual knowledge, was not liable for injury to an employee.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by James McKale against Walker D. Hines, Director General of Railroads, operating the Central of Georgia Railroad. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff brought suit to recover damages for personal injuries received while in the employ of the Director General of Railroads operating the Central of Georgia Railroad, and the case is here on exceptions to the awarding of a nonsuit. The Central of Georgia Railroad has an electric charging station on its terminals in Savannah where its trucks are recharged after having finished the day's work. The Atlantic Compress Company had a cotton compress located adjacent to these terminals, and the compress company used the same sort of trucks in its business. Both the trucks of the Atlantic Compress Company as well as the trucks of the defendant were taken care of at this station; the compress company paying the Director General of Railroads for its proportion of the cost of the labor and supplies used in its behalf. The plaintiff was employed by the railroad company at this station, and it was his duty to recharge the trucks of both the compress company and of the defendant. There is a shed maintained by the defendant under which the trucks of both the defendant and the compress company are placed after the day's work is done for the purpose of being recharged at night, and it was the plaintiff's duty to operate the

trucks from this shed to the recharging station and there recharge the trucks. On the night of his injury the plaintiff undertook to operate a truck belonging to the Atlantic Compress Company from the shed in question, a distance of about 30 feet, from where it had been left by an employee of the compress company at the close of the day's work, into the charging station. While moving the truck into the station plaintiff was standing on the front foot board of the truck with his back in the direction in which the truck was moving, and while he was within 3 or 4 feet of the wall of the charging station he attempted to put on the brake of the truck, but for some reason it would not work, and he was mashed between the truck and the wall of the station. The truck was also equipped with a reversed lever by which the truck could be stopped immediately without reference to the brake. The truck so injuring the plaintiff after the accident was found to be the Atlantic Compress Company's truck. The employee of the compress company, who had placed the truck in the shed, knew that the brake appliance was out of repair, but when he had finished his day's work there was no one on the premises on behalf of the defendant to whom a report of the defect could be made. Knowing that it was the plaintiff's duty to operate for the purpose of recharging all the trucks placed in the shed, it was the defendant's duty to provide some representative to inspect the trucks so placed in the shed and to have made a report of the defects and disrepair of any of said trucks, and not subject the plaintiff to injury by reason of defective trucks placed there for recharging and to warn plaintiff of any insecurity in any of said trucks. The defect in the truck was known to the defendant, or in the exercise of proper care and diligence should have been known. Its defects or deficiencies were unknown to the plaintiff, and could not have been discovered by the exercise of ordinary care and diligence. It was no part of the plaintiff's duty to inspect the trucks, and he had a right to rely on the fact of the truck being in good condition, since he found it where serviceable trucks were placed for the purpose of being recharged, and defendant, knowing of the defect and deficiency, was negligent in placing said truck where only trucks in good condition should have been placed; that this truck was used by the defendant in its business of handling freight, and defendant used it as its own, causing the same to be operated by its employees, and, irrespective of the ownership of the truck, operated it and used it as its own instrumentality. The plaintiff, in operating it from the shed where it was placed to the recharging station, was in the discharge of his duty.

The evidence in support of the foregoing allegations contained in the petition substan-

tially stated are as follows: The truck which caused the injury to the plaintiff was not used by the defendant in any of its business or in any respect and had never been so used. It was the property of the Atlantic Compress Company, and had always been used by that company in its business, and was so used until its employee placed it in the adjacent shed for the purpose of being recharged by the plaintiff at the recharging station of the defendant. There was no evidence whatever that the defendant knew of any defects or deficiencies in the truck operated by the employee of the Atlantic Compress Company when he placed it in the shed, or at any other time, or had anything to do with placing the truck in the shed. The employee of the compress company discovered the afternoon when he placed the truck in the shed that the brakes were for some reason defective, but he did not know what was the matter with them, and did not report their condition to the defendant company or to any one else. It was the duty of this employee to report any defect in the truck that he discovered to some officer or agent of the compress company in order that it might be sent to the repair shop about a half a mile away from the charging station. He did not make a report as to the defect of this truck to anybody, because there was no one at the compress office to whom to make the report, and he did not go to the office of the defendant company for that purpose, because he had never made any report of the kind to it, although, if he had gone into the office, he might have found an employee of the defendant company therein. Plaintiff testified in reference to his work:

That he would go out and get one of the electric trucks and run it into the charging station, and when he got it in there he would work on the batteries, would clean them, would look to see that all of the wires were connected and in good order, would oil the trucks, and, in order to oil them, would have to go underneath the trucks below the platform of the trucks. "All I was hired down there for was to charge the trucks and if I found anything broke on them have it marked 'To the shop.' I did not actually do the repairing myself. If I found anything defective or broken part of it so that it would not operate, I should chalk it to the shop, and it would be taken to the other place where they repaired trucks before they were operated again. Mr. Pharr, he was my foreman; he told us down there, he said, 'McKale, if you happen to find anything the matter with these trucks mark them to the shop, because some careless driver is liable to leave them outside the charging station when they need repairs.' My business was to work on the trucks, not with the trucks."

Plaintiff was operating the truck in question over smooth concrete floors on which there was a quantity of oil which had been dropped from the trucks as they were oiled

each night. Plaintiff was an experienced man, having been employed in this work three years. While running the truck into the charging station he stood on the front end of the truck with his back to the wall which he was approaching. He did not undertake to put on the brake or to see if it was in working condition until within three or four feet of the wall of the charging station, and then found that the brake would not work. He did not attempt to use the reverse lever on the truck until the wall had touched his back. Plaintiff's duty was to examine the truck before recharging it, and this work was performed by him sometimes out in the shed before running the truck into the station, but generally in the station, where the light enabled him to do the work.

Simon N. Gazan, of Savannah, for plaintiff in error.

H. W. Johnson, of Savannah, for defendant in error.

HILL, J. [1] 1. It is well established in principle and authority:

"That a master is answerable for defects in any instrumentalities which he has temporarily taken over from the owner and made a part of his own plant. * * * So far as regards his obligations to his servants, he must be considered as the owner pro tempore." 3 Labatt's Master & Servant, § 1074; 1 Shearman & Redfield on Negligence (6th Ed.) § 197; Georgia Railroad v. Hunter, 12 Ga. App. 301, 77 S. E. 176; Southern Bell Tel. & Tel. Co. v. Covington, 139 Ga. 566 (2a), 77 S. E. 382; Central Ry. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590.

[2] In the instant case the evidence for the plaintiff clearly disproved the allegations of the petition relied upon to show that the master had taken over and used as a part of his plant the instrumentality whose defective condition was the cause of the servant's injury.

[3] 2. The defendant corporation owned and operated electric trucks for the transportation of freight from railroad cars to steamships, and vice versa. These trucks were recharged every night at the charging station of the defendant corporation by its servant. Another corporation owned and operated electric trucks of identically the same kind as those of the defendant. By an agreement with the defendant the trucks of the other company were recharged at night at the defendant's charging station by the defendant's employee. The trucks of the other corporation were used every day by the employees of that company, and at the end of the day were placed by them in a shed near the charging station, and afterwards operated by the employees of the defendant corporation from that shed to the charging

station to be recharged. When recharged these trucks were taken possession of and used by the employees in the business of the company owning them. No use was made of the trucks of this company whatever by the defendant, and its possession of them was alone for the purpose of recharging them for the use of the owner company. One of these trucks which had been left for recharging had a defective brake, and while plaintiff was taking it into the charging station for the purpose of being recharged, he was injured because of this defect. Held: The defendant corporation was not the temporary owner of the defective truck, and had no qualified right of property therein and could not be held to have had constructive knowledge of its defective condition, and, in the absence of actual knowledge of its defective condition, was not liable for the injury to its employee. Green v. Babcock Lumber Co., 130 Ga. 469 (1), 60 S. E. 1062.

After a careful examination of the allegations of the petition and the plaintiff's evidence applicable thereto, this court is clearly of the opinion that a fatal variance exists between the allegations of negligence on which defendant's liability is predicated and the proof, and therefore that the judgment of nonsuit was not error.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 530)

SPIRES v. GOLDBERG et al. (No. 12052.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by the Court.)

1. Weapons — 18(1)—One selling to minor liable for natural and probable consequences.

Where one has violated a penal statute of this state which forbids the sale of a pistol to a minor, and injury results therefrom, he should be held liable for the injury, if it be a natural and probable consequence of the violation of the statute and should reasonably have been anticipated by the offender as a natural and probable result of his unlawful act.

2. Negligence — 62(1)—Intervening cause defined.

If, subsequently to the original wrongful act, a new cause intervened, sufficient of itself to stand as the cause of the injury, the former will be considered as too remote. But if the intervening cause and its probable consequences should reasonably have been anticipated by the original wrongdoer as a natural and probable result of the wrongful act, the causal connection between the wrongful act and the consequent injury is not broken, and an action for resulting damages will lie against the original tort-feasor.

3. Negligence \Leftrightarrow 62(1)—First wrongdoer responsible.

A tortious act may have several consequences, concurrent or successive, for all of which the first tort-feasor is responsible; and a consequence of an original wrong may in turn become the cause of succeeding consequences, and should not be regarded as an efficient intervening cause, which will excuse the original cause, so long as it appears that the injury is attributable to the original wrong as a result which reasonably might or ought to have been anticipated and foreseen.

4. Weapons \Leftrightarrow 18(2)—Whether injury by one to whom minor lent pistol was proximate result of selling to minor held a question for the jury.

The allegations of the petition show that the defendant sold to a minor loaded cartridges and a pistol in violation of the criminal statute of the state, and that this minor, some days afterwards, lent the pistol to another minor, and the latter shot, injured, and damaged a third minor, who brought suit against the defendant as the original wrongdoer. *Held*, that these allegations, with others in the petition, presented issuable facts relating to the cause of action and the liability of the defendant, which should have been submitted to the jury, and the court erred in sustaining the demurrer and dismissing the petition.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Phocian Spires, by next friend, against Sam Goldberg and others. Judgment for defendants, and plaintiff brings error. Reversed.

The petition, briefly stated, makes the following allegations: In November, 1919, the defendants sold to a named minor, about 14 years of age, a pistol and loaded cartridges to be used in it, and the following January this minor loaned the pistol to a minor of about the same age, for the purpose of using it in target practicing. Two days later this second minor took the pistol to school, for the purpose of returning it, and while he was playing with it and demonstrating it to another minor it was discharged, and the bullet entered the petitioner's right shoulder, inflicting a dangerous and painful wound. The petition alleges that the defendants were negligent in selling the pistol to a minor in violation of the statute of the state of Georgia; that they were criminally negligent in so selling it, and were guilty of negligence per se; that they knew, or by the exercise of ordinary care and forethought should have known, that by reason of the immature age and lack of experience and understanding of the minor to whom they sold the pistol the public was endangered, and some one was liable to be killed or injured by the weapon.

The defendants demurred generally on the ground that no cause of action was set

forth; that the sale of the pistol to a minor, and the lending of the pistol, nearly 60 days thereafter, by that minor to another minor, by whom it was accidentally discharged while he was playing with it, did not constitute the immediate cause of the injury received by the plaintiff, and the injury could not have been reasonably expected by the defendants; that the proximate cause of the injury was the act of the minor who negligently discharged the pistol; that it was not such a probable result as could have been foreseen by the defendants, so as to make them liable therefor; that the mere sale of the pistol to a minor, even though in violation of the statute, there being no reason to anticipate that he would, after an interval of 60 days or more, lend it to another minor, who might inadvertently, by demonstrating it, injure a third minor, was not, in legal contemplation, to be anticipated by the defendants in the sale of the pistol.

The demurrer was sustained, and the petition dismissed, and the plaintiff excepted.

P. H. Rowe, Jas. S. Bussey, Jr., and Henry G. Howard, all of Augusta, for plaintiff in error.

C. Henry & R. S. Cohen, of Augusta, for defendants in error.

HILL, J. (after stating the facts as above). [1-4] Section 350 of the Penal Code of this state (1910) forbids the sale of pistols to minors and makes the violation of the statute a misdemeanor. It has been uniformly held in this state that a violation of a penal statute resulting in injury is negligence per se, and authorizes a recovery by the party injured, without other negligence. *Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068; *Elk Cotton Mills v. Grant*, 140 Ga. 729, 79 S. E. 836, 48 L. R. A. (N. S.) 656. There is no doubt as to this legal proposition, and if the minor who bought the pistol from the defendants had intentionally or negligently discharged it, causing injury to another, in the absence of negligence on the part of the injured person, the right to recover damages would result, without proof of any other act of negligence on the part of the defendants. 1 *Thompson on Negligence*, § 10.

Did the fact that the injury was not inflicted by the minor to whom the defendants sold the pistol, and did not "follow immediately upon" the violation of the statute, but was inflicted by another minor, to whom the pistol was loaned by the first minor, prevent a recovery of consequential damages? The solution of this question depends upon the application of the facts, admitted to be true by the demurrer, to the well-settled principles of law relating to proximate and remote cause. As tersely stated in section 4509 of Civil Code (1910):

"If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer."

And the next section of the Code (§ 4510) states the rule for ascertaining when damages can be recovered:

"Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not its legal or material consequence, are too remote and contingent."

These definitions are in substantial harmony with the decisions of the courts and the dicta of text-writers. The divergent and conflicting views are due to the difficulty of application of the principle to the particular facts of the case. Nothing new can be added to the many exhaustive discussions on the subject by the courts and learned writers, and we will content ourselves with a statement of the accepted general rule, and endeavor to make such application of the facts of this case as will correctly indicate the proper legal conclusion. The general rule of law is that—

"Whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided these acts causing the damage were the necessary or legal and natural consequences of the original wrongful act." Addison on Torts (Wood's Ed.) § 12; *Southern Ry. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. E. A. 109; *Valdosta Street Ry. Co. v. Fenn*, 11 Ga. App. 587, 75 S. E. 964.

In further elucidation of the subject it may be stated, in the apt language of the attorney of the plaintiff in error in his excellent brief:

"A tortious act may have several consequences, concurrent or successive, for all of which the first tort-feasor is responsible, and a consequence of an original wrong may in turn become the cause of succeeding consequences and should not manifestly be regarded as an intervening cause which will relieve the original cause, so long as it affirmatively appears that the mischief is attributable to the original wrong as a result which reasonably might have been, or ought to have been, foreseen as probable." *Southern Ry. Co. v. Webb*, supra; *Valdosta Street Ry. Co. v. Fenn*, supra.

The earliest illustration of the above-stated legal rule is found in the celebrated "squib" case, frequently referred to and approved by subsequent learned authorities. In that case the defendant threw a lighted squib into a large concourse of people in a market.

"The squib fell upon the standing of one Yates, who sold gingerbread; * * * one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the lighted squib from off the said standing, and then threw it across the * * * market house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the market house, and in so throwing it, struck the plaintiff * * * in the face therewith, and the combustible matter then bursting put out one of the plaintiff's eyes."

The judges unanimously held that the action was maintainable against the wrongdoer who first threw the lighted squib. The language of the judges in that case is strongly applicable to the facts of the instant case. Nares, J., said:

"Wherever an act is unlawful at first, trespass will lie for the consequences of it. He [the defendant] is the person who * * * gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damage."

Gould, J., was of the same opinion with Nares, J.:

"I agree with Brother Nares that, whenever a man does an unlawful act, he is answerable for all the consequences. * * * I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face."

De Grey, C. J., said:

"The true question is whether the injury is the direct and immediate act of the defendant; and I am of opinion that in this case it is. * * * I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act." *Scott v. Shepherd*, 2 Wm. Blackstone, 892.

This case is quoted from at length because it has been substantially followed ever since, and Mr. Thompson calls it—

"the best illustration of the doctrine of proximate and remote cause and of the interposition of causes deemed to have been set in motion by the original wrongdoer." 1 Thompson on Negligence, § 53.

Let us briefly apply to the facts of the instant case the law as announced by these learned judges. Here the defendants were the original wrongdoers. They gave the "mischievous faculty" to the pistol with the loaded cartridges when they sold it to the

minor in violation of the penal statute. That "mischievous faculty" remained in the pistol while the first minor had it in his possession and until it exploded in the hands of the second minor. The intermediate act of the second minor did not purge the original criminal act of the defendant. The fact that the first minor had possession of the pistol for some time is not material. The illegal act of placing it in his possession made the defendants responsible for any damages resulting as a legal and reasonable consequence until protected by the statute of limitations.

There are many other cases illustrating the point now under consideration and supporting the view we take of this case, but we will cite only two, which come nearest to analogy. In *Fowell v. Grafton*, 22 Ontario Law Reports, 550, the defendants sold an airgun to a boy who used it to shoot birds. While engaged in that pastime one of the bullets injured the plaintiff, who sued the defendants for damages, alleging negligence. A verdict was found for the plaintiff, and on appeal the judgment was affirmed. The selling of the airgun to a minor was a violation of the statute. Clute, J., in his opinion, used the following language appropriate to the instant case:

"Was the sale the causing cause of the accident, or was it too remote to be so regarded? The prohibition against selling an airgun to an infant under 16 years of age was, no doubt, to protect the child and the public as well, from the danger which would arise from an instrument of that kind being placed in the hands of such a person. The sale of the instrument makes the danger possible, and in that sense the defendants have created a dangerous condition of affairs which in effect resulted in the injury complained of. * * * The prohibition must mean that, if a child of tender age had a gun, he would probably use it, and, if he used it, he would probably hurt either himself or somebody else. * * * During all the time the infant had possession of the gun, that possession was unlawful, and made unlawful by the defendants. He was unlawfully possessed of it by their act; the natural result following—having become possessed of the weapon, he used it, and in using it caused the injury. His final act in the using is so connected with the prohibition that I do not think * * * it is so remote as to have entitled the defendants to have the case withdrawn from the jury."

In *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508, the facts are as follows: Two boys, one aged 10 and the other 12 years, purchased of a dealer cartridges for use in a toy pistol. * * * It was against the statute to sell pistol cartridges to minors. * * * Shortly after the purchase the toy pistol, loaded with one of the cartridges, was picked up by another minor, who discharged it, killing one of the minors first mentioned. It was held that the dealer was liable for

the death of the boy killed. The judge who spoke for the court used the following language strongly applicable to the facts of the case now under discussion:

"A man who places in the hands of a child an article of a dangerous character, and one likely to cause injury to the child * * * or to others, is guilty of an actionable wrong. * * * The more difficult question is whether the result is so remote from the original wrong as to bring the case within the operation of the maxim 'causa proxima, et non remota, spectatur.' * * * The fact that some agency intervenes between the original wrong and the injury does not necessarily bring the case within the rule; on the contrary, it is firmly settled that the intervention of a third person or of other and new direct causes does not preclude a recovery if the injury was the natural or probable result of the original wrong. *Billman v. Indianapolis*, etc., R. R. Co., 76 Ind. 166, 40 Am. R. 230. This doctrine remounts to the famous case of *Scott v. Shepherd*, 2 W. Black, 892, commonly known as the 'squib case.' The rule goes so far as to hold that the original wrongdoer is responsible, even though the agency of a second wrongdoer intervened. This doctrine is enforced with great power by Cockburn, C. J., in *Clark v. Chambers*, 7 Cent. L. J. 11, and is approved by the text-writers. * * * It is a probable consequence of such a sale as that charged against appellant that the explosives may be so used by children, among whom it is natural to expect that they will be taken, as to injure the buyers or their associates. * * * One who deals with children must anticipate the ordinary behavior of children. The appellant was bound to take notice of the natural conduct of lads like those to whom he sold the cartridges, and it cannot be justly said that the act of the lads in carrying the pistol with them to their home, and leaving it upon the floor within reach of their brother and playmate, was an unnatural or improbable one."

So, in the instant case, were not the defendants, when they sold the pistol to the minor, legally bound to take knowledge of the habits of boys to lend their pistols to their playmates, and that minors are in the habit of great negligence in handling these weapons while playing with and exhibiting them to other playmates? The purpose of the Legislature, in the act making it a misdemeanor to sell a pistol to a minor, was twofold—to protect that class and to prevent injuries resulting from negligence in the handling of these dangerous weapons by irresponsible persons. Knowledge of this purpose in a legal sense was chargeable to the defendants when they violated the law by selling the pistol to the minor. With such knowledge, is it not reasonable to assume that they were also chargeable with notice that a violation of the statute would result in the evil which its enactment was intended to prevent?

We conclude that under the allegations of the petition, admitted to be true by the de-

murrer, the question whether the violation of the statute by the defendant was the proximate cause of the plaintiff's injury, and the injury a result which he might in the exercise of prudence have reasonably anticipated as a natural result of his unlawful act, or whether the act of the minor who actually shot the plaintiff was such an intervening efficient cause as would prevent the unlawful act of the defendant from being the proximate cause, was a question properly determinable by the jury. 22 R. C. L., § 31; *Mills v. Central of Ga. Ry. Co.*, 140 Ga. 181, 78 S. E. 816, Ann. Cas. 1914C, 1098; *Mayor and Council of Unadilla v. Felder*, 145 Ga. 440, 89 S. E. 423; *Bonner v. Standard Oil Co.*, 22 Ga. App. 535, 96 S. E. 573; *Sparta Oil Mill v. Russell*, 6 Ga. App. 296, 65 S. E. 37.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 354)

HINES, Director General of Railroads, v. RUBNITZ. (No. 11292.)

(Court of Appeals of Georgia, Division No. 2, March 3, 1921.)

(Syllabus by Editorial Staff.)

1. Railroads ⇨394(6)—Petition held to allege wanton injury.

Petition held to charge wanton injury to plaintiff after his perilous position as a trespasser on defendant's tracks had become known.

2. Pleading ⇨64(2)—Allegation that a watchman knew or should have known duplicitous.

An allegation in a petition that a watchman, when he directed plaintiff to cross the tracks of the defendant, knew, or in the exercise of ordinary care should have known, that the plaintiff's safety would be endangered, is duplicitous.

3. Pleading ⇨64(2)—Duplicitous allegation cured by other allegations.

Though an allegation that a watchman knew or should have known that plaintiff's safety was endangered when he directed him to cross the tracks was duplicitous, defect was cured by other allegations showing that cause of action was based on the fact of knowledge.

4. Railroads ⇨369(3)—Signals required to warn trespasser near crossing.

Where a trespasser's perilous situation a short distance beyond a crossing is known to operators of train, a failure to ring a bell or give warning or to perform any act required by the statute to be performed at a crossing may be negligence independently of the statute.

5. Railroads ⇨5½, New, vol. 6A Key-No. Series—Suing Director General and alleging negligence against railroad sufficient.

In an action for personal injuries brought against the Director General, it is sufficient to

charge negligence against railroad, where petition alleges that defendant is operating and controlling railroad company.

6. Railroads ⇨344(1)—Petition not demurrable because not alleging purpose of going on tracks.

In action for injuries to plaintiff, struck by a train when crossing, at the direction of watchman, the tracks a short distance from the highway crossing, petition held not subject to special demurrer for failure to allege for what purpose or in what capacity plaintiff was crossing.

7. Railroads ⇨344(1)—Petition not demurrable for not stating reason for watchman's knowledge of danger.

In an action for injuries to plaintiff, struck by a train when crossing, at the direction of watchman, the tracks a short distance from the highway crossing, petition alleging that watchman had reason to know that plaintiff was near the end of standing cars which were going to be moved, and that he was in a place of danger, was not demurrable for failure to allege reason why watchman knew.

8. Railroads ⇨344(1)—Petition held to allege authority of watchman to give directions to cross.

In action for injuries to plaintiff, struck by a train a short distance from highway crossing, petition held sufficiently to allege the authority of a watchman to direct plaintiff to cross the tracks.

9. Railroads ⇨344(1)—Petition not demurrable for failure to allege how watchman acquired knowledge.

In action for injuries to plaintiff, struck by a train a short distance from the highway crossing, petition alleging that plaintiff was directed to cross by a watchman stationed at crossing and that watchman had full knowledge of plaintiff's desire to cross held not demurrable because not alleging how watchman acquired knowledge.

10. Pleading ⇨8(17)—Allegation of plaintiff's due care held not demurrable as a conclusion.

In action for injuries to plaintiff struck by a train near a highway crossing, allegation that plaintiff was exercising the utmost care and diligence for his protection held not demurrable as a conclusion.

11. Railroads ⇨344(1)—Petition held not demurrable for failure to allege engineer knew of plaintiff's presence.

In action for injuries to plaintiff struck by a train near a highway crossing, petition alleging that he had been directed to go across the tracks where he did by the watchman stationed at the crossing held not demurrable for failure to allege that engineer knew of plaintiff's presence on the tracks.

12. Railroads ⇨344(1)—Petition held not demurrable for failure to allege watchman knew where plaintiff would cross.

In action for injuries to plaintiff, struck by a train when attempting to cross the tracks a short distance from the highway crossing, petition alleging that plaintiff was by a watchman directed to cross held not demurrable for

failure to allege knowledge of watchman as to where plaintiff would cross.

13. Railroads \S 344(1)—Petition held not demurrable for failure to allege watchman knew train would move.

In action for injuries to plaintiff resulting from engine striking cars and moving them against plaintiff when he was attempting to cross the tracks on direction of watchman stationed at highway crossing near by, petition held not demurrable for failure to allege that watchman knew that engine would move cars against plaintiff.

14. Railroads \S 344(1)—Petition held not demurrable for failure to allege how employees knew of danger.

In action for injuries to plaintiff resulting from engine striking cars and moving them against plaintiff, petition alleging that engine-man knew plaintiff was in danger and failed to give signals held not demurrable for failure to allege how the knowledge was obtained or through what employee defendant had knowledge.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action for personal injuries by P. Rubnitz against W. D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

The petition, so far as affected by the demurrer, was as follows:

First. That the Central of Georgia Railway Company is a railroad corporation organized and existing under the laws of the state of Georgia, with its office and principal place of business in Savannah, Chatham county, Ga.

Second. Said company owns various railway tracks, connecting its main line, entering the city of Savannah, with the Ocean Steamship terminals, which tracks cross Bay street extension, in the western limits of Savannah.

Third. That Walker D. Hines, Director General of Railroads of the United States government, is operating and controlling the system of railway owned by the Central of Georgia Railway Company.

Fourth. The tracks of defendant at the second Bay street crossing, west of West Broad street, run north and south, Bay street running east and west. Bay street is a public street of the city of Savannah. Just before reaching the crossing of Bay street, the western of the two tracks divide, one branch running on the eastern, and the other branch on the western side of the aforesaid tracks, and all three tracks enter the Ocean Steamship terminals; also just prior to the Bay street crossing the eastern of the two tracks divide, one branch running to the northeast, and, after crossing Bay street extension, it subdivides into other tracks. At the point where petitioner was struck there are eight tracks.

Fifth. On the afternoon of February 22, 1918, about 4:30 o'clock, petitioner approached the said crossing of the defendant company. The watchman, whose name petitioner does not know and cannot ascertain, but whose name is well known to the defendant company, was

present and saw petitioner walk northward beside the eastern track just north of Bay street. After he had walked on the eastern side of the tracks, from 100 to 125 feet north of the Bay street crossing, an engine of the defendant company approached from the south and pushed two cars upon the third track from the west, which it left standing, with the northern end thereof about 100 or 125 feet north of Bay street crossing.

Sixth. Petitioner remained standing on the eastern side of the track aforesaid. Immediately after the engine had left the cars thus standing, it moved back towards the south and crossed the Bay street crossing. The watchman in charge of the crossing, whose duties were to protect persons using the crossing, was then standing upon the crossing in full view of petitioner.

Seventh. Petitioner had waited until the engine had moved the cars across the crossing and the same had become stationary, and the engine had moved back towards the south. He was exercising the utmost care and diligence for his protection.

Eighth. While petitioner was thus standing upon the eastern side of the track aforesaid, and out of danger, the watchman who was then standing upon the crossing motioned to the petitioner with his flag towards the left, saying to petitioner, "Go on across."

Ninth. Petitioner does not know what authority the watchman had to direct him to cross the tracks at any point other than the crossing, or whether he had any authority. The watchman did, in fact, exercise such authority, and had done so for nine years. The watchman's express authority cannot be ascertained by petitioner, but is well known to the defendant. Petitioner charges that the watchman had full knowledge of his desire to cross the tracks and of his presence upon the tracks. Petitioner started to cross the tracks and was upon the tracks at his express direction and with his full knowledge.

Tenth. After receiving the signal aforesaid, petitioner started across the tracks, in plain view of the watchman, and with his full knowledge and consent, and after petitioner had gotten to the track upon which the stationary cars were standing, and was upon the same, then being within 5 or 10 feet of the northern end of the cars, the engine of the defendant company moved northward across the Bay street crossing, struck the stationary cars suddenly and with great violence, knocking them upon petitioner and knocking petitioner to the ground. The cars were struck with such violence by the locomotive of the defendant that both trucks of one car ran over petitioner. The wheels of the car ran over petitioner's right leg just below the knee, so crushing and mangling it that it had to be amputated.

Eleventh. The defendant company, through its watchman, knew that petitioner was crossing the tracks. He had reason to know that petitioner was near the end of the standing cars aforesaid, that he was in a place of danger, and that the movement of the cars northward would strike petitioner to his injury and damage.

Twelfth. A part of the duty of said watchman is to signal persons across the railroad crossing when the crossing is clear of trains

or cars. Other duties performed by the said watchman are to signal trains across the street crossing, and to stop the same before crossing the street crossing; and the said watchman knew that, if he permitted the locomotive to move northward upon the track where the stationary cars were standing, and where petitioner was crossing, such movement would in all probability inflict injury upon petitioner.

Thirteenth. The agents and servants of the defendant company in charge of the engine at the time and place, whose names are unknown to petitioner and cannot be ascertained by him, but are well known to the defendant, approached the said crossing without ringing any bell, sounding any warning, or giving any other notice to any persons who might be upon the crossing, or who might be in danger, with the knowledge of the defendant or its watchman; and petitioner charges that, if such notice had been given of its purpose to cross said crossing, petitioner would have been enabled to avoid injury.

Fourteenth. The defendant company, through its crossing watchman, did a careless and negligent thing in directing petitioner across the tracks of the defendant company at a place other than a crossing, and knew that he was directing petitioner into a place of grave danger, and knew that after having done so that he should exercise commensurate care to avoid injury to petitioner.

Fifteenth. The defendant company had no person stationed upon the north end of the stationary cars, either to warn persons who might be upon the track of danger, or to signal to the engineer of the presence of such persons, so that he might stop the engine.

Sixteenth. The watchman in charge of the crossing, whose duties required that he should signal the crews in charge of the locomotive and trains to cross the street, although knowing that petitioner was crossing the tracks of the defendant company, nevertheless permitted the engine to cross the Bay street crossing, with result that the said locomotive struck the cars to petitioner's injury and damage.

Seventeenth. The said crossing watchman, whose duties required that he should stop engines and trains from crossing the street if occasion required, although he knew petitioner was crossing the tracks aforesaid, negligently failed to stop the said train, but permitted the same to move across the street, to petitioner's injury and damage.

Eighteenth. The defendant company would have avoided injury to petitioner if its crossing watchman had not motioned petitioner and directed him to cross the tracks at the time and place, and would also have avoided injury to petitioner if he had warned petitioner of the approach of the engine towards the stationary cars, and if the engineer had rung a bell or sounded a warning as the engine approached the Bay street crossing, and if the crossing watchman had not permitted the engineer in charge of the engine to cross the street and strike the cars. If the defendant company had sounded any warning whatever of the approach of the said engine to the said crossing, or if the crossing watchman had given petitioner any warning whatever of its approach, petitioner would not have been injured.

Nineteenth. Petitioner's injuries are due entirely to the fault and negligence of the defend-

ant company for the following reasons, to wit:

(1) Because the crossing watchman directed petitioner to cross the tracks of the defendant company at a time when the watchman knew, or in the exercise of ordinary care should have known, that petitioner's safety would be endangered.

(2) Because the crossing watchman knew petitioner's danger in crossing the tracks of the defendant company where he had been directed by the watchman aforesaid, and directed the engineer in charge of the locomotive to cross the street and permitted him to strike the cars aforesaid.

(3) Because the crossing watchman, knowing of petitioner's danger in crossing the tracks, failed to stop the locomotive before it had crossed the street and before it struck the cars aforesaid.

(4) Because the watchman, knowing of petitioner's presence upon the tracks, failed to give any warning whatever of his approaching danger, which warning the watchman could easily have given.

(5) The defendant company was negligent because its employees in charge of the locomotive permitted its engine to approach a public street crossing without sounding a bell, blowing a whistle or sounding any warning to apprise persons upon the crossing, or petitioner in a place of danger, known to the defendant, of the approach of the said engine and of the danger to petitioner.

(6) In suddenly and without warning striking the cars and injuring petitioner.

(7) In failing to have upon the northern end of said cars an employee who could have warned petitioner or notified the engineer of his dangerous position in time to stop the engine and avoid injury to petitioner.

(8) The defendant is guilty of negligence per se in crossing the street without sounding a bell, or other warning, as prescribed by law.

Defendant demurred specially to the petition on the following grounds:

(3) Because it is not alleged or shown for what purpose or in what capacity the plaintiff was crossing the railroad tracks at the place where he was injured.

(4) To the eleventh paragraph of the petition because it is not shown why the watchman had reason to know that petitioner was near the end of the standing cars and was in a place of danger.

(5) To subdivision (1) of the nineteenth paragraph because the same is ambiguous and uncertain in that it charges both actual and implied notice of the danger of the plaintiff, and defendant is not advised upon which theory the plaintiff relies.

(6) To paragraph 9 thereof because it appears from the allegations of the petition that the proximate cause of plaintiff's injury was due to his going upon and across the several yard tracks of defendant, not at a public or private crossing, while the switching and movement of cars was in progress on said tracks; it being alleged in the petition that plaintiff went upon and across the switching tracks in obedience to the direction of a crossing watchman of defendant at the Bay street extension crossing, but it not being alleged in the petition that said watchman had any authority so to direct the plaintiff, or that said watchman

in giving said direction was acting within the scope of his authority from this defendant.

(7) To the allegation of the ninth paragraph of the petition which alleges that "the watchman did in fact exercise such authority and had done so for nine years," because it is not alleged when, where, how, under what circumstances, or for what purpose said watchman had previously during nine years directed petitioner to cross said tracks at any point other than the public crossing where the watchman was employed.

(8) To the ninth paragraph of the petition, which charges that the watchman had full knowledge of plaintiff's desire to cross the track because it is not alleged for what purpose plaintiff desired to cross the track at a place other than the public crossing, or when or how defendant's watchman acquired such knowledge of plaintiff's desire to cross the track.

(9) To the seventh paragraph, which alleged that the petitioner was exercising the utmost care and diligence for his protection, on the ground that the same is the mere conclusion of the pleader.

(10) To paragraphs 13, 15, 18, and to subdivisions 5, 6, 7, and 8 of the nineteenth paragraph, because it is not alleged that defendant's engineer in charge of the movement of said engine had any knowledge of plaintiff's presence on said track in a position of danger or any reason to anticipate that he would be injured by the switching of said cars.

(11) To paragraphs 10, 11, 12, 14, 16, 17, and 19:

(a) Because it is not alleged or shown that defendant's watchman knew when he directed plaintiff to cross said tracks alleged that plaintiff would cross so near to the standing cars upon the tracks as to be struck and injured when the engine moved upon or coupled to them.

(b) Because it is not alleged or shown that the watchman knew when he directed plaintiff to cross the tracks as alleged that the engine which was moving on said tracks would strike the two stationary cars (which had just been left on said tracks as set forth in paragraphs 5, 6, and 7) with such violence as to suddenly cause said standing cars to be knocked over and upon the plaintiff while he was crossing the tracks at a distance of 5 to 10 feet therefrom as alleged in paragraph 10.

(12) To subdivision 5 of paragraph 19, which alleged that petitioner was in a place of danger known to said defendant because it is not alleged how the defendant knew that the plaintiff was in a place of danger or through what agent, officer, or employee defendant had such knowledge.

(13) To the allegations of paragraphs 13, 15, 16, 17, and 18, and to subdivisions 6, 7, and 8 of paragraph 19 of the petition, because no actionable negligence as to the plaintiff is alleged in said paragraphs against this defendant.

—Statement by editor.

H. W. Johnson, of Savannah, for plaintiff in error.

O'Neal & Kravitch and Oliver & Oliver, all of Savannah, for defendant in error.

STEPHENS, J. [1] 1. The allegations in a petition are sufficient to charge the de-

fendant with having wantonly injured the plaintiff after his perilous position as a trespasser upon the defendant's tracks had become known to the servants of the defendant operating and controlling the movements of an approaching train, where the petition alleges that the plaintiff, in approaching the defendant's railroad tracks at a public crossing, detoured and attempted to cross the defendant's tracks at a place near the crossing in the switchyards of the defendant, and that the plaintiff's presence there was known to the defendant's watchman stationed at the crossing, whose duty it was to signal the defendant's trains and thereby control their movements and to cause them to stop when necessary; that the watchman signaled to the plaintiff to cross in front of some box cars of a shifting train which had come to a stop, thus assuring him that he could cross the tracks in safety; that the plaintiff in thus attempting to cross was suddenly put in a perilous situation by a sudden starting of the train and was knocked down and run over and injured; and that such perilous situation of the plaintiff was known to the watchman.

[2, 3] 2. Although an allegation in the petition that the watchman when he directed the plaintiff to cross the tracks of the defendant knew or in the exercise of ordinary care should have known that the plaintiff's safety would be endangered is subject to special demurrer as being duplicitous, such defect is immaterial, since the petition elsewhere unequivocally charges that the watchman knew of the plaintiff's presence in the switchyard and of his perilous situation when attempting to cross the tracks, and clearly seeks to recover alone upon the theory that the plaintiff's presence in the switchyard and his dangerous and perilous position were known to those operating and controlling the train, and does not seek to recover upon the ground that his presence or perilous position could have been known by the exercise of due care upon the part of those operating and controlling the train.

[4] 3. Although a failure to observe statutory requirements as to duties required of those in charge of a train when approaching a crossing is not negligence per se as to one not at the crossing, yet a failure to perform any of the acts required by the statute may, independently of the statute, under the circumstances of the particular case, amount to negligence. Where a trespasser on the tracks of a railroad company is in a perilous situation a short distance beyond a crossing, and such perilous situation has become known to those operating the train, a failure on the part of the railroad company to ring a bell or to give warning to the trespasser or to perform any act which happens to be required by the statute may nevertheless at the time and place be negligence as

a matter of fact as respects the trespasser.

[5] 4. In a suit for damages alleged to have been caused by the negligence of a particular railroad company brought against Walker D. Hines, Director General of Railroads of the United States government, the petition, which alleges that he is operating and controlling a certain named railroad company, sufficiently alleges negligence against the defendant when it alleges negligence on the part of the railroad company.

[8-14] 5. The petition was not subject to any of the other special grounds of demurrer interposed.

6. The motion to dismiss the plaintiff's case because of no process against the defendant not being based upon fact, was properly dismissed.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 521)

YOUNG-JONES HARDWARE CO. v. DEWEY. (No. 11823.)

(Court of Appeals of Georgia, Division No. 2, March 16, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1015(3) — Opinion of judge who did not preside at trial on motion for new trial does not have same weight as in other cases.

Where the judge who heard the motion for a new trial was not the judge who presided at the trial of the case, the rule with reference to the weight of the opinion of the trial judge upon the facts does not have the same broad application. *Monahan v. National Realty Co.*, 4 Ga. App. 681(8), 62 S. E. 127; *Ford v. Harris*, 4 Ga. App. 467, 61 S. E. 881.

2. Sales \S 168½(4) — Right of buyer to "return" not exercised by notifying seller.

Where a contract gives the purchaser of personality sold under an express warranty the right upon compliance with specified conditions, to return it to the seller, a mere notice to the latter that the property is held subject to his order is not a compliance with the terms of the contract. Nor was a statement by the purchaser that "the machine was down at his farm and that he [the seller] could go down there and get it" a compliance with the terms of the contract to "return" the machine to the seller. *Malsby v. Young*, 104 Ga. 205(3), 30 S. E. 854; *Case Threshing Machine Co. v. Cook*, 7 Ga. App. 635, 67 S. E. 890.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Return.]

3. Sales \S 168½(3) — If buyer retains property beyond time allowed for trial, sale is absolute.

Where, in a contract of sale of a machine, it was stipulated that the purchaser should have until a definite time to try the machine, in

order to determine if it came up to the express warranty, the definite time of trial was of the essence of the contract, and if the purchaser retained possession of the machine beyond the time limited, this amounted to an approval of the machine and made the sale absolute. *O'Donnell v. Wing*, 121 Ga. 720, 49 S. E. 720; *International Filter Co. v. La Grange Ice & Fuel Co.*, 22 Ga. App. 167, 95 S. E. 736.

4. New trial \S 70 — Improperly granted when verdict demanded.

Upon a review of all the evidence the verdict for the plaintiff, which was directed by the trial judge, was demanded, and the judge who heard the motion for a new trial erred in granting another trial.

Error from City Court of Quitman; M. Baum, Judge.

Action by the Young-Jones Hardware Company against Joel Dewey. Verdict for plaintiff. From a judgment granting a new trial, plaintiff brings error. Reversed.

Bennet & Harrell, of Quitman, for plaintiff in error.

Morris & Weston and Branch & Snow, all of Quitman, for defendant in error.

HILL, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 576)

NICHOLS v. ATLANTIC ICE & COAL CORPORATION. (No. 12176.)

(Court of Appeals of Georgia, Division No. 2, March 26, 1921.)

(Syllabus by the Court.)

1. Master and servant \S 204(1) — Injury from known defect in machinery not actionable.

Where suit is brought by a servant against his master for injuries resulting from defective machinery, it must appear, before there can be a recovery, that the servant injured did not know, and had not equal means of knowing, of the defective condition of the machinery alleged to have caused his injury, and by the exercise of ordinary care could not have known thereof. *Civ. Code 1910, § 3131.*

2. Master and servant \S 217(19) — Risk of operating rip-saw with knowledge of defects and lack of helper assumed.

It affirmatively appearing, from the allegations in the petition, that the alleged defect in the rip-saw, and the insufficient assistance constituting the ground of negligence for which the damages were claimed, were not only known but fully realized by the plaintiff, and that, notwithstanding this knowledge and realization, he undertook the risk of operation, it must follow that he assumed the risk of any danger consequent to such operation, and was therefore not entitled to recover damages. *Flury v. Hightower, etc., Co.*, 132 Ga. 300,

64 S. E. 72; *Butler v. Atlanta Buggy Co.*, 10 Ga. App. 175, 73 S. E. 25.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. E. Nichols against the Atlantic Ice & Coal Corporation. Judgment dismissing the petition on demurrer, and plaintiff brings error. Affirmed.

Nichols sued the Atlantic Ice & Coal Corporation for damages on account of an injury alleged to have been received while he was running a rip saw for the defendant at its plant in Atlanta. The allegations of his petition are substantially as follows: Except in a general way, he was unfamiliar with the operation of rip saws, and did not know when they were in a defective condition. The rip saw which he was operating was defective, in that it had no shield over it for the protection of any one who might be operating it, and also had a wobble or kink in it, which caused it to wobble when it was being used. While he knew of this defective condition and knew that it was difficult to saw wood with the rip saw in that condition, he did not know that it was dangerous. He had a helper employed to assist him in the operation of the saw, but the day before he was injured this helper was taken away from him by the defendant, and on the day of the injury he was ordered to saw a board about four inches wide and about three-quarters of an inch thick with the saw, and, having no helper with him, it was necessary for him to hold both ends of the board and work the board through the saw, and while he was engaged in doing this the wobble or kink in the saw caused it to catch and jerk up the board, thus catching his hand in the saw and cutting off his fingers. The specific negligence alleged was: First, that the defendant did not provide the saw with a shield; second, that the plaintiff had been put to work with this saw in its defective and dangerous condition without proper warning; third, that the plaintiff's helper was taken away over his protest at a time when the services of the helper would have prevented the accident; and, fourth, that the plaintiff was not provided with a safe place and safe instrument for work.

A demurrer was filed on the following grounds: First, no cause of action is set forth; second, the plaintiff was injured by an assumed risk; third, that the petition does not allege that the plaintiff did not know of the defective condition of the saw and had not equal opportunity with the master of knowing thereof; fourth, that the petition discloses that the plaintiff did know of the defective condition of the saw, and with this knowledge assumed the risk of its condition; and, fifth, that the petition discloses that the plaintiff knew that his helper

had been removed and that the removal of the helper increased the danger in the work, and, with the knowledge of such increased danger, he nevertheless continued at the work, and therefore assumed the risk of such increased danger. The demurrer was sustained and the petition dismissed, and the plaintiff excepted.

Anderson & Slate and J. L. Anderson, all of Atlanta, for plaintiff in error.

McDaniel & Black, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 493)

TUGGLE v. FISK RUBBER CO. OF NEW YORK. (No. 11752.)

(Court of Appeals of Georgia, Division No. 2. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 302(3)—Ground of motion for new trial, complaining of admission of certain contract, not considered.

A ground of a motion for a new trial, assigning error in the admission in evidence over defendant's objection of "a certain contract dated November 13, 1917," cannot be considered on appeal.

2. Evidence \S 178(2)—Copies of invoices admissible, when defendant given notice to produce originals, and they had been destroyed.

Copies of sale invoices accompanying the goods involved in a suit were admissible on behalf of plaintiff, where defendant had been served with notice to produce the originals, and it appeared that they had been destroyed by fire.

3. Appeal and error \S 882(8), 1053(3)—Admission of evidence held harmless, where adverse party testified to same matter, and judge limited issues.

On the question of whether goods shipped defendant were sold or only consigned, the admission of evidence of orders showing other recent purchases did not require a reversal, where defendant testified to such purchases, and the judge clearly limited the jury to the one definite issue in dispute.

Error from Superior Court, De Kalb County; J. B. Hutcheson, Judge.

Action by the Fisk Rubber Company of New York against H. C. Tuggle. Judgment for plaintiff, and defendant brings error. Affirmed.

Key, McClelland & McClelland, of Atlanta, for plaintiff in error.

W. S. Dillon, of Atlanta, and L. B. Norton, of Lithonia, for defendant in error.

JENKINS, P. J. Certain goods shipped by the plaintiff to the defendant were destroyed by fire without fault on the part of the defendant. The sole issue on the trial was whether the goods had been sold or consigned. If they were sold, the defendant was liable for the purchase price as sued for; but, if consigned, the plaintiff could not recover. The jury found for the plaintiff. Held,

1. The verdict was authorized by the evidence.

[1] 2. A ground of the motion for a new trial assigning error as follows:

"Because movant alleges the court erred in admitting in evidence, over defendant's objection, a certain contract dated November 13, 1917"

—cannot, under previous rulings, be considered by this court. *Bacon v. Dannenberg Co.*, 24 Ga. App. 540, 541 (8), 101 S. E. 699; *Webb v. Slaton*, 24 Ga. App. 188 (1), 100 S. E. 227.

[2] 3. The plaintiff was entitled to introduce copies of the sale invoices accompanying the goods involved in the suit, after having served defendant with notice to produce the originals, it appearing that the originals had been destroyed by fire.

[3] 4. The ground complaining of the introduction of such copies is therefore without merit. Whether or not the court erred in allowing the introduction of original orders, showing other recent previous purchases by the defendant from the plaintiff of similar articles (see *Jones v. Teasley*, 105 S. E. 46 [3], 47), the defendant having himself testified to just such purchases (see *Swift Mfg. Co. v. Cunningham*, 24 Ga. App. 170 [5], 100 S. E. 225; *Copeland v. Ruff*, 20 Ga. App. 217 [1], 92 S. E. 955), and the judge by his charge having clearly limited the jury to the one definite issue in dispute, the verdict will not be set aside on the ground that the court erred in allowing a witness for the plaintiff to testify with respect to the orders and invoices.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 509)

JAMES v. DOUGLASVILLE BANKING CO.
(No. 11793.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Judges \S 45—Disqualified when wife's grandmother and grandmother of party's officer were sisters.

Where the grandmothers of a judge's wife and an officer and stockholder of the plaintiff

corporation were sisters, the judge and the officer were related by affinity within the third degree, under the rule of the canon law, and the judge was disqualified.

2. Judgment \S 261, 359—Motion to arrest and to vacate improperly denied, when judge disqualified.

Where defendant's counsel denied the judge's qualification and stated the facts, which were not controverted, but the judge proceeded with the case, a motion to arrest, vacate, or set aside the judgment, supported by uncontroverted proof, should have been granted.

3. Judgment \S 336—Motion to set aside judgment held not to require brief of evidence.

A motion to set aside the judgment in a foreclosure suit, where the plea had been stricken and no verdict was rendered or was required under Civ. Code 1910, \S 3283; was not in terms or effect a motion for new trial based upon a verdict, and no brief of the evidence was required.

Error from Superior Court, Douglas County; F. D. Irwin, Judge.

Action by the Douglasville Banking Company against W. A. James. Judgment for plaintiff, and defendant brings error. Reversed.

W. A. James, of Atlanta, for plaintiff in error.

D. S. Strickland, of Douglasville, for defendant in error.

JENKINS, P. J. [1] 1. Where a judge is related by affinity to one who is an officer and stockholder of a plaintiff corporation, by reason of the grandmother of the judge's wife and the grandmother of such officer having been sisters, the relationship is in the third degree, under the rule of the canon law, and falls within the inhibition of section 4642 of the Civil Code (1910). Such a judge is disqualified from sitting in a case between the corporation and an individual defendant, except with the consent of both parties at interest. *Short v. Mathis*, 101 Ga. 287, 288, 28 S. E. 918; *Smith v. State*, 2 Ga. App. 574, 575, 59 S. E. 311; *Olliff v. State*, 1 Ga. App. 553, 555, 57 S. E. 941.

[2] 2. In the instant case the plaintiff foreclosed a mortgage on realty and on the trial of the case the defendant's counsel denied the qualification of the judge, and, in support of his objection, stated in his place the facts of disqualification, which were not controverted; but the judge proceeded thereafter to hear the case and to enter a judgment of foreclosure against the defendant and the defendant at the same term of court filed a motion to arrest, vacate, or set aside the judgment upon the ground of such disqualification, and supported his allegations by uncontroverted proof at a hearing, after due notice to the opposite party. Held, the court erred in overruling the motion and

in failing to set aside the judgment thus complained of. *Gillespie v. Farkas*, 19 Ga. App. 158, 91 S. E. 244; *State Mutual Life Ins. Co. v. Walton*, 142 Ga. 765, 766 (3), 83 S. E. 656; *Shuford v. Shuford*, 141 Ga. 407, 408 (9), 81 S. E. 115; *Rogers v. Felker*, 77 Ga. 46; *Brantley v. Greer*, 71 Ga. 11, 13.

[3] 3. While "a motion to set aside a verdict, based on matters not appearing on the face of the record, is in effect a motion for a new trial, and is subject to all the rules of law governing such motions," so as to require a brief of the evidence (*Ga. Ry. & Electric Co. v. Hamer*, 1 Ga. App. 673, 58 S. E. 54), yet where, as in the instant case, the motion was neither in terms nor effect a motion for new trial based upon a verdict, but was a motion to set aside a judgment in a case where the plea had been stricken and where no verdict had been rendered or was required (*Ray v. Atlanta Banking Co.*, 110 Ga. 305, 306 (4), 35 S. E. 117; *Civil Code* 1910, § 3283), a brief of the evidence was unnecessary.

Judgment reversed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 539)

MAYO v. BOWEN. (No. 12059.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by the Court.)

1. Deeds \S 111—Conveyance held by the tract and not by the acre.

A deed described the land conveyed as follows: "All that certain tract or parcel of land situate, lying, and being in the 1192d district, G. M., of Toombs county, Georgia, containing 56 acres, more or less, and bounded as follows: On the north by lands of W. Y. Bowen, on the east by lands of D. C. Newton & Son, on the south by land of W. J. Hall, and on the west by lands of Mrs. M. M. James." Held, that this was a conveyance of land by the tract, and not by the acre. *Kendall v. Wells*, 126 Ga. 343, 55 S. E. 41.

2. Provisions of statute; "more or less."

In a conveyance of land by the tract the qualifying words "more or less" "will cover any deficiency not so gross as to justify the suspicion of willful deception or mistake amounting to fraud; in this event the deficiency is apportionable." *Civil Code* 1910, § 4122; *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, More or Less.]

3. Vendor and purchaser \S 341(4)—Whether deficiency justifies suspicion of willful deception or mistake is generally for the jury.

Whether or not a deficiency in the quantity of land sold by the tract, with the qualifying words "more or less," is so "gross as to justify the suspicion of willful deception or mistake amounting to fraud" is, as a general rule, a question of fact to be decided by the jury in the light of all the circumstances of the particular case, and not one of law for determination by the court. *Perkins Mfg. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556; *Estes v. Odom*, supra.

4. Vendor and purchaser \S 341(4)—Deficiency of 23½ acres in tract described as 56 acres held question for jury.

The deed in the instant case described the quantity of land as being "56 acres, more or less." The survey of the land conveyed disclosed the fact that there were 32½ acres, a deficiency of 23½ acres. It was a question for the jury whether, under all the circumstances of the particular case, this deficiency was so gross as to justify the suspicion of fraud, in which event the vendee would be entitled to an apportionment of the price according to relative value. *Owens v. Durham*, 9 Ga. App. 179, 70 S. E. 989; *Bryan v. Yates*, 7 Ga. App. 712, 67 S. E. 1048.

5. Vendor and purchaser \S 176—Rules as to deficiency in acreage applies whether conveyance is for life, in remainder, or in fee.

The rules of law stated above are applicable to all conveyances of land, whether the estate conveyed in the land described is for life, in remainder, or in fee simple.

6. Verdict improperly directed.

Under the facts in evidence the case falls within the general rule, and the trial court committed error in directing a verdict for the plaintiff for the full amount of the suit.

Error from Superior Court, Toombs County; R. N. Hardeman, Judge.

Action by L. F. Bowen against N. R. Mayo. Judgment for plaintiff; and defendant brings error. Reversed.

Williams & Corbitt, of Lyons, for plaintiff in error.

Lankford & Rogers, of Lyons, for defendant in error.

HILL, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 559)

HALL v. GRANT et al. (No. 11810.)(Court of Appeals of Georgia, Division No. 2.
March 28, 1921.)*(Syllabus by the Court.)***1. Sales 411—Petition in buyer's action for breach of contract held to state cause of action.**

A petition which alleged a contract of purchase containing a provision that time should be of the essence thereof, and which alleged a part payment of the purchase money in cash and the execution of a promissory note for the balance, a tender of payment of the note and a refusal by the defendants to accept payment, a failure and refusal of the defendants to deliver to the plaintiff the personalty bought, and consequent damage to plaintiff, set forth a cause of action as against a general demurrer.

*(Additional Syllabus by Editorial Staff.)***2. Sales 196—Provision that time should be of essence held waived, when tender after time fixed was refused on different ground.**

Where a contract for the sale of a truck provided for part payment in cash and the remainder on a specified date, a note being executed, but, after maturity of the note, the buyer tendered payment and the sellers refused to accept payment, saying that they did not have any truck at that time, but would deliver one later, and that the note could then be paid, a provision that time should be of the essence of the contract was waived.

Error from City Court of Albany; Clayton Jones, Judge.

Action by Alfred Hall against L. P. Grant and others. Judgment dismissing the petition on demurrer, and plaintiff brings error. Reversed.

The petition alleged that the plaintiff traded with the defendants, a partnership, on or about March 15, 1920, for a described truck, giving in payment a secondhand truck and his note for the difference between the price of the new and the old truck, the defendants contracting to deliver the new truck to plaintiff on or about April 15, 1920; that the plaintiff tendered to the defendants the sum due on the promissory note, and that the defendants refused to accept the same, and refused to deliver the new truck to the plaintiff in accordance with the terms of the trade. The suit was for damages because of this action on the part of the defendants. The petition was amended, so as to allege that the defendants still retained the secondhand truck mentioned and the note, and had never tendered or offered to return them to plaintiff and that a tender of payment of the note was made by the plaintiff to one of the members of the partnership on April 22, 1920, and that payment was refused; the said member stating that he did not have a truck at that time to deliver, but would deliver

one later, and then the note could be paid.

The defendants demurred generally and specially to the petition, and on the hearing thereon tendered in evidence, without objection, the contract signed by the plaintiff on March 15, 1920, for the new truck, in which it was stated that the plaintiff had that day received the new truck traded for, describing it, and that a portion of the purchase price was paid in cash and the remainder would become due on April 15th following, and which contained, among other provisions, a provision that the title to said new truck should remain in the defendants until paid for, time being of the essence of the contract. The trial judge sustained the general demurrer and dismissed the petition.

Milner & Farkas, of Albany, for plaintiff in error.

Lippitt & Burt, of Albany, for defendants in error.

HILL, J. (after stating the facts as above). It is a well-settled rule of law that for every breach of a contract the wrongdoer must respond to the injured party in damages to the extent and in satisfaction of the injury received.

"In statutes or other legal instruments giving compensation for 'damages,' the word always refers to some actionable wrong—some loss, injury, or harm which results from the unlawful act, omission, or negligence of another." *Austin v. Augusta Terminal Ry. Co.*, 108 Ga. 674, 84 S. E. 853, 47 L. R. A. 755.

"Where the understanding of the parties to a contract are concurrent, and one is ready and willing, and offers to perform, and the other is not, the first is discharged from the performance of his part, and may maintain an action against the other." *Biggers v. Pace*, 5 Ga. 172.

"For failure of the seller to deliver, the buyer's form of remedy is an action for breach of contract for nondelivery. * * * In general, the allegations, in an ordinary case for nondelivery, are the making of the contract whereby the defendant sold, or agreed to sell and deliver, to the plaintiff certain goods, to be delivered (at a certain place and time) for the payment of a certain price; that plaintiff duly performed, or was and is ready to perform, his part of the contract; that defendant did not deliver the goods, and that plaintiff has been damaged thereby." 23 Standard Ency. Proc. 289.

[2] A reading of the contract in question discloses that under its terms an immediate delivery of the new truck was contemplated upon it being signed. But the petition alleged that no delivery of such truck had ever been made. The inclusion of the provision that time should be of the essence of the contract was evidently based upon the proposition of immediate delivery of the property therein described upon the signing thereof. The petition, as amended, admits that the note was

not paid on the date when due, but alleges that shortly thereafter the plaintiff tendered payment of the note to the defendants, and that the defendants declined acceptance of payment at that time, "stating that they did not have a truck at that time to deliver but would deliver one later and then the note could be paid." We are of the opinion that this is an allegation of waiver on the part of the defendants of the provision in the contract that time should be of the essence of the contract. The petition alleged that the plaintiff had tendered to the defendants the sum due on the note and the defendants refused to accept the same.

[1] We are of the opinion that the petition as amended set forth a cause of action as against the general demurrer, and that the trial judge erred in sustaining the demurrer and dismissing the petition.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 524)

STROUP v. CRAWFORD et al. (No. 11869.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Action \S 50(6) — Pleading \S 64(2) — Petition by vendor against vendee for fraud held duplicitous, multifarious, and to contain distinct causes of action.

In a vendor's action against the vendees for fraud inducing the sale, petition held subject to demurrer, under Civ. Code 1910, \S 5631, as duplicitous, multifarious, and containing distinct causes of action, where it was against both defendants for fraud, against one of them as a tenant in common, and, by amendment, against one of them as partner, for violation of the fiduciary relationship.

2. Partnership \S 213(1) — Petition held insufficient to show partnership as between parties.

Under Civ. Code 1910, $\S\S$ 3156, 3157, relative to partnerships, a petition alleging that plaintiff and one of the defendants were partners in the purchase of real estate, and alleging several uncompleted transactions relating to the business of the partnership, and one transaction in another state, but not alleging any contract of partnership, was insufficient to show a partnership between the parties.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Action by W. H. Stroup against J. A. Crawford and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

C. D. McCutchen and F. K. McCutchen, both of Dalton, for defendants in error.

HILL, J. Stroup sued J. A. Crawford and W. S. Crawford for \$250 alleging, in substance, the following facts:

Plaintiff and defendants bought a described house and lot in Dalton as tenants in common. While plaintiff was in Florida, the defendant W. S. Crawford wired him, asking for the lowest price for his interest in said house and lot. After some correspondence he offered to sell for \$1,500, and this offer was accepted. The deed was made to J. A. Crawford. Plaintiff charges that J. A. Crawford and W. S. Crawford misled and deceived him as to the purpose in purchasing his interest in the lot. He thought, and had reason to believe, that the lot was desired as a house for W. S. Crawford, and he would not have sold it to J. A. Crawford for the purpose of speculation. Plaintiff alleges that, when W. S. Crawford offered to pay him the \$1,600 for his interest in the lot, he and his father, defendant J. A. Crawford, had agreed to sell the lot for the sum of \$3,500. When plaintiff and defendant J. A. Crawford bought the property, they intended to hold it as an investment, for the purpose of realizing a profit out of it. He reposed confidence in the honesty of defendant J. A. Crawford, and, because of their joint ownership of the property, it was J. A. Crawford's duty to fully acquaint him with all the facts in relation to the sale of his interest in the property; but both defendants concealed the facts from him, intending to defraud him, and did by these deceitful means defraud him of the sum of \$250.

The plaintiff amended his petition, alleging that J. A. Crawford and himself were partners in the purchase of real estate, alleging several transactions relating to the business of the partnership, which were not completed, and one transaction in the purchase and sale of a piece of real estate by them in the state of Tennessee. On general and special demurrer the plaintiff was required by the court to amend his petition by "alleging whether or not there was an express contract of copartnership, and whether verbal or written," and, on his refusal to do so, the court sustained the demurrer and dismissed the petition; and the plaintiff excepted. Held, there was no error in the judgment sustaining the demurrer.

[1] 1. (a) The original petition was against both defendants, for fraud and deceit, (b) and against one of the defendants as a tenant in common. (c) The amendment was against only one of the defendants as a partner in real estate transactions, and charged fraud arising from a violation of his fiduciary relationship. (d) The petition was therefore

subject to the objection pointed out by the demurrer, that it contained distinct causes of action and against different parties, and was duplicitous and multifarious. Civil Code (1910) § 5631; Price v. Virginia-Carolina Chemical Co., 136 Ga. 175, 71 S. E. 4; Orr v. Cooledge, 117 Ga. 195 (3), 43 S. E. 527.

[2] 2. The allegations of the petition as amended were wholly insufficient to show a partnership inter se. Civil Code (1910) §§ 3156, 3157.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.



(26 Ga. App. 554)

DUNAWAY v. J. B. COLT CO. (No. 11787.)

(Court of Appeals of Georgia, Division No. 2. March 26, 1921.)

(Syllabus by the Court.)

1. Sales ⇨340—On buyer's refusal to accept seller may retain goods for buyer and sue for price.

Where an executory contract of purchase and sale has been breached prior to the delivery of the goods, by reason of the purchaser's anticipatory refusal to accept them, the seller, under section 4131 of the Civil Code of 1910, has the choice of one of three remedies: (1) He "may retain them and recover the difference between the contract price and the market price at the time and place for delivery"; or (2) "he may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale," provided he does so after notice to the vendee and within a reasonable time (Robson & Evans v. Hale & Sons, 139 Ga. 753, 755, 78 S. E. 177); or (3) "he may store or retain the property for the vendee and sue him for the entire price" (Maddox v. Washburn-Crosby Mill Co., 135 Ga. 539, 69 S. E. 821; Southern Flour & Grain Co. v. St. Louis Grain Co., 11 Ga. App. 401, 403, 75 S. E. 439).

2. Sales ⇨342—Seller's tender after buyer's cancellation held not waiver of right to retain for buyer and recover price.

Where a purchaser of goods renounces the contract of sale prior to their delivery, by notifying the seller to cancel the order, and the seller then delivers the goods to a railroad company for transportation to the purchaser, and, after their arrival in the railroad depot at destination, the purchaser still refuses to accept the goods, and the seller then has them returned to the place of shipment and there holds them in a warehouse for the purchaser, such a mere ineffective tender on the part of the seller would not, ipso facto, amount to a waiver on his part of his rights, under the Code section cited, and he would ordinarily be still entitled to pursue one of the remedies there provided, and to sue for the purchase price of the goods thus stored or retained for the purchaser.

3. Trial ⇨141—Verdict for plaintiff properly directed when case as established was undisputed.

There was no evidence of any probative value tending in any way to dispute the plaintiff's case as established by its testimony, and the court therefore did not err in directing a verdict in the plaintiff's favor.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by the J. B. Colt Company against W. L. Dunaway. Judgment for plaintiff, and defendant brings error. Affirmed.

The J. B. Colt Company sued W. L. Dunaway for the purchase price of certain property stored or retained for him. The undisputed evidence shows the following facts: On June 13, 1918, defendant gave an order for the goods in question, which order the plaintiff accepted on June 17, 1918. On June 29, 1918, the defendant notified the plaintiff that owing to war conditions, he would not take the goods, and to consider his order as canceled. On July 17, 1918, the defendant shipped the goods by railroad from its factory at Chicago, Ill., addressed to the defendant at Tignall, Ga. The goods arrived at destination on August 9, 1918, but the defendant refused to accept them. On the plaintiff's instructions they were returned to the plaintiff at Chicago, and there placed in a warehouse and held for the defendant.

Clement E. Sutton, of Washington, Ga., for plaintiff in error.

I. T. Irvin, Jr., of Washington, Ga., for defendant in error.

JENKINS, P. J. (after, stating the facts as above). [1] This is not a suit for the purchase price of goods sold and delivered on open account. If such were its purport, then under the facts disclosed by the record, it could not have been maintained. Maddox v. Wagner, 111 Ga. 146, 36 S. E. 609; Bridges & Murphy v. McFarland, 143 Ga. 581, 583, 85 S. E. 856; Dilman Bros. v. Patterson Produce Co., 2 Ga. App. 213, 58 S. E. 365. The nature of the present action, which is for goods stored or retained, distinguishes it from these cases and the cases of Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 146, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112, and Rounsaville & Bro. v. Leonard Mfg. Co., 127 Ga. 735 (4), 56 S. E. 1030. In none of the cases cited were the goods at any time stored or retained for the vendee. As was said by the Supreme Court in the Oklahoma Vinegar Co. Case, 116 Ga. 146, 42 S. E. 381, 59 L. R. A. 122, 94 Am. St. Rep. 112:

"While * * * the seller might have stored and retained the property for the buyers after notice by the buyers that they would not receive the goods, it is sufficient to say that it did not do so, but without so doing sought to recover the price agreed on. Had it done so it

might have brought an action against the buyers for the entire price of the goods. On the contrary, instead of storing and retaining the goods after the notice, it delivered them to the carrier, doubtless under the well-recognized general rule that, in ordinary transactions of bargain and sale of goods, a delivery to the carrier is a delivery to the seller."

The basis of that holding was that, inasmuch as the plaintiff's petition "treated the contract as an executed one on its part," its only remedy under the facts was "an action to recover damages for the breach." In the Rounsaville Case the seller sought, by its delivery to the carrier, to treat the contract as executed on its part, and to sue for the purchase price of the goods, which the court, following the Oklahoma Vinegar Company Case, held could not be done. After the refusal of the goods, the plaintiff, in delivering to the carrier, chose to regard it solely as the defendant's agent, abandoned the goods, and, as the court said (127 Ga. 742, 56 S. E. 1033):

"They were not stored in the railroad's warehouse by the plaintiff, nor at the instance of the plaintiff. They never have been held and stored by the plaintiff for the defendants, so as to bring the facts of the case within the provisions of the statute. * * *

The instant case is also distinguishable from that of *Linder v. Cole Bros. Co.*, 10 Ga. App. 102, 72 S. E. 719, where the seller alleged and relied upon a delivery to the purchaser.

In the case before us, however, the plaintiff did not abandon the goods, and does not claim or stand upon a delivery, but has continuously maintained its dominion and control over them, has evidently paid all transportation and storage charges while in the hands of the railroad, and still retains for the defendant in its warehouse the identical goods ordered. The petition is planted solely on the remedy provided under section 4131 of the Civil Code for the contract price of goods stored or retained for the purchaser. The allegations and the proof conform to all the requirements of the statute in a suit of this character. *American Mfg. Co. v. Champion Mfg. Co.*, 13 Ga. App. 552, 554, 79 S. E. 485; *Southern Flour & Grain Co. v. St. Louis Grain Co.*, 11 Ga. App. 401, 403, 75 S. E. 439; *Tuggle v. Green*, 25 Ga. App. 647, 104 S. E. 85, 87.

[2, 3] It is contended, however, that the mere shipment and tender of the goods to the defendant at Tignall, in the plaintiff's unsuccessful effort to get the defendant to comply with his contract by accepting them, amounted to an election by the plaintiff not to store or retain the goods, and operated as

a complete waiver of the right of procedure subsequently resorted to. When the defendant canceled his order and renounced his contract of purchase, such notice to the plaintiff was "not only a repudiation of the contract but also a revocation of the carrier's agency to receive them" for him. *Oklahoma Vinegar Co. v. Carter*, supra, quoting *Unexcelled Fireworks Co. v. Polites*, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788; *Rounsaville v. Leonard Mfg. Co.*, supra. Since the railroad company remained throughout the transaction the agent of the plaintiff, and has been continuously so treated by it in the giving of shipping instructions and in the payment of charges, the possession of the goods in the hands of the carrier was, in effect, the act of the plaintiff. The mere proposal by way of tender cannot therefore be taken as such an election of remedies as would of itself preclude the plaintiff from thereafter resorting to the remedy given it under the statute law. It would not seem reasonable and just to hold that the rights or remedies of the plaintiff would be ipso facto destroyed merely because of its tender of the goods in an effort to obtain a compliance with the terms of the contract. Such act on his part was wholly nugatory, in so far as it affected his remedies under the provisions of the Code; and no effort has been made by the defendant to show that such procedure resulted in any sort of actual injury to him. So far as the pleadings and evidence show, it was an act which neither injured the defendant nor benefited the plaintiff. In so tendering them it was not acting within the scope of its legal remedies, nor was any effort made to enforce the terms of such proposal. The doctrine of election of remedies or estoppel would not therefore seem to apply. *Commercial City Bank v. Mitchell*, 25 Ga. App. 838, 105 S. E. 57.

The ruling in the instant case is not in conflict with what was held in *Phillips-Jones Co. v. Blackstock*, 23 Ga. App. 574, 576, 99 S. E. 48, 49. There, after delivery to the carrier, the plaintiff, in ordering the return of the goods to its factory from the place of destination, lost a part of them in transit, and its evidence failed to disclose what portion was lost and what remained, so that, as was there said:

"The evidence thus fails to prove the case as laid, in that it shows that at least a portion of the goods as ordered is not now and was not at the time the suit was instituted stored for the vendee."

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 259)

LOYD v. STATE. (No. 11843.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 28, 1921. Rehearing Denied
March 2, 1921.)

(Syllabus by Editorial Staff.)

1. Homicide \S 310(2)—Under indictment for assault with intent to murder instruction on shooting at another held not error.

Under an indictment charging an assault with intent to murder, evidence that accused, who had sworn out a warrant for another, shot prosecutor, a deputy sheriff, as he was signing a criminal recognizance for the other, but with intent only to prevent the signing and not to murder, authorized an instruction on shooting at another.

2. Criminal law \S 1177—Imposing misdemeanor sentence under indictment for assault with intent to murder not reversible error.

Where the judge charges, in effect, that the jury shall fix a maximum and minimum sentence in event of assault with intent to murder or shooting at another, but fails to instruct them to fix such punishment if they recommend he be punished as for a misdemeanor, and the judge imposes a misdemeanor sentence, the charge to this effect cannot be complained of by accused.

3. Homicide \S 169(2)—Evidence as to what a warrant which accused had issued contained inadmissible.

In a prosecution under an indictment for assault with intent to murder, in which it was shown that accused shot prosecutor to prevent him from signing a recognizance for one whom accused had arrested, it was not error to reject evidence as to what the warrant for arrest charged.

4. Criminal law \S 815(11) — Instruction held not to ignore statement by accused.

An instruction that jury are to take the law as given by the court and apply that law to the facts as they find them, and in that sense the jury are the judges of the law and the facts, held not erroneous as ignoring the statement made by accused.

5. Criminal law \S 762(1) — Instruction held not an expression of opinion.

A charge that no one has the right to shoot a human being with a pistol unless the act is justified or excused by some rule of law held not erroneous as an expression of opinion forbidden by Pen. Code 1910, § 1058.

6. Criminal law \S 761(12) — Instruction held not to assume that accused shot prosecutor.

An instruction that no one has a right to shoot a human being with a pistol unless the act is justified or excused by some rule of law held not erroneous as assuming that accused shot prosecutor.

7. Homicide \S 310(1) — Instruction held not argumentative.

A charge that no one has a right to shoot a human being with a pistol unless the act is justified or excused by some rule of law, and that the intentional shooting and wounding of

a human being, whether a white man or negro, with a pistol, is unlawful unless done under circumstances of justification or excuse, according to the principles of the Penal Code, held not argumentative.

8. Criminal law \S 761(12), 762(1)—Homicide \S 300(4, 12)—Instruction that signing a recognizance for one whom accused had arrested was no defense to shooting signer held not erroneous.

In a prosecution under an indictment for assault with intent to murder, in which it was shown that accused shot prosecutor, a deputy sheriff, as he was signing a recognizance for one for whom accused had sworn out a warrant, an instruction that signing of a bond or attempt to sign a bond as security for one under arrest is no provocation in law and will not justify the shooting of a human being with a pistol held not erroneous as cutting off right to self-defense, or as an expression of opinion, or as argumentative, or as ignoring statement made by accused, or as assuming that accused shot prosecutor.

9. Criminal law \S 815(11) — Homicide \S 293—Instruction held not erroneous as not being a fair statement of defendant's case or as ignoring statement.

In a prosecution under an indictment charging assault with intent to murder, in which it was shown that accused shot prosecutor as he was signing a recognizance for one whom accused had arrested, an instruction if jury should not find beyond a reasonable doubt defendant intentionally and unlawfully shot prosecutor, a human being, with a pistol, as alleged, or if jury have reasonable doubt of his guilt, verdict of not guilty should be returned, held not erroneous as not being a fair statement of defendant's contentions, or as ignoring defendant's statement at the trial.

10. Criminal law \S 789(8) — Instruction on reasonable doubt held not objectionable.

Charge that the state is not required to prove guilt beyond all doubt, moral and not mathematical certainty is all that can be expected in legal investigation, and the doubt of a jury to justify acquittal should be reasonable and not mere vague conjecture or possibility of innocence of accused, held not objectionable.

11. Criminal law \S 798½—Not error to give jury written forms of verdict.

It is not error for the court in a criminal case to give to the jury written forms of verdicts which they would be authorized to find.

Error from Superior Court, Bleckley County; E. D. Graham, Judge.

Tom Loyd was convicted of cheating and swindling, and he brings error. Affirmed.

The approved grounds of the amended motion for a new trial were as follows:

(2) Because the court erred in declining to admit the following testimony of the state's witness W. H. Jones, brought out on cross-examination: "Q. What was the charge in the warrant? A. Cheating and swindling. I served the warrant for cheating and swindling."

The defendant maintains before the court

that the crime with which this defendant was charged, cheating and swindling, was admissible because it shed light upon the whole transaction, that is, the negro had beat the defendant out of his money. This was the cause of the whole trouble, and should have been permitted to go to the jury for what it was worth. The negro's name was Newsome.

(3) Because the court erred in charging the jury as follows: "As I said, you have been impaneled, gentlemen, to try the issue formed on this bill of indictment, and you have been sworn to try this case according to the evidence. The law you are required to take from the court. You are the judges of both the facts and the law in this sense: You are to take the law as given you by the court, and apply that law to the facts as you find them, and in that sense you are the judges of the law and of the facts."

The defendant excepts to this charge for the reason that the court confined the jury to a consideration of the evidence in making up their verdict, and thereby excluded from their consideration the defendant's statement. * * *

(4) Because the court erred in charging the jury as follows: "No one has the right to shoot a human being with a pistol unless the act is justified or excused by some rule of law. The intentional shooting and wounding of a human being, whether a white man or a negro, with a pistol, is unlawful unless it is done under circumstances of justification or excuse, according to the principles of the Penal Code of this state."

The defendant excepts to this charge for the reason that the said charge was an expression of opinion by the presiding judge on the facts in the case, which is forbidden by section 1058 of the Penal Code of 1910. The defendant further excepts to the charge upon the ground that the court assumed in its charge to the jury that the defendant shot Tobe Harrell, the human being. This great question was a question for the jury to decide without any expression of opinion from the court. The charge was argumentative, and gave the contentions of the state very strongly, and ignored again the defendant's side of the case as contained in his statement. * * *

(5) Because the court erred in charging the jury as follows: "Refusing to pay an account or debt, or the signing of a bond, or attempt to sign a bond, as security for a person under arrest, is no provocation in law, and will not under any circumstances justify or excuse the shooting and wounding of a human being with a pistol."

The defendant excepts to this charge for the reason that it cut the defendant off from his right of self-defense, and cut the defendant off from any defense whatever that he may have put up in his statement to the jury. This charge was also an expression of opinion by the court on the facts proven in the case, which is forbidden by section 1058 of the Penal Code of Georgia. The defendant further excepts to this charge because it was argumentative and stated the state's side of the case too strongly, at the same time ignoring the defendant's side of the case. The defendant excepts to the charge further because the charge assumed that the defendant shot the prosecutor in the case, a human being. * * *

(6) Because the court erred in charging the jury as follows: "If you find beyond a reasonable doubt that in this county, within four years prior to the finding of the indictment, the defendant, Tom Loyd, unlawfully and intentionally shot and wounded Tobe Harrell, a human being, with a pistol, the following rules should control you in arriving at a verdict: If the pistol as used by the defendant was a weapon likely to produce death, and the defendant intentionally shot and wounded said Tobe Harrell with said pistol with deliberate intent to kill him, solely for the reason that said Tobe Harrell failed or refused to pay a debt or an account, or solely because the said Harrell was signing or attempting to sign a bond as surety, the defendant would be guilty of the offense of assault with intent to murder."

The defendant says that this charge is error for the same reasons assigned in the foregoing grounds. * * *

(7) Because the court erred in charging the jury as follows: "If you should find beyond a reasonable doubt that the defendant is guilty of the offense of assault with intent to murder, you would not be authorized to find him guilty of the offense of unlawfully shooting at another. If, however, you should not find that the defendant is guilty of the offense of assault with intent to murder, but should find beyond a reasonable doubt that in this county, prior to the finding of the indictment, the defendant unlawfully and intentionally shot and wounded Tobe Harrell, a human being, with a pistol, within the range such pistol would carry, not in his, the said Tom Loyd's, own defense, and not under circumstances of justification according to the principles of the Penal Code of this state, he would be guilty of the offense of unlawfully shooting at another."

The defendant excepts to this charge upon the ground that there is no unlawful shooting at another in this case. According to the state's case and the contentions of the state before the jury, the defendant was guilty of the offense of assault with intent to murder, and according to the defendant's statement in the case, he was guilty of no offense whatever, but was justified. There was no middle ground, no room for a compromise verdict by the jury, and it was error for the presiding judge to instruct the jury on the law of unlawful shooting at another, because that branch of the law was not involved in this case, and it gave the jury an opportunity, which they took advantage of, of finding the defendant guilty of unlawfully shooting at another. * * *

(8) Because the court erred in charging the jury as follows, to wit: "If you should not find beyond a reasonable doubt that in this county, within four years prior to the finding of the indictment, the defendant intentionally and unlawfully shot and wounded Tobe Harrell, a human being, with a pistol, as alleged, or if you have a reasonable doubt of his guilt, you should return a verdict of not guilty."

This was not a fair statement of the defendant's contentions. This charge ignored the defendant's statement. This charge was so worded that the jury could not understand it. The court should have charged the defendant's contentions in this immediate connection as stated in his statement to the jury and left it to the jury to say whether the defendant had

provocation or not. The defendant contends, for all these reasons, the foregoing charge was error.

(9) Because the court erred in charging the jury as follows: "The state, however, is not required to prove the guilt of a defendant beyond all doubt. Moral and not mathematical certainty is all that can be expected in legal investigation. The doubt of a jury to justify an acquittal should be reasonable, and not mere vague conjecture or possibility of the innocence of the accused."

The defendant excepts to this charge because the court failed to charge the jury in this connection that if they had any reasonable doubt about the defendant's guilt they should acquit, and the defendant excepts to that part of the charge, "The state, however, is not required to prove the defendant's guilt beyond all doubt."

(10) Because the verdict of the jury in said case was contrary to the following charge of the court: "Under our law, as it stands now—I refer to an act passed recently—whenever the jury finds the defendant guilty of a felony which is punishable by imprisonment in the penitentiary for a term of years, and the offense is not reduced to a misdemeanor by their recommendation, it devolves upon the jury to fix the sentence in their verdict. In such cases the law requires the jury to fix a minimum and a maximum sentence; that is, in their verdict they should fix a punishment of not less than so long and not more than so long in the penitentiary of the state, stating the time that they fix. In such cases, however, you will understand that they would have to remain within the period fixed by law for the punishment of a defendant in such cases."

The defendant contends that the jury did not fix the punishment in this case. * * *

(11) Because the court erred in charging the jury as follows: "If you find the defendant guilty of the offense of unlawfully shooting at another, and should not wish to recommend that he be punished as for a misdemeanor, then the form of your verdict should be, 'We, the jury, find the defendant guilty of unlawfully shooting at another, and fix his punishment at not less than so long and not more than so long, stating the time.' You will remember that that offense is punished by the law by confinement in the penitentiary from one to four years."

The defendant excepts to this charge for the same reason that he excepts in the foregoing ground of the amended motion for a new trial. The jury found the defendant guilty of unlawfully shooting at another, which was a compromise verdict in this case, and the court fixed the punishment in this case, and not the jury, which is contrary to the act of the Legislature of 1919 (Laws 1919, p. 387). The jury should fix the punishment in the penitentiary in a felony case, but the jury did not do it, and the judge fixed the punishment, which is forbidden by law now since the act was passed. So the charge authorizing the jury to find such a verdict is error.

(12) Because the court erred in charging the jury as follows: "If you should find the defendant guilty of shooting at another, and wish to recommend that he be punished as for a misdemeanor, then the form of your verdict should be, 'We, the jury, find the defendant guilty of

unlawful shooting at another, and recommend that he be punished as for a misdemeanor.'"

The defendant excepts to this charge for the reason that there was no middle ground in the case, and not room for a compromise verdict by the jury by finding the defendant guilty of the offense of unlawfully shooting at another.

* * *

The defendant further excepts to this charge for the reason that the court did not give the jury instructions to fix the punishment in the penitentiary, but told the jury that they could recommend that he be punished as for a misdemeanor. Under this charge, the jury accepted the invitation of the presiding judge, and recommended that he be punished as for a misdemeanor, and therefore gave the court the right to fix the punishment in this case, which is forbidden by the act of the Legislature of 1919. This defendant was charged with a felony, with assault with intent to murder, in one count, and the defendant contends that the presiding judge had no right, under the law, to give the jury an opportunity to find the defendant guilty of a lower grade of crime and to fail to fix the punishment in the penitentiary and leave it to the presiding judge to fix the punishment. * * *

(13) Because the court erred in charging the jury as follows, to wit: "I have written out some forms of verdict corresponding with the charge that I have given you, and they will be handed to you, and you can select from these forms that form of verdict which coincides with your finding."

The defendant excepts to this charge for the reason that the court had no right to write the forms of the verdict for the jury on paper, and send them out with the jury in order to let the jury select from these forms the verdict which they could find. The jury should be left alone to make their verdict from their memory of what occurred on the trial of said case, and they should not be aided by any writing of the presiding judge purporting to be the form of the verdict. For these reasons the defendant assigns the charge as error.

—Statement by editor.

John R. Cooper and W. O. Cooper, Jr., both of Macon, and C. A. Weddington, of Cochran, for plaintiff in error.

W. A. Wooten, Sol. Gen., of Eastman, for defendant in error.

LUKE, J. [1] 1. The evidence in this case shows conclusively that while Tobe Harrell was sitting in a chair in the sheriff's office in the courthouse preparing to sign a criminal recognizance for a man against whom Loyd had sworn out a warrant, Loyd shot Harrell three times with a 32-caliber pistol, hitting him once in the shoulder, once in the neck, and once near the heart. Loyd, in his statement on his trial, said, "I just wanted to keep him (Harrell) from signing that bond and beating me out of my money;" and, further, that he had no intention of murdering Harrell. Loyd was charged with assault with intent to murder and was convicted of shooting at another, with a recommendation that he be punished as for a misdemeanor, and

was sentenced by the court as for a misdemeanor. The court did not err in charging the law of shooting at another, nor was the verdict finding defendant guilty of the lesser offense, with a recommendation that he be punished as for a misdemeanor, contrary to law.

[2] 2. Where the judge charges the jury in effect that the jury should fix a maximum and minimum sentence in the event of a conviction for either assault with intent to murder or shooting at another, but he fails to instruct them to fix such sentence if they recommend that he be punished as for a misdemeanor, and the judge himself imposes a misdemeanor sentence, the charge to this effect furnishes no ground of complaint on the part of the defendant.

[3-11] 3. There is no merit in any of the approved grounds of the motion for a new trial, and the evidence amply sustains the verdict.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 538)

**BLANCHARD, HUMBER & CO. v. HAGAN
GAS ENGINE & MFG. CO.**
(No. 12055.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by the Court.)

Evidence 568(1)—Execution 179, 196—
Verdict properly directed in claim case when evidence clearly shows person lending money with which to pay title retention notes has no title preventing levy; testimony that property was witness' property is a conclusion.

In a claim case where the evidence clearly showed that at the date of the levy of the execution the defendant in *fi. fa.* had both title to, and possession of, the property levied on, it was proper for the court to direct a verdict for the plaintiff in *fi. fa.*

Error from Superior Court, Marion County; John B. Hutcheson, Judge.

Proceedings on the claim of Blanchard, Humber & Co. to property levied on under a *fi. fa.* in favor of the Hagan Gas Engine & Manufacturing Company. Judgment for the plaintiff in *fi. fa.*, and the claimant brings error. Affirmed.

This is a claim case. The evidence in substance is as follows: The defendant in *fi. fa.* bought certain personal property from the Woodruff Machinery Manufacturing Company, giving therefor promissory notes con-

taining a retention of title to the personalty until paid for, which were duly recorded. He paid the notes, and an entry of payment was duly made on the record, and possession of the property was delivered to him by the payee. The execution against him was obtained on April 25, 1916, and on July 8, 1919, was levied on the personalty in question, which was then in his possession. On the part of the claimants it was testified that the property in question was their property at the date of the levy. The claim was based on the following facts: The claimants lent to the defendant in *fi. fa.* the money to pay his notes for the property and paid the notes and took possession of the property. Subsequently, on August 4, 1919, a transfer of the notes, which had previously been marked paid and delivered to the defendant in *fi. fa.*, was made by the Woodruff Machinery Manufacturing Company to the claimants, at the request of the defendant in *fi. fa.*, while the property was in the possession of the levying officer. The defendant in *fi. fa.* testified that he had never repaid to the claimant the money borrowed to pay the note. The court, at the conclusion of the evidence, directed a verdict for the plaintiff in *fi. fa.*, and the claimants excepted.

T. B. Rainey, of Buena Vista, and Geo. C. Palmer, of Columbus, for plaintiff in error.

W. B. Short and W. D. Crawford, both of Buena Vista, for defendant in error.

HILL, J. (after stating the facts as above). The direction of a verdict for the plaintiff in *fi. fa.* was demanded. No other legal verdict could have been rendered. The property levied on was in the possession of the defendant in *fi. fa.* at the time of the levy. The title thereto reverted to him when he paid the title retention notes. The fact that the claimants had loaned to the defendant in *fi. fa.* the money with which to pay these notes did not give the claimants any title to the property as against the lien of plaintiff's *fi. fa.*, in the absence of a written transfer of the notes. Swann Davis Co. v. Stanton, 7 Ga. App. 668, 67 S. E. 888; Burch v. Pedigo & Lyons, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808. The testimony of the claimant that the property levied upon at the date of the levy was their property was merely a conclusion of the witness and without any probative value, the facts clearly showing that at that time the title was in the defendant in *fi. fa.*, the title-retention notes having been paid by him and delivered up to him by the payee. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 510)

WOLFE v. CITIZENS' BANK OF DUBLIN.
(No. 11799.)(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)*(Syllabus by the Court.)*

1. Appeal and error \S 195 — Objection that amendment to plea was not allowed by order of court cannot be first raised in brief.

Where an amendment to a plea is filed in the clerk's office at the trial term, and considered by the court in the decision of the case, and specified as a part of the record to be sent up to this court, it is too late to raise for the first time, in the brief of counsel for the defendant in error, the point that the amendment was not allowed by an order of the trial court and therefore cannot be considered.

2. Set-off and counterclaim \S 28(1) — "Mutual demands" import reciprocal obligations.

The words "mutual demands," as applied to debts which may be the subject of set-off, necessarily import that there must be reciprocal obligations between the parties (citing Words and Phrases, Mutual Debts).

3. Usury \S 101 — Former contract must be between same parties to permit set-off of usury.

"Usury paid on a former contract may be pleaded as a set-off to the existing debt, provided it be not barred by the statute of limitations," and provided further that the "former contract," on which the usury was paid, was between the same parties as those to the "existing debt."

4. Bills and notes \S 376—Usury \S 101—Only "usury" in particular note may be urged against bona fide holder; usury in earlier notes cannot be set off against transferee of renewal note.

The defense of "usury," which is good even against a bona fide holder for value of a negotiable promissory note who acquired title to the same before maturity, means the usury with which the note in question is infected, and does not include usury in other notes made by the defendant to other persons; and in a suit by the holder of the first note, against the maker thereof, he will be allowed to set off only the usury in that note.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Usury.]

Error from City Court of Dublin; R. D. Flynt, Judge.

Action by the Citizens' Bank of Dublin against J. A. Wolfe. Judgment for plaintiff, and defendant brings error. Affirmed.

The Citizens' Bank of Dublin sued J. A. Wolfe, maker of a promissory note, alleging that the note was made payable to the order of the City National Bank of Dublin, and by it indorsed and transferred to the petitioner. The defendant, in a plea filed at the appearance term, admitted the execution of the note sued on, and alleged that the plaintiff was the successor of the City National Bank, a

banking corporation under the laws of the United States, and, as the successor of the said national bank, had taken the note sued on with full notice of all the equities between the defendant and the national bank, and further alleged that the note contained usurious interest which the national bank had received, charged, and reserved from the defendant when the note was originally made, and that this usurious interest should be allowed the defendant as a set-off against the note. The defendant alleged that he had made, previous to the date of that note, other notes to the national bank, in which there was a large amount of usury reserved and taken by that bank at the time the notes were made, aggregating the usurious sum of \$1,400, and this amount the defendant insisted should be allowed him as a set-off against the principal of the note in suit. Allowing the sums claimed as a set-off, the defendant alleged that there only remained due on the note the sum of \$690, which sum he had tendered to the plaintiff before the return day, and that the tender was a continuous tender and unconditional.

At the trial term of the case the defendant filed an amendment to his plea, in which amendment he alleged that the note sued on was a renewal note and had been renewed for a number of times; that at each renewal thereof interest was charged in the face of the note at the rate of 12 per cent. per annum, and that he was entitled to set off the usury with which the note was infected. He further alleged that previous to this note he made other notes payable to the "plaintiff," on which he paid usury aggregating the sum of \$1,090, which he asked to be allowed him as a set-off to the principal of the note in suit. And as to the note sued on, amounting to \$2,090, the defendant alleged that it was given by him to "plaintiff" in renewal of all his previously existing indebtedness to the national bank, and that this note was infected with usury which was charged and collected when the note was made. The allegation in this amended plea that the notes in question were made by the defendant to the "plaintiff" was not supported by the evidence. The evidence indisputably shows that the note in suit and all the other notes were originally made by the defendant to the national bank; that the note in suit was the last note made by him, and that it was made to the national bank; and the evidence further shows that all the notes in question, except the note sued on, were fully paid by the defendant—principal and interest—to the national bank, the statement being made that the bank at the time of the execution of the notes in question "charged and reserved" the usurious interest. The first plea filed by the defendant was abandoned as being under the national bank law and therefore not applicable, and

the second plea was filed under the state law. The second plea was not formally allowed by any order of the trial court. It was filed in the clerk's office at the trial term and was specified in the bill of exceptions as a part of the record to be sent up to this court by the clerk. The defendant in error insists here for the first time that this amended plea should not be considered by this court, because it appears that no order was passed in the trial court allowing such plea to be filed.

The case was heard by the judge below without the intervention of a jury, and he rendered a judgment for the plaintiff for the amount of the note sued on, with legal interest, after deducting therefrom the usurious interest embraced in the particular note; but he did not allow as a set-off the usury alleged to have been paid by the defendant on the previous notes made by him to the national bank; and the question for decision by this court, on the merits of the case, arises on the exception to the judgment refusing to allow the defendant a set-off of the usurious interest paid by him to the national bank on the previous notes.

Robt. L. Berner, of Macon, and S. W. Sturgis, of Dublin, for plaintiff in error.

M. H. Blackshear, of Dublin, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. The objection that there was no order of the court allowing the amendment to the plea to be filed at the first term was too late, having been made for the first time in this court. In *Smith v. West*, 134 Ga. 11, 67 S. E. 405, the court says:

"In specifying the parts of the record to be sent up to this court, the additional answer is mentioned. * * * It is too late for the defendant in error for the first time, in his brief filed in this court, to raise the point that this amendment was not duly allowed, and therefore cannot be considered."

[2-4] 2. Should the trial court have allowed the set-off of the usurious interest "charged and reserved" by the national bank on the previous notes against the note in suit, or should he have limited the ruling on that point to the amount of the usury paid on the particular note in suit? It is clearly inferable from the evidence that all of the usurious interest on all the notes in question, including the one in suit, was charged and reserved by the national bank when the notes were first made and when they were renewed from time to time by the defendant, and the evidence shows that the principal of all of the previous notes and the interest, including the usurious interest, had been fully paid by the defendant to the national bank. The defendant insists that upon the note in suit he was entitled to a credit of the aggregate amount of all the sums of usury paid by him, within the statute of limitations, on the previous

notes as well as the note in suit. He bases his contention upon the law of set-off under the Code. Section 4340 of the Civil Code (1910) provides that as "between the parties themselves any mutual demands, existing at the time of the commencement of the suit, may be set-off"; and the learned counsel for the plaintiff in error insists that the excess of interest in the previous notes, as well as in the note in suit, constitutes a demand which may be recovered either by a plea or a separate suit. Was the usury which the national bank charged and reserved on the previous notes, and which the evidence showed was paid in full to the national bank by the defendant, a mutual demand existing at the time of the commencement of the suit between the plaintiff and the defendant? What is the meaning of the words "mutual demands," in the section referred to?

"The word 'mutual,' as applied to debts which may be the subject of set-off, necessarily imports that there must be reciprocal obligations between the parties." 5 Words and Phrases (1st Ed.) p. 4649. An obligation existed on the part of the plaintiff to exact from the defendant the legal demands which he could make on the note in suit, and the defendant had the right to demand of the plaintiff that he should have a credit of the usury in the said note. But where was there any obligation on the part of the plaintiff to allow the defendant a credit on the previous notes, which the evidence does not show that the plaintiff had ever held as transferee or otherwise, and upon which usurious interest had been fully paid by the defendant to another party? Under the national bank law, as he had fully paid the usury to the national bank, he might have had the right, in a separate suit, to sue for and recover the amount actually paid to that bank. *Haseltine v. Central Bank of Springfield*, 183 U. S. 132, 22 Sup. Ct. 50, 46 L. Ed. 118. But even as to the national bank, having actually paid the usurious interest to that bank, he could not set it off in a suit brought by the bank against him, but he would be confined to the remedy of a direct suit for the debt. In *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395, it is said:

"Usury paid on a former contract may be pleaded as a set-off to the existing debt, provided it be not barred by the statute of limitations."

In that case it appears that the former contract infected with usury was between the same parties as in the suit to which it was held that the set-off could be pleaded. And in the case of *Angier v. Smith*, 101 Ga. 844, 28 S. E. 167, it was held that the defense of usury was good even against a bona fide holder for value of a negotiable promissory note who acquired the title to the note before its maturity, but in that case the usury was in the note which had been transferred for value and which was in suit. The taint of usu-

ry in a note remains in it even after it has been transferred to a bona fide holder for value before due, but it cannot be the law that the amount of usury in one note, or in a dozen notes, paid by the defendant to other persons, can be set off by him as a legitimate claim, when he is sued by another on a different note. To illustrate by the facts of the present case: If, as a matter of law, the defendant has the right as against the plaintiff to set off the amounts of usury contained in the notes which he had previously made and paid in full to the national bank, it would allow him to collect from the plaintiff, a stranger to all the other contracts, more than half of the principal of the note of which he was the bona fide holder. We are therefore of the opinion that the learned trial judge did not commit any error in limiting the set-off to which the plaintiff in error was entitled to the amount of the usury which was contained in the note in suit, and in refusing to allow him as a set-off the usurious interest which he had paid to the City National Bank of Dublin on the other notes.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 572)

LAMB v. FULTON BAG & COTTON MILLS.
(No. 12037.)

(Court of Appeals of Georgia, Division No. 2.
March 26, 1921.)

(Syllabus by the Court.)

1. Master and servant §316(1)—"Independent contractor" defined.

When a person is employed to do specific work and is in the exercise of a distinct and independent employment, and in the execution of this specific work is not under the immediate supervision and control of his employer, and the manner of doing the work and the employment, payment, and control of the labor is left entirely to the employee, the relation of master and servant does not exist; the party employed being an independent contractor. Moll on Independent Contractors and Employers' Liability, §§ 13, 14, 15, and 16.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

2. Master and servant §316(2)—Building repairer held independent contractor, liable for minor's unlawful employment.

The defendant corporation, the owner of cotton mills, made a contract for the repair of the roof of its buildings with one who was specially engaged in that line of work. By the terms of the contract the defendant agreed to pay a fixed sum to the contractor and was to furnish a portion of the material to be used in the doing of the work. All the particulars in connection with the doing of the work, the em-

ployment, payment, and control of the labor, and the direction and supervision of the work, were left entirely to the contractor. A minor under 14 years of age was employed by the contractor to help make the repairs, for which he was to be paid by the contractor a certain wage. The defendant had nothing to do with the selection of the minor, had no authority to discharge him, and did not direct him in the manner of doing his work. While engaged in this work he fell off the roof of the building and was killed. *Held*, the minor was not a servant of the defendant corporation at the time of his death, and the defendant was not responsible for his wrongful employment, and not liable in damages to his widowed mother for his death. Civ. Code 1910, §§ 4414, 4415, subd. 5; *Harris v. McNamara*, 97 Ala. 181, 12 South. 103; *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582.

3. Master and servant §332(3) — Nonsuit properly granted on ground of employment by independent contractor.

The evidence substantially stated above showing clearly that the plaintiff's minor son was not the servant of the defendant corporation at the time of his death, but was the servant of the independent contractor, and this being the controlling question in the case, there was no error in the award of a nonsuit.

4. Decision of other questions unnecessary.

The existence of the relation of master and servant between the plaintiff's minor son at the time of his death and the defendant corporation being a condition precedent to the right to recover either for the loss of the minor's services during his minority or for the value of his life, arising from his wrongful employment or from negligence, and it being proved by the plaintiff's evidence that this relation did not exist, it is unnecessary to decide the questions raised by the assignments of error as to the sustaining of the demurrers to the first and third counts of the petition.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Mrs. D. A. Lamb against the Fulton Bag & Cotton Mills. Judgment for defendant, and plaintiff brings error. Affirmed.

Suit was brought in the city court of Atlanta by Mrs. Lamb against the Fulton Bag & Cotton Mills seeking to recover damages for the wrongful death of her minor son. The declaration contained four counts. A demurrer was filed to all of the counts, which was sustained by the court as to counts 1, 3, and 4, and overruled as to count 2. Exceptions pendente lite were preserved as to the judgment sustaining the demurrer as to counts 1 and 3. No exception was taken to the judgment on the demurrer as to count 4. The case went to trial on count 2, and at the conclusion of the plaintiff's evidence on motion of the defendant a nonsuit was granted. The substantial allegations on count 2, to which the evidence applied, were that John

Lamb, who was the minor son of the plaintiff, his widowed mother, was employed by the defendant without her knowledge or consent and was placed at work at a dangerous employment at which he was killed. This count contained no allegation of negligence and seeks to recover the value of the child's services up to the age of 21. The suit is based upon the theory that the defendant, having employed the plaintiff's minor son without her consent, is liable in any event for the loss of his services resulting to her by reason of his homicide, and the issue determined on the suit was as to whether the minor, at the time of his death, was employed by the defendant as its servant, and the judgment of nonsuit is based upon the conclusion of the court that the evidence did not disclose the existence of this relation, and therefore there can be no recovery against the defendant based upon the theory of master and servant set up under the second count.

Incidentally it may be remarked in passing that the allegation in this count that the plaintiff's minor son was put at dangerous work without her consent is not supported by any evidence. The issue as to whether or not the plaintiff's minor son was employed by the defendant as its servant depends upon the construction of the evidence, and the evidence as to this issue, substantially stated, is as follows:

The plaintiff testified that at the time of her son's death he was working, as she thought, for Mr. C. R. Henry, and not for the defendant. She testified further that, while she knew that her son was working for Henry, she had not limited the character of services to be performed by her minor son while in the employment of Henry. He made \$1.50 per day while working for Henry, which sum he turned over to her. One Mathers, another witness for the plaintiff, testified that at the time of Lamb's death he, the witness, was employed by C. R. Henry, who was engaged in the general tin business, doing all kinds of sheet metal work, roofing, guttering, etc.; that he, acting for Henry Bros., which was the trade-name of C. R. Henry, made a contract to do certain described work for the defendant, the Fulton Bag & Cotton Mills, this contract being between C. R. Henry, in the business name of Henry Bros., and the Fulton Bag & Cotton Mills; that Mathers made the contract with the Fulton Bag & Cotton Mills for Henry Bros. to do the work for \$1.75 per hour for a man and his helper, which were to be supplied by Henry Bros.; that the Fulton Bag & Cotton Mills showed the witness Mathers, representing Henry Bros., the work which the latter was to do, consisting of putting up gutter pipes, down spouts, etc.

The Fulton Bag & Cotton Mills had some material which it agreed to turn over to Henry Bros. to be used in the work. Henry Bros. were to do the work in their own way,

using their own skill, and without any direction from the Fulton Bag & Cotton Mills except that when Henry Bros. had finished doing the work on one building the Fulton Bag & Cotton Mills showed them the next building on which to work, but the work contracted to be done was one entire job. Mathers, representing Henry Bros., selected John Lamb, the plaintiff's son, who was employed by Henry Bros., to help him do the work to be done by Henry Bros. under their contract with the defendant corporation. Lamb appeared to be about 16 or 17 years old at the time of his employment by Henry Bros., and stated that he was 16, and he had been working for Henry Bros. about a year and a half doing the same character of work as was to be done for the defendant corporation by Henry Bros. Ninety-five per cent. of the work which Lamb, the minor, did was roofing work. Lamb was paid \$1.50 per day by Henry Bros. for nine hours' work, and Mathers was paid \$5 per day by Henry Bros. for nine hours' work, while Henry Bros. received from the defendant corporation under the contract \$1.75 per hour. Henry Bros. selected Mathers and Lamb, who were employed by them generally, to do the special work under the contract for the Fulton Bag & Cotton Mills. The Fulton Bag & Cotton Mills showed Mathers the work which was to be done under the contract made by it with Henry Bros., which consisted of putting up gutter pipes, down spout, etc. The Fulton Bag & Cotton Mills loaned to Mathers a negro to help him in doing the work generally under the contract with Henry Bros., the duty of the negro being to pull about, from place to place as might be needed, the scaffold. This was a voluntary act on the part of the defendant, and it was under no obligation under the contract to supply any help to Henry Bros. When Lamb, the minor son of plaintiff, fell off of the building, Mathers did not know why he was on the roof or that he was then doing any work at all on the roof. The contract between the defendant and Henry Bros. did not specify the number of hours they were to work for the defendant corporation, but Henry Bros. regulated their own hours. Mathers and Lamb, the employees of Henry Bros., while doing the work embraced in the contract, went in and out the mill of the defendant corporation at pleasure, and, when the minor Lamb was killed, Mathers, acting for Henry Bros. hired another man to finish the work which Lamb was doing. The payment for the work was made directly to Mr. C. R. Henry, doing business as Henry Bros. The Fulton Bag & Cotton Mills had no control over Henry Bros., Mathers, or Lamb, but they could order the latter two off of the premises. "They did not have the right to fire either Mathers or Lamb at any time because they were working for C. R. Henry." The Fulton Bag & Cotton Mills had no knowledge as to what pay either Mathers

or Lamb were getting from Henry Bros. for their work. A letter was introduced from the Fulton Bag & Cotton Mills confirming the contract made with Henry Bros. through Mathers; this letter further showing that the defendant corporation was to pay for any material that was used in doing the work, and also was to pay Henry Bros. \$1.75 per hour to cover the time of both men on the job.

This is a substantial statement of the evidence for the plaintiff on the issue as to whether the deceased minor son, at the time of his death, was the employee of the defendant corporation or was employed by Henry Bros., an independent contractor, to do the work for the Fulton Bag & Cotton Mills.

Walter S. Dillon and C. M. Lancaster, both of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 496)

DECATUR LUMBER CO. v. FULTON.
(No. 11780.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by the Court.)

1. Master and servant \S 235(12) — Servant not required to inspect appliances to discover concealed dangers.

"As a general rule, a servant is under no obligation to inspect the appliances about which he works or that part of the plant by which his safety may be affected, for the purpose of discovering concealed dangers which would not be disclosed by superficial observation." *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787(2), 49 S. E. 788; *Austin v. Appling*, 88 Ga. 54, 57, 13 S. E. 955; *Cochrell v. Langley Mfg. Co.*, 5 Ga. App. 317, 320, 63 S. E. 244.

2. Master and servant \S 235(4)—Reliance on master's care permissible.

"When machinery, though not perfect in all respects, can be and has been used with safety under given circumstances, a servant using such machinery is warranted in acting upon the assumption that the master has fulfilled, and will continue to fulfill, his duty to see that the circumstances are such that the machinery can be used with safety, unless it is apparent to the servant that the master has failed to fulfill his duty in this respect, or such failure can be ascertained by the servant's using that degree of care which the law imposes upon him." *Southern Cotton Oil Co. v. Dukes*, supra.

3. Master and servant \S 217(3) — Master's knowledge of latent defect greater.

Not only is it true that "the duty of inspecting for defects which would not be dis-

closed by superficial observation is not primarily imposed upon a servant" who is employed merely to operate a machine or to see that it is operated; but, "except where the injured employee is an inspector, the master's means of knowledge of latent defects in the machinery furnished are primarily to be considered as greater than those of the servant." *Hubbard v. Macon Ry. & Light Co.*, 5 Ga. App. 223, 62 S. E. 1018; *Southern States Portland Cement Co. v. Helms*, 2 Ga. App. 308, 58 S. E. 524. See, also, *Burton v. Wadley So. Ry. Co.*, 25 Ga. App. 380, 103 S. E. 881; *Beard v. Georgian Mfg. Co.*, 8 Ga. App. 618(2), 70 S. E. 57; *Hines v. Little*, 105 S. E. 618.

4. Master and servant \S 261(4)—Allegation as to lack of knowledge of defect held equivalent to statutory requirement.

A petition by a servant against his master for injuries resulting from defective machinery is not deficient under section 3131, of Civil Code 1910, as failing to allege that the servant injured did not know, and had not equal means of knowing, of such defect, "and by the exercise of ordinary care could not have known thereof," where the petition alleges that the defect was "unknown to" petitioner, "and could not have been known to him upon inspection or the exercise of care, but same was known, or should have been known, to the defendant"; such allegations being taken as the equivalent of the requirement set forth by the Code. *Charleston & Western Carolina Ry. Co. v. Miller*, 115 Ga. 92(2), 41 S. E. 252.

5. Master and servant \S 258(12)—Petition held sufficient.

The petition was good as against general demurrer. *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 81-83, 58 S. E. 289; *Southern States Portland Cement Co. v. Helms*, supra; *Southern Cotton Oil Co. v. Gladman*, 1 Ga. App. 259, 260(8), 58 S. E. 249; *Cochrell v. Langley*, supra.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by Ralph Fulton against the Decatur Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ralph Fulton sued the Decatur Lumber Company for damages for personal injuries, alleging the following facts: Plaintiff was employed by defendant in its sawmill as a butting saw operator; that at the time of his injury he was operating such a saw "suspended from rafters or crossbeams in the top of the mill shed, so that the saw was about the height of an average man's chest from the ground"; that this saw "was suspended in such manner that it would swing from side to side in a semicircular manner as the pendulum of a clock, and was so adjusted by the use of a cable, to which there was attached a heavy iron; that when the saw was not being used it would be drawn by means of said rope or cable and weight out of plaintiff's way and danger;" that when it was necessary to use such instru-

mentality he would grasp "the handhold attached to the bars or beams sustaining the saw, and pull the same across the log or timber for the purpose of cutting the same"; that plaintiff, while thus acting in the employ of defendant, in accordance with his previous instructions and custom, reached out and took "hold of the handlepiece to pull the saw through a piece of timber for the purpose of cutting the same," and then, in accordance with such instructions and his custom, turned "the same loose, so that it might be drawn by the cable and weight" back to where it was supposed to stay. He alleges that, "after the saw had been thus pulled back by the cable and weight at a considerable angle away from" petitioner, "the rope or cable to which the weight was attached broke, and the saw, which was circular in nature and revolving at great rapidity, swung" against him, "causing the injuries for which he sues."

He further alleges that he himself was without fault; "that it was not his duty to examine the rope and cable, nor could he have ascertained from an examination of the same that it was defective or might break;" that it "was the duty of the defendant to have and maintain safe appliances for the operation of such a dangerous instrument as a circular saw, and that they were negligent in not so doing; that the cable and weight were insecurely and negligently swung; that the same was unknown to your petitioner, and could not have been known to him upon inspection or the exercise of care, but same was known or should have been known to the defendant;" and that the defendant was further "negligent, in (a) not providing and furnishing" petitioner "a safe place within which to work, and (b) in not providing and furnishing your petitioner with safe appliances with which to work, and (c) that said rope and cable were negligently fixed."

T. S. Hawes, of Bainbridge, for plaintiff in error.

Hartsfield & Conger, of Bainbridge, for defendant in error.

JENKINS, P. J. Affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 528)

COWETA FERTILIZER CO. v. JOHNSON.
(No. 12047.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by the Court.)

1. Attorney and client \S 85—Verdict and judgment consented to by attorney binds client in absence of fraud; attorney may consent to verdict and judgment allowing defendant smaller credit than he claimed.

Where an attorney at law consents to the taking of a compromise verdict and judgment

in a case in which he is employed, such verdict and judgment are binding upon his client, if there was no fraud and no violation of express directions given by the client to the attorney and known to the adverse party or his attorney.

(Additional Syllabus by Editorial Staff.)

2. Judgment \S 441—New trial \S 29—Motion not proper remedy when attorney consents to verdict and judgment fraudulently, etc.

Where an attorney consents to a verdict and judgment against his client fraudulently or collusively, or in violation of instructions, the proper remedy is not by motion for new trial, but by equitable petition or motion to set aside the judgment.

Error from City Court of Carrollton; James Beall, Judge.

Action by the Coweta Fertilizer Company against A. F. Johnson. Defendant's motion for a new trial was granted, and plaintiff brings error. Reversed.

The Coweta Fertilizer Company sued A. F. Johnson on a promissory note. At the appearance term the defendant filed a plea in which he alleged that he had made a payment of \$85 on the note, which was not credited thereon, and when the case was reached for trial the attorneys for both plaintiff and defendant agreed on a consent verdict for the plaintiff for the full amount of the note, less a credit of \$42.50. Judgment was entered accordingly. During the term at which the verdict and judgment were rendered the defendant made a motion for a new trial on the usual general grounds and on the grounds: (1) That when the verdict was rendered against him he was confined to his home with an attack of appendicitis and was unable to attend court on the day of trial, and had so notified his attorney by sending him a certificate of his physician; and (2) that his attorney had no authority to permit the verdict and judgment to be taken against him, except in accordance with his plea allowing him a credit of \$85, that the agreement by his counsel for a verdict for less than this amount of credit, to wit, a credit of \$42.50, was without the knowledge and consent of the movant, and that he objected as soon as he was informed of it, and insisted that the payment set up in his plea was made by him, and that he did not owe the plaintiff the \$85 or any part thereof. The movant's affidavit as to his sickness and the affidavit of his physician were attached to the motion for a new trial. The judge granted the motion, and the plaintiff excepted.

Hall & Jones, of Newnan, for plaintiff in error.

R. D. Jackson & Son, of Carrollton, for defendant in error.

HILL, J. (after stating the facts as above). [1] Verdicts and judgment rendered by consent of counsel in good faith and without any fraud or violation of express instructions given by the client to the attorney and known to the adverse party or his attorney are binding upon the client, the consent of counsel being in law the consent of the parties they represent. Civil Code 1910, § 4955. In the case of Davis v. First National Bank of Blakely, 139 Ga. 703, 78 S. E. 193, 46 L. R. A. (N. S.) 750, Mr. Justice Lumpkin, in quite a lengthy and learned decision reviewing the English rule on the subject and some of the decisions of the courts of the United States, said:

"It may be stated that the Code and the decisions generally follow the English rule, at least in part, and that the decisions hold that, if an attorney at law consents to the taking of a compromise decree in a case in which he is employed, it is binding upon his client, in the absence of fraud or of violation of express directions given by his client and known to the adverse party or his attorney."

In this case it will be noted in the affidavit of the movant that his attorney who agreed to the verdict acted in good faith, and did so thinking he had authority to accept a credit of half the sum of his payment, and the client does not charge that there was any fraud by his attorney in the making of this agreement, or that there was any violation of express instructions given to his attorney on the subject. In fact, it is not alleged in his affidavit that he had given his attorney any instruction at all on the subject. In *Perkerson v. Reams*, 84 Ga. 298, 10 S. E. 624, it was held:

"Where counsel appear for parties before the court, and there is no question as to their authority for making such appearance or acting in behalf of the parties, all that counsel do before the court is binding upon their clients, especially when such action on the part of counsel leads to judgments and orders of the court. Such orders will not be set aside at the instance of clients upon the ground that their counsel had no authority to agree thereto."

We do not think that section 4956 of the Civil Code of 1910 is applicable to the facts

of the present case. That section provides as follows:

"Without special authority, attorneys cannot receive anything in discharge of a client's claim but the full amount in cash."

[2] In the present case the attorney of the defendant was not endeavoring to collect or enforce his client's claim, but was resisting a suit or claim against his client and consented to the credit in favor of his client. We are of the opinion that, where a settlement of a suit is made by an attorney accepting less than the full amount of the claim in cash, the agreement binds the client if the settlement is carried out by a consent verdict and judgment and the settlement was made without fraud on the part of the attorney or any instruction of the client to the contrary. This being true, we think the trial judge had no right to grant a new trial. Indeed, if the movant had any rights at all under the facts of this case he was certainly not entitled to a new trial. New trials are granted because of errors of the trial court occurring during the trial or on the ground of newly discovered evidence. No error of the court is alleged, and certainly the evidence did not fall within the classification of newly discovered evidence. If there had been any fraud alleged and shown, or any violation of instructions given by the client to the attorney, or any collusion of any sort between the attorneys for the plaintiff and the defendant, either an equitable petition setting up the facts and asking that the judgment be vacated, or a motion to set aside the judgment, would have been the proper remedy, not a motion for a new trial. But, regardless of this, we are satisfied that the verdict and judgment should stand; there being in this case no allegation or evidence of any fraud, or any violation of instructions given by the defendant to his attorney, but, on the contrary, a distinct allegation by the defendant of good faith on the part of his attorney in consenting to the verdict and judgment, although such consent was made without his (the defendant's) knowledge or consent.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 504)

BIBB MFG. CO. v. SNOW. (No. 11791.)

(Court of Appeals of Georgia, Division No. 2. March 16, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1004(1)—Damages \S 132(13)—Amount of damages not disturbed unless indicating bias or gross mistake; \$2,000 for loss of three fingers held not excessive.

The amount of damages found by the jury will not be interfered with by this court unless so small or so large as to justify the inference of gross mistake, undue bias, or prejudice. An inference in the present case that the amount of damages is excessive is not justified by the evidence.

2. Appeal and error \S 1066—Trial \S 256(10), 295(7)—Instruction as to assumption of risk, correct in general, must be met by more specific instruction; Inapplicable charge on comparative negligence held not prejudicial.

The excerpts from the charge of the court on which error is assigned stated correctly the principles of law applicable to the evidence, and were sufficient in the absence of timely requests for more specific instructions.

3. No error and evidence sufficient.

No material error of law appears in the trial, and the evidence supports the verdict.

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Action by Newtle Snow, by next friend, against the Bibb Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Snow, a minor more than 14 years of age, by his mother, as next friend, sued the Bibb Manufacturing Company for damages in the sum of \$5,000, alleging, in substance, that July 19, 1918, he entered into the employment of the defendant, under a contract of employment made with his mother, she being a widow; that, while he was engaged in the performance of his duty in the operation of what is known as a carding machine, it became necessary for him to lift a certain lid, described in his petition; and that, while he was lifting this lid, his hand slipped off and went into the cylinder of the machine, and the steel teeth of the same cut off and badly mangled three fingers of his right hand. The petition alleges that the machine was defective and not a machine equal in kind to that in general use, and not reasonably safe for persons to operate with ordinary care and diligence; the particular defect in the machine being that it was not equipped with a handle or knob by which the operator could take hold of the said lid when necessary to do so and thus prevent his hand from slipping off. It is further alleged that at the time of the injury the said minor was 16 years of age, and had been working on that

particular job only a few days prior to his injuries, and that he did not appreciate the dangers in the machine and did not have equal means with the master of knowing of said dangers. The defendant, in addition to the general denial of the allegations in the petition, alleged that the said minor was warned of all the dangers incident to the running of the said machine; that his injury was the result of his own fault; that the defendant was in no wise negligent as to warnings required of it; that the machine on which the plaintiff was injured was equal in kind to the machines in general use, and was equipped with a knob or handle whereby the lid was to be raised; and that the plaintiff was injured by his own negligence, while engaged, out of his line of duty in raising the lid. By amendment the plaintiff alleged that after his employment the defendant put him at work at a more dangerous and hazardous employment than that for which he had been originally employed. This allegation was denied by the defendant, and the affirmative defense was set up that contributory negligence on the part of the minor was the proximate cause of the injury. The jury, on the trial of the case, returned a verdict in favor of the plaintiff for \$2,000.

Rogers, & Tuck, of Covington, and J. O. Knox, of Monroe, for plaintiff in error.

King & Johnson, of Covington, for defendant in error.

HILL, J. (after stating the facts as above).

[1] 1. The first ground in the motion for a new trial complained of the amount of the verdict, alleging that it was excessive. The Code of this state (Park's Code, § 4399) provides that, the question of damages being one for the jury, the courts should not interfere unless the damages found were so small or so excessive as to justify the "inference of gross mistake or undue bias," and it has been uniformly held by the Supreme Court and this court that a verdict giving damages alleged to be excessive will not be set aside unless the amount reasonably indicates that the finding resulted from bias or gross mistake. The evidence on this point showed that three fingers of the plaintiff's right hand were cut off by the machine, that on account of the injuries he was confined, under the care of a physician, for over 11 weeks, suffering great pain, and that the deformed condition of his hand would not only diminish his capacity to labor, but would cause him great humiliation and mortification for the remainder of his life. In view of very wide discretion given by our law to the jury in the assessment of damages for pain and suffering, the loss of time occasioned by the injuries, and the diminution of capacity to labor caused by the loss of three fingers of the right hand, the conclusion is justified, in the

opinion of this court, that the jury, in fixing the amount of damages, was not influenced by bias or prejudice or gross mistake.

[2] 2. The plaintiff in error excepts to the charge of the court that a minor assumes the ordinary risks of employment of which he undertakes, in so far as those risks are or ought to be known or appreciated by the minor, whether the source of his knowledge be his own observation and experience, or instructions which he received from his employer or his employer's representative; the error assigned being that the charge was applicable only to minors under the age of 14 years, and that a servant over the age of 14 years assumes all ordinary risks of his employment, barring only extraordinary and unusual risks and risks brought about by the negligence of the master. We think the general principle of the assumption of risks by a minor employee is correctly stated in this excerpt, and, if the defendant desired a more specific application of the principle to minors over the age of 14, proper instructions should have been requested. Besides, there was evidence that the minor in question, who was not quite 16, had never worked on the particular machine whereon he was hurt until a few days before the injury, and that he was put to work on the machine without any warning or instruction as to its dangerous character, and that the dangerous character of the machine was not so manifest as to make unnecessary such instructions or warnings. The verdict may have resulted from this view of the evidence, which indicated negligence on the part of the defendant, regardless of the age of the minor.

3. The third and fifth grounds of the motion for a new trial complain of excerpts from the charge of the court, wherein the jury were instructed that a servant's knowledge of a defect in a machine is a bar to his suit only when it appears that he understood and appreciated the risk created by that defect, and that, when deciding that question, the jury would be authorized to consider the mentality, the experience, or the lack of experience of the servant. The complaint as to these instructions was that they excluded from the minds of the jury the question whether the master had used due and proper care in ascertaining the mentality and experience, or lack of experience, of the servant at the time of his employment. In this connection the court fully instructed the jury that, if the minor comprehended the risk involved, he could not recover, and that he was bound to exercise his own skill and diligence to protect himself, in the exercise of proper care and diligence in discovering the risk of his employment, and also specifically instructed the jury that, if the danger was manifest and obvious, and as easily known to the servant as to the master, the latter would not be liable for any failure to give

warning of the danger or instructions to the employee. The charge, therefore, on this subject, as a whole, sufficiently submitted to the jury the law relating to the facts of the case. The excerpts objected to in these grounds of the motion, we think, could not have misled the jury, and, so far as they went, were sound. If they were not full enough, and more specific and particular instructions were desired, a proper request should have been made.

4. The charge of the court on the subject of contributory negligence and the doctrine of comparative negligence was, in the abstract, correct, but we do not think that it was applicable to the facts in the case. This question was not involved either in the pleadings or the evidence. The case was tried on the issues that the machine upon which the plaintiff was put to work was defective, and not a machine equal in kind with those in general use; that the plaintiff was inexperienced in the use of such a machine and was unacquainted with its dangerous character, which was not manifest and apparent; and that the defendant failed to warn him of such dangers. Therefore the charge on the subject of comparative negligence was not applicable. But we fail to see how it was prejudicial in any respect to the defendant.

[3] We conclude, therefore, that none of the exceptions contain any substantial merit; that the case was fairly tried, and the verdict is supported by the evidence.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J.,
concur.

(26 Ga. App. 569)

COBB COUNTY v. ABERNATHY.
(No. 11976.)

(Court of Appeals of Georgia, Division No. 2,
March 26, 1921.)

(Syllabus by the Court.)

1. Bridges \S 43, 46(8)—Hole held ~~emol~~ at cause of injury from fright of mule; ~~ques~~ tion properly left to the jury.

It appearing from the petition that the plaintiff's mule, in crossing a bridge on a public highway, took fright at a hole in the bottom of the bridge and "jumped and shied and fell down upon said bridge," causing injuries to the plaintiff, who was riding the mule, and that the county was negligent in permitting the hole to remain in the bridge after notice, and that such negligence was the real cause of the injury, the plaintiff had a cause of action; the jury being the judge of these matters as questions of fact.

2. Bridges \S 43—Where defect and fright of animal combine to cause injury, county is liable.

Where two causes combine to produce an injury, both of which are in their nature prox-

that the crime with which this defendant was charged, cheating and swindling, was admissible because it shed light upon the whole transaction, that is, the negro had beat the defendant out of his money. This was the cause of the whole trouble, and should have been permitted to go to the jury for what it was worth. The negro's name was Newsome.

(3) Because the court erred in charging the jury as follows: "As I said, you have been impaneled, gentlemen, to try the issue formed on this bill of indictment, and you have been sworn to try this case according to the evidence. The law you are required to take from the court. You are the judges of both the facts and the law in this sense: You are to take the law as given you by the court, and apply that law to the facts as you find them, and in that sense you are the judges of the law and of the facts."

The defendant excepts to this charge for the reason that the court confined the jury to a consideration of the evidence in making up their verdict, and thereby excluded from their consideration the defendant's statement. * * *

(4) Because the court erred in charging the jury as follows: "No one has the right to shoot a human being with a pistol unless the act is justified or excused by some rule of law. The intentional shooting and wounding of a human being, whether a white man or a negro, with a pistol, is unlawful unless it is done under circumstances of justification or excuse, according to the principles of the Penal Code of this state."

The defendant excepts to this charge for the reason that the said charge was an expression of opinion by the presiding judge on the facts in the case, which is forbidden by section 1058 of the Penal Code of 1910. The defendant further excepts to the charge upon the ground that the court assumed in its charge to the jury that the defendant shot Tobe Harrell, the human being. This great question was a question for the jury to decide without any expression of opinion from the court. The charge was argumentative, and gave the contentions of the state very strongly, and ignored again the defendant's side of the case as contained in his statement. * * *

(5) Because the court erred in charging the jury as follows: "Refusing to pay an account or debt, or the signing of a bond, or attempt to sign a bond, as security for a person under arrest, is no provocation in law, and will not under any circumstances justify or excuse the shooting and wounding of a human being with a pistol."

The defendant excepts to this charge for the reason that it cut the defendant off from his right of self-defense, and cut the defendant off from any defense whatever that he may have put up in his statement to the jury. This charge was also an expression of opinion by the court on the facts proven in the case, which is forbidden by section 1058 of the Penal Code of Georgia. The defendant further excepts to this charge because it was argumentative and stated the state's side of the case too strongly, at the same time ignoring the defendant's side of the case. The defendant excepts to the charge further because the charge assumed that the defendant shot the prosecutor in the case, a human being. * * *

(6) Because the court erred in charging the jury as follows: "If you find beyond a reasonable doubt that in this county, within four years prior to the finding of the indictment, the defendant, Tom Loyd, unlawfully and intentionally shot and wounded Tobe Harrell, a human being, with a pistol, the following rules should control you in arriving at a verdict: If the pistol as used by the defendant was a weapon likely to produce death, and the defendant intentionally shot and wounded said Tobe Harrell with said pistol with deliberate intent to kill him, solely for the reason that said Tobe Harrell failed or refused to pay a debt or an account, or solely because the said Harrell was signing or attempting to sign a bond as surety, the defendant would be guilty of the offense of assault with intent to murder."

The defendant says that this charge is error for the same reasons assigned in the foregoing grounds. * * *

(7) Because the court erred in charging the jury as follows: "If you should find beyond a reasonable doubt that the defendant is guilty of the offense of assault with intent to murder, you would not be authorized to find him guilty of the offense of unlawfully shooting at another. If, however, you should not find that the defendant is guilty of the offense of assault with intent to murder, but should find beyond a reasonable doubt that in this county, prior to the finding of the indictment, the defendant unlawfully and intentionally shot and wounded Tobe Harrell, a human being, with a pistol, within the range such pistol would carry, not in his, the said Tom Loyd's, own defense, and not under circumstances of justification according to the principles of the Penal Code of this state, he would be guilty of the offense of unlawfully shooting at another."

The defendant excepts to this charge upon the ground that there is no unlawful shooting at another in this case. According to the state's case and the contentions of the state before the jury, the defendant was guilty of the offense of assault with intent to murder, and according to the defendant's statement in the case, he was guilty of no offense whatever, but was justified. There was no middle ground, no room for a compromise verdict by the jury, and it was error for the presiding judge to instruct the jury on the law of unlawful shooting at another, because that branch of the law was not involved in this case, and it gave the jury an opportunity, which they took advantage of, of finding the defendant guilty of unlawfully shooting at another. * * *

(8) Because the court erred in charging the jury as follows, to wit: "If you should not find beyond a reasonable doubt that in this county, within four years prior to the finding of the indictment, the defendant intentionally and unlawfully shot and wounded Tobe Harrell, a human being, with a pistol, as alleged, or if you have a reasonable doubt of his guilt, you should return a verdict of not guilty."

This was not a fair statement of the defendant's contentions. This charge ignored the defendant's statement. This charge was so worded that the jury could not understand it. The court should have charged the defendant's contentions in this immediate connection as stated in his statement to the jury and left it to the jury to say whether the defendant had

provocation or not. The defendant contends, for all these reasons, the foregoing charge was error.

(9) Because the court erred in charging the jury as follows: "The state, however, is not required to prove the guilt of a defendant beyond all doubt. Moral and not mathematical certainty is all that can be expected in legal investigation. The doubt of a jury to justify an acquittal should be reasonable, and not mere vague conjecture or possibility of the innocence of the accused."

The defendant excepts to this charge because the court failed to charge the jury in this connection that if they had any reasonable doubt about the defendant's guilt they should acquit, and the defendant excepts to that part of the charge, "The state, however, is not required to prove the defendant's guilt beyond all doubt."

(10) Because the verdict of the jury in said case was contrary to the following charge of the court: "Under our law, as it stands now—I refer to an act passed recently—whenever the jury finds the defendant guilty of a felony which is punishable by imprisonment in the penitentiary for a term of years, and the offense is not reduced to a misdemeanor by their recommendation, it devolves upon the jury to fix the sentence in their verdict. In such cases the law requires the jury to fix a minimum and a maximum sentence; that is, in their verdict they should fix a punishment of not less than so long and not more than so long in the penitentiary of the state, stating the time that they fix. In such cases, however, you will understand that they would have to remain within the period fixed by law for the punishment of a defendant in such cases."

The defendant contends that the jury did not fix the punishment in this case. * * *

(11) Because the court erred in charging the jury as follows: "If you find the defendant guilty of the offense of unlawfully shooting at another, and should not wish to recommend that he be punished as for a misdemeanor, then the form of your verdict should be, 'We, the jury, find the defendant guilty of unlawfully shooting at another, and fix his punishment at not less than so long and not more than so long, stating the time.' You will remember that that offense is punished by the law by confinement in the penitentiary from one to four years."

The defendant excepts to this charge for the same reason that he excepts in the foregoing ground of the amended motion for a new trial. The jury found the defendant guilty of unlawfully shooting at another, which was a compromise verdict in this case, and the court fixed the punishment in this case, and not the jury, which is contrary to the act of the Legislature of 1919 (Laws 1919, p. 387). The jury should fix the punishment in the penitentiary in a felony case, but the jury did not do it, and the judge fixed the punishment, which is forbidden by law now since the act was passed. So the charge authorizing the jury to find such a verdict is error.

(12) Because the court erred in charging the jury as follows: "If you should find the defendant guilty of shooting at another, and wish to recommend that he be punished as for a misdemeanor, then the form of your verdict should be, 'We, the jury, find the defendant guilty of

unlawful shooting at another, and recommend that he be punished as for a misdemeanor.'"

The defendant excepts to this charge for the reason that there was no middle ground in the case, and not room for a compromise verdict by the jury by finding the defendant guilty of the offense of unlawfully shooting at another. * * *

The defendant further excepts to this charge for the reason that the court did not give the jury instructions to fix the punishment in the penitentiary, but told the jury that they could recommend that he be punished as for a misdemeanor. Under this charge, the jury accepted the invitation of the presiding judge, and recommended that he be punished as for a misdemeanor, and therefore gave the court the right to fix the punishment in this case, which is forbidden by the act of the Legislature of 1919. This defendant was charged with a felony, with assault with intent to murder, in one count, and the defendant contends that the presiding judge had no right, under the law, to give the jury an opportunity to find the defendant guilty of a lower grade of crime and to fail to fix the punishment in the penitentiary and leave it to the presiding judge to fix the punishment. * * *

(13) Because the court erred in charging the jury as follows, to wit: "I have written out some forms of verdict corresponding with the charge that I have given you, and they will be handed to you, and you can select from these forms that form of verdict which coincides with your finding."

The defendant excepts to this charge for the reason that the court had no right to write the forms of the verdict for the jury on paper, and send them out with the jury in order to let the jury select from these forms the verdict which they could find. The jury should be left alone to make their verdict from their memory of what occurred on the trial of said case, and they should not be aided by any writing of the presiding judge purporting to be the form of the verdict. For these reasons the defendant assigns the charge as error.

—Statement by editor.

John R. Cooper and W. O. Cooper, Jr., both of Macon, and C. A. Weddington, of Cochran, for plaintiff in error.

W. A. Wooten, Sol. Gen., of Eastman, for defendant in error.

LUKE, J. [1] 1. The evidence in this case shows conclusively that while Tobe Harrell was sitting in a chair in the sheriff's office in the courthouse preparing to sign a criminal recognizance for a man against whom Loyd had sworn out a warrant, Loyd shot Harrell three times with a 32-caliber pistol, hitting him once in the shoulder, once in the neck, and once near the heart. Loyd, in his statement on his trial, said, "I just wanted to keep him (Harrell) from signing that bond and beating me out of my money;" and, further, that he had no intention of murdering Harrell. Loyd was charged with assault with intent to murder and was convicted of shooting at another, with a recommendation that he be punished as for a misdemeanor, and

was sentenced by the court as for a misdemeanor. The court did not err in charging the law of shooting at another, nor was the verdict finding defendant guilty of the lesser offense, with a recommendation that he be punished as for a misdemeanor, contrary to law.

[2] 2. Where the judge charges the jury in effect that the jury should fix a maximum and minimum sentence in the event of a conviction for either assault with intent to murder or shooting at another, but he fails to instruct them to fix such sentence if they recommend that he be punished as for a misdemeanor, and the judge himself imposes a misdemeanor sentence, the charge to this effect furnishes no ground of complaint on the part of the defendant.

[3-11] 3. There is no merit in any of the approved grounds of the motion for a new trial, and the evidence amply sustains the verdict.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 538)

**BLANCHARD, HUMBER & CO. v. HAGAN
GAS ENGINE & MFG. CO.**
(No. 12055.)

(Court of Appeals of Georgia, Division No. 2,
March 16, 1921.)

(Syllabus by the Court.)

Evidence 568(1)—**Execution** 179, 196—
Verdict properly directed in claim case when evidence clearly shows person lending money with which to pay title retention notes has no title preventing levy; testimony that property was witness' property is a conclusion.

In a claim case where the evidence clearly showed that at the date of the levy of the execution the defendant in *fi. fa.* had both title to, and possession of, the property levied on, it was proper for the court to direct a verdict for the plaintiff in *fi. fa.*

Error from Superior Court, Marion County; John B. Hutcheson, Judge.

Proceedings on the claim of Blanchard, Humber & Co. to property levied on under a *fi. fa.* in favor of the Hagan Gas Engine & Manufacturing Company. Judgment for the plaintiff in *fi. fa.*, and the claimant brings error. Affirmed.

This is a claim case. The evidence in substance is as follows: The defendant in *fi. fa.* bought certain personal property from the Woodruff Machinery Manufacturing Company, giving therefor promissory notes con-

taining a retention of title to the personalty until paid for, which were duly recorded. He paid the notes, and an entry of payment was duly made on the record, and possession of the property was delivered to him by the payee. The execution against him was obtained on April 25, 1918, and on July 8, 1919, was levied on the personalty in question, which was then in his possession. On the part of the claimants it was testified that the property in question was their property at the date of the levy. The claim was based on the following facts: The claimants lent to the defendant in *fi. fa.* the money to pay his notes for the property and paid the notes and took possession of the property. Subsequently, on August 4, 1919, a transfer of the notes, which had previously been marked paid and delivered to the defendant in *fi. fa.*, was made by the Woodruff Machinery Manufacturing Company to the claimants, at the request of the defendant in *fi. fa.*, while the property was in the possession of the levying officer. The defendant in *fi. fa.* testified that he had never repaid to the claimant the money borrowed to pay the note. The court, at the conclusion of the evidence, directed a verdict for the plaintiff in *fi. fa.*, and the claimants excepted.

T. B. Rainey, of Buena Vista, and Geo. C. Palmer, of Columbus, for plaintiff in error.
W. B. Short and W. D. Crawford, both of Buena Vista, for defendant in error.

HILL, J. (after stating the facts as above). The direction of a verdict for the plaintiff in *fi. fa.* was demanded. No other legal verdict could have been rendered. The property levied on was in the possession of the defendant in *fi. fa.* at the time of the levy. The title thereto reverted to him when he paid the title retention notes. The fact that the claimants had loaned to the defendant in *fi. fa.* the money with which to pay these notes did not give the claimants any title to the property as against the lien of plaintiff's *fi. fa.*, in the absence of a written transfer of the notes. *Swann Davis Co. v. Stanton*, 7 Ga. App. 668, 67 S. E. 888; *Burch v. Pedigo & Lyons*, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808. The testimony of the claimant that the property levied upon at the date of the levy was their property was merely a conclusion of the witness and without any probative value, the facts clearly showing that at that time the title was in the defendant in *fi. fa.*, the title-retention notes having been paid by him and delivered up to him by the payee. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 510)

WOLFE v. CITIZENS' BANK OF DUBLIN.
(No. 11799.)(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)*(Syllabus by the Court.)*

1. Appeal and error \S 195 — Objection that amendment to plea was not allowed by order of court cannot be first raised in brief.

Where an amendment to a plea is filed in the clerk's office at the trial term, and considered by the court in the decision of the case, and specified as a part of the record to be sent up to this court, it is too late to raise for the first time, in the brief of counsel for the defendant in error, the point that the amendment was not allowed by an order of the trial court and therefore cannot be considered.

2. Set-off and counterclaim \S 28(1) — "Mutual demands" import reciprocal obligations.

The words "mutual demands," as applied to debts which may be the subject of set-off, necessarily import that there must be reciprocal obligations between the parties (citing Words and Phrases, Mutual Debts).

3. Usury \S 101 — Former contract must be between same parties to permit set-off of usury.

"Usury paid on a former contract may be pleaded as a set-off to the existing debt, provided it be not barred by the statute of limitations," and provided further that the "former contract," on which the usury was paid, was between the same parties as those to the "existing debt."

4. Bills and notes \S 376 — Usury \S 101 — Only "usury" in particular note may be urged against bona fide holder; usury in earlier notes cannot be set off against transferee of renewal note.

The defense of "usury," which is good even against a bona fide holder for value of a negotiable promissory note who acquired title to the same before maturity, means the usury with which the note in question is infected, and does not include usury in other notes made by the defendant to other persons; and in a suit by the holder of the first note, against the maker thereof, he will be allowed to set off only the usury in that note.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Usury.]

Error from City Court of Dublin; R. D. Flynt, Judge.

Action by the Citizens' Bank of Dublin against J. A. Wolfe. Judgment for plaintiff, and defendant brings error. Affirmed.

The Citizens' Bank of Dublin sued J. A. Wolfe, maker of a promissory note, alleging that the note was made payable to the order of the City National Bank of Dublin, and by it indorsed and transferred to the petitioner. The defendant, in a plea filed at the appearance term, admitted the execution of the note sued on, and alleged that the plaintiff was the successor of the City National Bank, a

banking corporation under the laws of the United States, and, as the successor of the said national bank, had taken the note sued on with full notice of all the equities between the defendant and the national bank, and further alleged that the note contained usurious interest which the national bank had received, charged, and reserved from the defendant when the note was originally made, and that this usurious interest should be allowed the defendant as a set-off against the note. The defendant alleged that he had made, previous to the date of that note, other notes to the national bank, in which there was a large amount of usury reserved and taken by that bank at the time the notes were made, aggregating the usurious sum of \$1,400, and this amount the defendant insisted should be allowed him as a set-off against the principal of the note in suit. Allowing the sums claimed as a set-off, the defendant alleged that there only remained due on the note the sum of \$690, which sum he had tendered to the plaintiff before the return day, and that the tender was a continuous tender and unconditional.

At the trial term of the case the defendant filed an amendment to his plea, in which amendment he alleged that the note sued on was a renewal note and had been renewed for a number of times; that at each renewal thereof interest was charged in the face of the note at the rate of 12 per cent. per annum, and that he was entitled to set off the usury with which the note was infected. He further alleged that previous to this note he made other notes payable to the "plaintiff," on which he paid usury aggregating the sum of \$1,090, which he asked to be allowed him as a set-off to the principal of the note in suit. And as to the note sued on, amounting to \$2,090, the defendant alleged that it was given by him to "plaintiff" in renewal of all his previously existing indebtedness to the national bank, and that this note was infected with usury which was charged and collected when the note was made. The allegation in this amended plea that the notes in question were made by the defendant to the "plaintiff" was not supported by the evidence. The evidence indisputably shows that the note in suit and all the other notes were originally made by the defendant to the national bank; that the note in suit was the last note made by him, and that it was made to the national bank; and the evidence further shows that all the notes in question, except the note sued on, were fully paid by the defendant—principal and interest—to the national bank, the statement being made that the bank at the time of the execution of the notes in question "charged and reserved" the usurious interest. The first plea filed by the defendant was abandoned as being under the national bank law and therefore not applicable, and

the second plea was filed under the state law. The second plea was not formally allowed by any order of the trial court. It was filed in the clerk's office at the trial term and was specified in the bill of exceptions as a part of the record to be sent up to this court by the clerk. The defendant in error insists here for the first time that this amended plea should not be considered by this court, because it appears that no order was passed in the trial court allowing such plea to be filed.

The case was heard by the judge below without the intervention of a jury, and he rendered a judgment for the plaintiff for the amount of the note sued on, with legal interest, after deducting therefrom the usurious interest embraced in the particular note; but he did not allow as a set-off the usury alleged to have been paid by the defendant on the previous notes made by him to the national bank; and the question for decision by this court, on the merits of the case, arises on the exception to the judgment refusing to allow the defendant a set-off of the usurious interest paid by him to the national bank on the previous notes.

Robt. L. Berner, of Macon, and S. W. Sturgis, of Dublin, for plaintiff in error.

M. H. Blackshear, of Dublin, for defendant in error.

HILL, J. (after stating the facts as above). [1] 1. The objection that there was no order of the court allowing the amendment to the plea to be filed at the first term was too late, having been made for the first time in this court. In *Smith v. West*, 134 Ga. 11, 67 S. E. 405, the court says:

"In specifying the parts of the record to be sent up to this court, the additional answer is mentioned. * * * It is too late for the defendant in error for the first time, in his brief filed in this court, to raise the point that this amendment was not duly allowed, and therefore cannot be considered."

[2-4] 2. Should the trial court have allowed the set-off of the usurious interest "charged and reserved" by the national bank on the previous notes against the note in suit, or should he have limited the ruling on that point to the amount of the usury paid on the particular note in suit? It is clearly inferable from the evidence that all of the usurious interest on all the notes in question, including the one in suit, was charged and reserved by the national bank when the notes were first made and when they were renewed from time to time by the defendant, and the evidence shows that the principal of all of the previous notes and the interest, including the usurious interest, had been fully paid by the defendant to the national bank. The defendant insists that upon the note in suit he was entitled to a credit of the aggregate amount of all the sums of usury paid by him, within the statute of limitations, on the previous

notes as well as the note in suit. He bases his contention upon the law of set-off under the Code. Section 4340 of the Civil Code (1910) provides that as "between the parties themselves any mutual demands, existing at the time of the commencement of the suit, may be set-off"; and the learned counsel for the plaintiff in error insists that the excess of interest in the previous notes, as well as in the note in suit, constitutes a demand which may be recovered either by a plea or a separate suit. Was the usury which the national bank charged and reserved on the previous notes, and which the evidence showed was paid in full to the national bank by the defendant, a mutual demand existing at the time of the commencement of the suit between the plaintiff and the defendant? What is the meaning of the words "mutual demands," in the section referred to?

"The word 'mutual,' as applied to debts which may be the subject of set-off, necessarily imports that there must be reciprocal obligations between the parties." 5 Words and Phrases (1st Ed.) p. 4649. An obligation existed on the part of the plaintiff to exact from the defendant the legal demands which he could make on the note in suit, and the defendant had the right to demand of the plaintiff that he should have a credit of the usury in the said note. But where was there any obligation on the part of the plaintiff to allow the defendant a credit on the previous notes, which the evidence does not show that the plaintiff had ever held as transferee or otherwise, and upon which usurious interest had been fully paid by the defendant to another party? Under the national bank law, as he had fully paid the usury to the national bank, he might have had the right, in a separate suit, to sue for and recover the amount actually paid to that bank. *Haseltine v. Central Bank of Springfield*, 183 U. S. 132, 22 Sup. Ct. 50, 46 L. Ed. 118. But even as to the national bank, having actually paid the usurious interest to that bank, he could not set it off in a suit brought by the bank against him, but he would be confined to the remedy of a direct suit for the debt. In *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395, it is said:

"Usury paid on a former contract may be pleaded as a set-off to the existing debt, provided it be not barred by the statute of limitations."

In that case it appears that the former contract infected with usury was between the same parties as in the suit to which it was held that the set-off could be pleaded. And in the case of *Angier v. Smith*, 101 Ga. 844, 28 S. E. 167, it was held that the defense of usury was good even against a bona fide holder for value of a negotiable promissory note who acquired the title to the note before its maturity, but in that case the usury was in the note which had been transferred for value and which was in suit. The taint of usu-

ry in a note remains in it even after it has been transferred to a bona fide holder for value before due, but it cannot be the law that the amount of usury in one note, or in a dozen notes, paid by the defendant to other persons, can be set off by him as a legitimate claim, when he is sued by another on a different note. To illustrate by the facts of the present case: If, as a matter of law, the defendant has the right as against the plaintiff to set off the amounts of usury contained in the notes which he had previously made and paid in full to the national bank, it would allow him to collect from the plaintiff, a stranger to all the other contracts, more than half of the principal of the note of which he was the bona fide holder. We are therefore of the opinion that the learned trial judge did not commit any error in limiting the set-off to which the plaintiff in error was entitled to the amount of the usury which was contained in the note in suit, and in refusing to allow him as a set-off the usurious interest which he had paid to the City National Bank of Dublin on the other notes.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 572)

LAMB v. FULTON BAG & COTTON MILLS.
(No. 12037.)

(Court of Appeals of Georgia, Division No. 2.
March 26, 1921.)

(*Syllabus by the Court.*)

1. Master and servant \S 316(1)—“Independent contractor” defined.

When a person is employed to do specific work and is in the exercise of a distinct and independent employment, and in the execution of this specific work is not under the immediate supervision and control of his employer, and the manner of doing the work and the employment, payment, and control of the labor is left entirely to the employee, the relation of master and servant does not exist; the party employed being an independent contractor. Moll on Independent Contractors and Employers' Liability, §§ 13, 14, 15, and 16.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

2. Master and servant \S 316(2)—Building repairer held independent contractor, liable for minor's unlawful employment.

The defendant corporation, the owner of cotton mills, made a contract for the repair of the roof of its buildings with one who was specially engaged in that line of work. By the terms of the contract the defendant agreed to pay a fixed sum to the contractor and was to furnish a portion of the material to be used in the doing of the work. All the particulars in connection with the doing of the work, the em-

ployment, payment, and control of the labor, and the direction and supervision of the work, were left entirely to the contractor. A minor under 14 years of age was employed by the contractor to help make the repairs, for which he was to be paid by the contractor a certain wage. The defendant had nothing to do with the selection of the minor, had no authority to discharge him, and did not direct him in the manner of doing his work. While engaged in this work he fell off the roof of the building and was killed. *Held*, the minor was not a servant of the defendant corporation at the time of his death, and the defendant was not responsible for his wrongful employment, and not liable in damages to his widowed mother for his death. Civ. Code 1910, §§ 4414, 4415, subd. 5; *Harris v. McNamara*, 97 Ala. 181, 12 South. 103; *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582.

3. Master and servant \S 332(3) — Nonsuit properly granted on ground of employment by independent contractor.

The evidence substantially stated above showing clearly that the plaintiff's minor son was not the servant of the defendant corporation at the time of his death, but was the servant of the independent contractor, and this being the controlling question in the case, there was no error in the award of a nonsuit.

4. Decision of other questions unnecessary.

The existence of the relation of master and servant between the plaintiff's minor son at the time of his death and the defendant corporation being a condition precedent to the right to recover either for the loss of the minor's services during his minority or for the value of his life, arising from his wrongful employment or from negligence, and it being proved by the plaintiff's evidence that this relation did not exist, it is unnecessary to decide the questions raised by the assignments of error as to the sustaining of the demurrers to the first and third counts of the petition.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Mrs. D. A. Lamb against the Fulton Bag & Cotton Mills. Judgment for defendant, and plaintiff brings error. Affirmed.

Suit was brought in the city court of Atlanta by Mrs. Lamb against the Fulton Bag & Cotton Mills seeking to recover damages for the wrongful death of her minor son. The declaration contained four counts. A demurrer was filed to all of the counts, which was sustained by the court as to counts 1, 3, and 4, and overruled as to count 2. Exceptions pendente lite were preserved as to the judgment sustaining the demurrer as to counts 1 and 3. No exception was taken to the judgment on the demurrer as to count 4. The case went to trial on count 2, and at the conclusion of the plaintiff's evidence on motion of the defendant a nonsuit was granted. The substantial allegations on count 2, to which the evidence applied, were that John

and did buy from him a certain lot of pine timber, consisting mostly of original forest or long leaf pine timber and partly of short leaf pine timber; that since said contract was made defendant has cut from the land, sawed into lumber, and hauled away the greater part of said timber, and the defendant has had free access at the timber now uncut, and could have cut it at almost any time since the summer of 1909, and now is at liberty to cut it at any time it may so desire."

The record does not show what the pleadings of the purchasers were in defense of the former suit, or that the cause was terminated by any judgment. It merely appears to have been compromised or adjusted in some way by the parties without going to judgment.

In October, 1918, Florence, Phillips & Co. brought against Newsome the present suit for \$500 damages, alleging that he has refused and now refuses to allow them to enter his land and cut the remaining timber. The suit expressly pleads and relies upon the alleged contract as set forth by Newsome in his former suit against them, as above quoted. The gist of Newsome's defense was that, since the contract of sale did not prescribe when the timber was to be removed, the plaintiffs were required to cut and remove it within a reasonable time, which they had failed to do. The jury found for the defendant. The court denied a motion for new trial.

Error is assigned because, in admitting in evidence as an admission the third paragraph of Newsome's former petition, the court limited the consideration of this evidence by the jury to the sole purpose of establishing the fact that timber was sold by Newsome. Upon this the court ruled as follows:

"I am admitting it because it is admissible for one purpose only. It is admissible solely as a declaration upon the part of the defendant in this action that he sold some timber. Whether or not he sold this timber I do not know. It has probative value solely as a declaration upon the part of the defendant here that he sold some timber to these plaintiffs. It is not binding upon anybody. It is not an estoppel. The declaration he may have made in that suit is admissible for that purpose."

Counsel for plaintiffs thereupon agreed to such restriction by stating:

"That is what we are offering it for. If it had never gone to judgment or been tried, if it is shown to have been drawn at Mr. Newsome's instance, it is admissible. Its only probative value is to establish the one disputed issue here. Any declaration, statement, written court record, or anything else that is any suggestion at all or intimation that there was a contract between the parties, is admissible for the purpose of establishing the contract."

Error is also assigned on the court's charge with reference to this evidence:

"I merely tell you that the suit that Newsome brought against the plaintiff in this case

could not be construed as alleging that the contract was that they might cut the timber at any time. That suit is admitted in evidence to the jury solely for the purpose of letting it have such probative effect as it might have as to the issue in the case as to whether or not Newsome actually sold the timber to the plaintiffs or not. You will look to the other evidence in the case to determine the terms and stipulations in the contract as to when the timber was to be cut, and not to that declaration."

Immediately following the language complained of in the final sentence quoted, the court, however, further said:

"You may consider everything in that petition as bearing and shedding light upon that issue, as to whether he should cut it within a reasonable time, indefinite time, or at any time, but that language is not an express allegation or admission that that was the original contract between the parties."

Plaintiffs also assigned error, "because all of the evidence offered on behalf of" Newsome "is insufficient to carry the burden imposed upon him by law of showing that" they "did not offer to cut the timber within a reasonable time."

M. C. Barwick, of Louisville, for plaintiff in error.

Phillips & Abbot, of Louisville, for defendant in error.

JENKINS, P. J. [1-3] 1. In a sale of timber growing on a described tract or parcel of land, where the deed or contract of sale expressly provides for its removal "at any time," an estate in fee passes to the vendee, with such an interest in the soil as will be sufficient for its growth, although the fee in the soil remains in the vendor; and such an estate is not terminated and forfeited by the failure of the vendee to remove the trees in a reasonable time. *North Georgia Co. v. Bebee*, 128 Ga. 563, 57 S. E. 873. But where such a conveyance or contract is silent as to the time within which the timber shall be removed, an implication arises that such right is to be exercised within a reasonable time from the date of the sale; and on failure so to do the interest of the vendee in the timber ceases. *McRae v. Stillwell, Millen & Co.*, 111 Ga. 65 (1a), 38 S. E. 604, 55 L. R. A. 513; *Goette v. Lane*, 111 Ga. 400, 38 S. E. 758; *Shippen Bros. Lumber Co. v. Gates*, 136 Ga. 37(1), 70 S. E. 672; *Mills & Williams v. Ivey*, 3 Ga. App. 557(2), 60 S. E. 299. In such a case what amounts to a reasonable time is a question of fact for the jury, to be decided in the light of all the facts and circumstances of the transaction. *Allison v. Wall*, 121 Ga. 822, 49 S. E. 831; *Branch v. Johnson*, 9 Ga. App. 699, 700, 71 S. E. 1123, and cases cited supra.

[4-6] 2. When a person has assumed a certain position in a litigation, and has succeeded in maintaining it through a judgment or

decision of the court, or through the acquiescence of the opposite party, to his detriment, he will not be permitted to assume a contrary position in a subsequent suit between the same parties relating to the same subject-matter. *Haber-Blum-Bloch Hat Co. v. Friesleben*, 5 Ga. App. 123, 62 S. E. 712; *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; *Davis v. Wakelee*, 156 U. S. 689, 15 Sup. Ct. 555, 39 L. Ed. 578; section 5736, Civil Code. Thus, where, under a suit on a contract, the plaintiff obtains a judgment or relief amounting to an adjudication in his favor, and is afterwards himself sued for a subsequent breach upon his own part of the same contract, he cannot be heard to deny the essential terms of the contract, as pleaded in the former petition and under which he had recovered. In the instant case, however, this principle does not have proper application, for the reason that the specific allegation contained in the former petition, upon which the present plaintiffs now rely as establishing one of the terms of the original contract, was not so pleaded in the former suit, and the trial judge was therefore correct in holding that the doctrine of estoppel did not apply, but properly allowed the previous allegations to be considered by the jury as in the nature of a possible admission, shedding light in this way upon the question as to what constituted the true agreement in respect to the feature of the contract now in dispute. *Printup v. Patton & Jackson*, 91 Ga. 422, 18 S. E. 311; *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92; *St. Paul Fire Ins. Co. v. Brunswick Grocery Co.*, 113 Ga. 786 (2), 39 S. E. 483; *Sons & Daughters of Job v. Wilson*, 4 Ga. App. 235 (1), 61 S. E. 134; *Tison v. South Ga. Ry. Co.*, 8 Ga. App. 91(2), 68 S. E. 651; Civil Code 1910, §§ 5775, 5776.

3. The jury in the instant case having been authorized to find that the original contract of sale did not provide that the vendee was privileged to remove the timber at any time, and the trial judge having fairly submitted to the jury the question as to what amounted to a reasonable time under the facts and circumstances of the present case, and their verdict in favor of the defendant being authorized by the evidence, the court did not err in refusing the grant of a new trial.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(25 Ga. App. 563)

CRAWFORD v. ENGLISH. (No. 11966.)

(Court of Appeals of Georgia, Division No. 2.
March 26, 1921.)

(Syllabus by the Court.)

1. Petition in action for commissions held not subject to demurrer.

The allegations of the petition set forth a cause of action, and there was no error in over-

ruling the demurrer on all of the grounds, general and special.

(Additional Syllabus by Editorial Staff.)

2. Brokers §56(3)—Owner cannot defeat right to commissions by making sale personally to purchaser procured by broker.

Under Civ. Code 1910, § 3587, providing that a broker's commissions are earned when he finds a purchaser ready, able, and willing to buy and offering to buy on the owner's terms, and that placing property in the hands of a broker does not prevent a sale by the owner, the owner cannot deprive the agent of commissions by making a personal sale to a customer procured through the activities of the agent.

3. Brokers §55(1)—Right to commissions not inconsistent with fiduciary relationship to another broker formerly employing plaintiff, whose contract was terminated.

Where P. had an exclusive agency for the sale of land and employed plaintiff to assist in selling the land, and, after the expiration of the contract, the owner contracted with plaintiff to procure a purchaser, and he procured one with whom he had come in touch while working for P., his entire right to commissions was not inconsistent with his fiduciary relationship with P.

4. Brokers §82(1)—Petition in action for commissions held not to show contract unilateral.

In a broker's action for commissions, the petition, alleging that it was expressly agreed that described property was to be sold for a specified price net to the owner, that plaintiff undertook to sell it by a specified date for a specified commission, and that all of such terms were agreed to by defendant, and that plaintiff had fully performed the contract, was not demurrable as showing that the contract was unilateral.

5. Brokers §82(1)—Petition in action for commissions held sufficiently to describe land.

The petition in a broker's action for commissions sufficiently describes the land sold as 1,400 acres located in two named counties on which defendant then resided, and which he subsequently sold to M., and being land on a specified public road through which the line between such two counties passed, which M. now owns and is in possession of.

6. Brokers §43(3)—Description of land need not be as complete as in deed.

The description of property placed in the hands of a broker for sale need not be as definite and complete as that which should be given in deeds of conveyance.

Error from City Court of Americus; W. M. Harper, Judge.

Action by W. L. English against John Crawford. Judgment overruling all demurrers to the petition except one, and defendant brings error. Affirmed.

W. L. English sued John Crawford for commissions on the sale of certain real es-

tate placed in his hands by Crawford. The original petition alleges, in substance, that on June 30, 1919, Crawford entered into a contract with J. H. Purvis (a copy of which is attached to the petition) in which he gave to Purvis the exclusive right to sell 1,400 acres of land in Sumter and Schley counties, at an agreed price and upon stated terms; that Purvis employed the petitioner to aid him in his efforts to sell the land in pursuance of the terms of the contract, and also employed for the same purpose one P. D. Willford, and the three of them worked together from the date of the contract with Purvis until the date of its expiration on September 30th; that the petitioner, while associated with Purvis, had frequent communications with one R. L. McMath with reference to the purchase of the property, and took him over it on several occasions; and that after September 30th, when the contract with Purvis expired by its terms, the petitioner had several conferences with Crawford, who wanted him to continue his efforts to sell the property, as he was quite anxious to dispose of it, under the same terms as contained in the contract with Purvis, but he refused to do this, and advised Crawford that he would do all in his power to sell the property, on condition that Crawford would pay him the usual commission of 5 per cent. for making the sale.

By an amendment to his petition the plaintiff alleged that on the expiration of the Purvis contract the defendant made a specific written contract with him, in which the defendant employed him to sell the property in question at \$50 per acre net cash, and agreed to pay him 5 per cent. commission, the property which he placed in his hands for sale being described as "1,400 acres of land located in Sumter and Schley counties, Ga., on which the said John Crawford then resided, and which he subsequently sold to R. L. McMath, and being the place in said two counties on the Bumphead public road and the Sumter and Schley county line passing through same, which the said R. L. McMath now owns and is in possession of."

The petition alleges the following understanding and agreement with John Crawford: That the petitioner continued to keep the said R. L. McMath as a customer, whom he had first interested in the property under the Purvis contract, and advised Crawford that R. L. McMath was interested, and that he felt sure that he could sell him the property; that he was in constant communication with the said McMath, had frequent conferences with him up to the day immediately prior to the closing of the deal between Crawford and the said McMath, and that he had a conference with the son of the said McMath in reference to the sale to McMath on the day before the closing of the sale by Crawford to McMath, and that, while the

petitioner was not present when the papers were actually drawn and had not been notified by Crawford to be present, he had procured the purchaser who actually bought and paid for the said property in cash under the terms given to the petitioner by Crawford; that the property was sold by Crawford to the petitioner's purchaser, and the suit is brought to recover the 5 per cent. upon the purchase price according to the stipulations of the contract made by the petitioner with Crawford.

The defendant filed general and special demurrers, contending that the allegations of the petition do not clearly and distinctly set forth a cause of action, that the contract attached to the petition is not a contract in the petitioner's own name, and that there is no assignment of it, and that the plaintiff has no contractual rights thereunder as against the defendant; that the suit seeks to recover on an express contract and at the same time seeks to recover on a quantum meruit, and these are not such rights as can be pleaded in one and the same suit; that the contract attached to the suit is not a valid contract, in that its terms are too indefinite to be the basis of a suit, there being no definite terms stated in the contract giving to Purvis the right to sell the property alleged to have been sold, and no description of the property placed with Purvis for sale; that there is no description of the property alleged to have been sold either in the contract attached to the petition or in the petition itself; that the terms on which the property is to be sold by the plaintiff are not alleged; that the suit is duplicitous and seeks to recover on an express and an implied contract; and that the paragraphs of the petition are so intermingled, referring to both express and implied contracts, that it is impossible to distinguish the one from the other.

After the amendment to the petition had been filed, the defendant renewed the demurrer as amended, on the same grounds and on the additional ground that the contract set out in the amendment was unilateral and not binding on the defendant, in that there were no corresponding obligations resting upon the plaintiff; that there was no consideration shown for the making of the contract; that there is a misjoinder of causes of action, in that the original petition seeks to recover on an implied contract and the amendment seeks to recover on an express contract; and that the original petition shows that one Purvis had the exclusive contract of sale of the land and that the defendant was working under Purvis and under Purvis' contract, and no right of recovery was shown in the plaintiff. The court sustained the demurrer as to paragraph 11, which was demurred to as being an effort to recover in the same action on both an express and implied con-

tract, and overruled all the other grounds of demurrer.

Wallis & Fort, of Americus, for plaintiff in error.

W. T. Lane & Son and W. W. Dykes, all of Americus, for defendant in error.

HILL, J. (after stating the facts as above). [2] 1. Where property is placed in a broker's hands for the purpose of sale, the broker's commissions are earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy, on the terms stipulated by the owner. This is a right given to brokers by statute, which has so frequently been emphasized by the decisions of the Supreme Court and this court that it seems that citation of authorities is unnecessary. Civil Code 1910, § 3587; *Harvil v. Wilson Bros.*, 11 Ga. App. 156, 74 S. E. 845. The right of an owner to sell property which has been placed in the hands of a broker for sale, unless it be otherwise agreed, is also recognized by statute, and this right has also been upheld by decisions of this court and of the Supreme Court. But this right of the owner does not authorize him to take advantage of the work of his agent in procuring a purchaser for the property, nor to breach his contract with the agent and deprive the agent of commissions which have been earned under the contract, by himself making a personal sale to the customer who has been procured by the activities of the agent; in other words, where the agent has procured a customer or purchaser by his efforts in that behalf, the owner cannot deprive him of his commissions by completing the sale of which the agent was the producing cause. The law contemplates that the owner shall assert his right to sell his property only on condition that he will do so without a breach of the contract made with his agent. *Brown & Peeples v. Stokes*, 25 Ga. App. —, 103 S. E. 423; *Doonan v. Ives & Krouse*, 73 Ga. 286.

[3] 2. The objection is made by the demurrer that the plaintiff had no right to sell the property for his own benefit, because the previous contract made with Purvis to sell the same property and his employment by Purvis to aid him in such sale are in conflict with the allegations of the petition on this subject. These allegations showed that the contract made with Purvis by the defendant had expired by its express limitation before the contract made with the plaintiff; that after the expiration of the Purvis contract the defendant made a different contract with the plaintiff for the sale of the property, and it is manifest that reference to the Purvis contract is only by way of inducement to show how the plaintiff came in touch with R. L. McMath, who subsequently became the purchaser of the property as the

result of the negotiations with him by the petitioner, which were commenced under the Purvis contract and which were completed under the petitioner's individual contract with the defendant. There is no allegation in the petition which justifies the criticism made by the demurrer that the plaintiff's alleged right to recover his commissions was inconsistent with his fiduciary relationship with Purvis under his (Purvis') contract, for the allegations of the petition as to this point and the express terms of the Purvis contract show that the Purvis contract had expired by its own limitations, and that the plaintiff's services were rendered under his own contract, made with the defendant after the expiration of the Purvis contract.

[4] 3. There is no merit whatever in the criticism, made by the supplemental demurrer, that the contract was unilateral. Both the contract with Purvis and the special contract subsequently made with the plaintiff, under which his rights accrued, are explicit as to the terms and conditions. It was expressly agreed, according to these allegations, that the described property was to be sold for the express price of \$50 per acre cash to the owner net, and that the plaintiff undertook to do this by the 1st day of January thereafter for the agreed commission of 5 per cent., and the allegation is expressly made that all of these terms were agreed to by the defendant after they had been proposed by the plaintiff, and that, after the contract had been thus agreed on, the plaintiff had fully performed his part thereof and had earned his commissions as therein stipulated.

[5, 6] Nor is there any merit in the criticism of the demurrer that the property to be sold was not sufficiently described. Indeed, we think that the description of the property was entirely sufficient to identify the property placed with the agent for sale even without the aid of aliunde evidence. We do not think that the description of property placed in the hands of a broker for sale needs to be as definite and complete as that which should be made in deeds of conveyances.

[1] After giving to all the grounds of the demurrer careful consideration, in connection with the allegations of the petition that are specified, with the exception of the one sustained by the trial judge, we are of the opinion that none had merit. The allegations of the petition clearly, distinctly, and sufficiently set forth a cause of action and a right of recovery, if proved, under the rules of law embodied in the Code section referred to in this opinion and the repeated rulings of the Supreme Court and this court in relation thereto.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App 544)

GREENBERG & BOND CO. v. YARBROUGH. (No. 11774.)(Court of Appeals of Georgia, Division No. 2.
March 26, 1921.)*(Syllabus by the Court.)*

1. Master and servant \Rightarrow 301(4) — Servant, hired for particular employment to third person, is his servant.

Where a person hires his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the person to whom he is hired, although he remains the general servant of the person who hired him.

2. Master and servant \Rightarrow 301(4)—Undertaker hiring automobiles with chauffeurs held liable for their negligence.

Where an undertaker is employed to conduct a funeral and to furnish automobiles in that service, and he hires from a taxicab company the automobiles, with chauffeurs furnished by the taxicab company, and the undertaker has the exclusive right to direct the mode and manner in which the chauffeurs shall perform the special service in connection with the funeral, and as to the funeral the chauffeurs are under the exclusive control of the undertaker, the chauffeurs become particular servants of the undertaker, and he is liable for their acts of negligence.

3. Master and servant \Rightarrow 330(3), 332(4) — Liability of hirer for chauffeur's negligence sufficiently defined and shown.

The instructions of the trial judge as to the test by which the jury could determine who was the master at the time the act of negligence was performed by the servant were correct, and the verdict for the plaintiff, if it was not demanded, was amply supported by the evidence.

Error from Superior Court, Fulton County; John B. Hutcheson, Judge.

Action by Mrs. L. T. Yarbrough against the Greenberg & Bond Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Anderson and Westmoreland & Smith, all of Atlanta, for plaintiff in error.

Hewlett & Dennis, of Atlanta, for defendant in error.

HILL, J. Greenberg & Bond Company was employed by two brothers to conduct the funeral of their mother, to furnish the coffin and robes and automobiles, and in general to see that the funeral was properly conducted. Greenberg & Bond Company did not itself own automobiles but was in the habit of hiring them, in connection with its business, from the Smith Taxicab Company and others. There is some conflict in the evidence on the question as to whether the automobiles used in the funeral were engaged by

Greenberg & Bond Company at the request and as the agent of the two brothers when they made the contract with the former for the funeral services; Greenberg & Bond Company insisting that these automobiles were hired by it as agent of the brothers, who had instructed it to do so, and this was all well known by them when the contract was made as it had ordered the automobiles at their request and while they were in their offices arranging for the funeral. The two brothers, on the contrary, testified that they knew nothing whatever about the automobiles ordered by the Greenberg & Bond Company, or that it had hired them from other parties, and that they had no knowledge whatever on the subject, and had never heard of the Smith Taxicab Company furnishing automobiles to Greenberg & Bond Company until some time after the funeral. The plaintiff below was a relative of the deceased mother and a sister of the two brothers who had made the contract for the funeral services, and she occupied one of the automobiles to the cemetery, and from the cemetery after the burial services were completed. While she was in the automobile, in company with several others, on the way back from the funeral, she was injured by the negligent driving of the chauffeur, who negligently ran into a telephone pole on the side of the road while he was exceeding the statutory speed limit. The verdict was for the plaintiff, and case is before this court on exceptions to the overruling of the defendant's motion for a new trial. The controlling question is whether, under the evidence, the driver of the automobile was the servant of Greenberg & Bond Company at the time of the injury caused by his negligence, or whether he was the servant of the Smith Taxicab Company, who had furnished the automobile and the chauffeur to the undertakers for the funeral in question. The motion for a new trial contains several specific grounds, but in the view we take of the case they are not material, for the case turns upon the question above stated: Who was the master of the chauffeur at the time of the injury? The trial judge submitted this question, under instructions, to be determined by the jury, and the question is raised by the plaintiff in error as to the soundness of these instructions, which will be considered later in this opinion.

[1] It is well established that—

"The fact that an employee is the general servant of one employer does not, as matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. And it is true as a general proposition that when one person lends his servant to another for a particular employment (or hires him), the servant, for anything done in that particular employment, must be dealt with as

the servant of the man to whom he is lent (or hired), although he remains the general servant of the person who lent him (or hired him)." 18 R. C. L. 784.

Wood, in his work on Master and Servant, § 317, quoted with approval by the Supreme Court of this state in *Brown v. Smith & Kelly*, 86 Ga. 277, 12 S. E. 411, 22 Am. St. Rep. 456, says:

"The real test by which to determine whether a person is acting as the servant of another is to ascertain whether at the time when the injury was inflicted he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct."

Labatt, in his treatise on the subject of Master and Servant (2d Ed.) § 52, says:

"One person may be taken to have been the servant of another in respect of a given transaction, although he did not occupy that position for all purposes. In order to establish the relationship, it is merely necessary to show that he was a servant as regards the particular piece of work in which he was engaged at the time when he sustained or inflicted the injury complained of. * * * The special master is alone liable to third persons for injuries caused by such wrongful acts as the special servant may commit in the course of his employment."

And in *Shearman & Redfield on Negligence*, § 162, it is said:

"If the hirer is vested for the time with the exclusive right to discharge the servants and employ others, he alone is responsible for their defaults."

In the case of *Byrne v. K. C., F. S. & M. R. Co.*, 61 Fed. 607, 9 C. C. A. 669, 24 L. R. A. 696, Judge Taft uses the following language:

"The question is one of agency. The result is determined by the answer to the further questions. Whose work was the servant doing? and, Under whose control was he doing it?"

In that case the railway company rented its engine to a bridge company for use in the performance of certain services, the bridge company paying the railway company \$10 a day for its use and the expense of the fuel and supplies used in the running of the engine. In the conduct of the work done by the engine it was under the control of the superintendent of the bridge company. As this superintendent expressed it, "The bridge company rented the crew along with the engine from the railway company." The engine, while being thus operated, ran over and killed Nason, whose administrator, Byrne, brought suit against the railway company for damages, Judge Taft, speaking for the United States Circuit Court of Appeals, said:

"On this state of facts we are clearly of the opinion that the court was right in holding that

the railway company was not responsible for the acts of the engineer and fireman in running the engine which killed Nason. They were, it is true, general servants of the railway company, but at the time of the accident they were engaged in the work of the bridge company, were subject to the orders of the bridge company's officers, and in what they did or failed to do were acting for the bridge company."

There are a great many other decisions in point. Indeed the trouble has not been in the principle of law, which seems to be uniform, but in the application of the particular facts to the principle which has given rise to the great number of conflicting decisions on the question under consideration. Judge Lurton quotes with approval the language of Chief Justice Cockburn in *Rourke v. White Moss Colliery Co.*, 2 C. P. Div. 205, as follows:

"When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he was lent, although he remains the general servant of the person who lent him."

See, also, *Powell v. Va. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 921. The relation of master and servant exists only when the person whom it is sought to charge as master for the act of the servant either employed or controlled him, or had the right of control over him, at the time the injury sued for happened. To make the master responsible he must not only have the power to select the servant, but to direct the mode of executing the work and so to control him in his acts in the course of his employment as to prevent injury to others. He who has the choice, direction, and control of the servant is deemed to be the master, and whether or not the relation of master and servant exists so as to render the rule of respondeat superior applicable depends mainly on whether the employer retains the direction and control of the work, or has given it to another person. *Brown v. Smith*, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456.

[2] Applying these principles to the facts in this case, was the negligent chauffeur, at the time of his act of negligence which caused the injury to the plaintiff, the servant of Greenberg & Bond Company, or was he the servant of the Smith Taxicab Company? Unquestionably he was the general servant of the Smith Taxicab Company. Was he the special servant of Greenberg & Bond Company? It is insisted by counsel for the plaintiff in error that he was not the servant of Greenberg & Bond Company at the time of the injury because all that Greenberg & Bond Company did by way of control of the chauffeur, in the performance of his duty as chauffeur was to give him general directions to

take certain persons to the funeral, and, after the funeral services at the cemetery, to take them back home or where they desired to go, and that this was not sufficient control and direction to raise the relation of master and servant at that time, and they invoke the well-known rule applied in what are known as the "carriage cases," mention of which is made in 24 L. R. A., cited supra. In the decision rendered by Judge Taft he distinguished those cases from the case then under consideration. He said:

"If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving, and, if the coachman acts wrongfully, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving, and an injury occurs to any one, the hirer may be liable, not as the master, but as the procurer and cause of the wrongful act complained of. In the present case the defendants parted for the time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for the time."

And Mr. Justice Field, in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, said, in connection with these carriage cases:

"It is manifest, therefore, that they have no application whenever it appears that the master has parted to another for a time with control over his servant, to be used in the work of that other."

[3] Now the question in the present case is: Did the Smith Taxicab Company surrender to Greenberg & Bond Company the direction and control of the chauffeur and the automobile while engaged in and during the conduct of the funeral? The question is not whether Greenberg & Bond Company did exercise any other control than the giving of directions to go to the cemetery and to return therefrom, but whether it had the right, during the conduct of the funeral, to control the mode and manner in which the chauffeur was to exercise the duty for which he had been hired. Could it discharge him from that particular service for any misconduct on his part? After he had left the Smith Taxicab Company and gone into the service temporarily of Greenberg & Bond Company what control as to that service did the Smith Taxicab Company have over him? It did have a general control as to all other services that he might render it as his general master. But after hiring this chauffeur and the car to the Greenberg & Bond Company did the taxicab company have any further control over him? Could it have taken him back from the undertaker's until after the services had been completely performed?

We think not. The test is as to who controlled his services as to the particular service that he was performing when his negligent act was committed. Did not Greenberg & Bond Company at that time have the exclusive control of his movements, not only giving him general directions, but ordering him how to go, and what to do; and, if he in any wise misconducted himself in the performance of that service, could they not have discharged him therefrom? The contract for the funeral was made exclusively with the Greenberg & Bond Company by the two brothers of the deceased mother. The Greenberg & Bond Company agreed to furnish everything necessary to conduct the funeral as desired by its employers. These employers had no contractual relation whatever with the Smith Taxicab Company, and, according to their evidence, had no knowledge about the automobiles; and as to this the verdict of the jury must be accepted as the truth. But we do not deem it necessary to discuss this phase of the question further. It must be conceded that, under the facts of this case and in light of the decisions cited above, the negligent chauffeur was, at the time of the commission of his act of negligence, in the service of the Greenberg & Bond Company. The trial judge left this question to the determination of the jury, under instructions which, we think, presented the correct test as to when the relationship of master and servant arises. His instructions were as follows:

"If you should find that the defendant hired the automobile in question from the auto company, or any other person, who furnished a driver with the machine, and that the Smith Auto Company, or person from whom they hired it, did completely surrender to the defendant, Greenberg & Bond Company, the control of the driver so that the Smith Auto Company or other party hiring it could not exercise any control whatever over him, the driver in that case would be the servant of the defendant, and the defendant would be responsible for the negligence of the driver, if you find there was any negligence. But, on the other hand, if you should find that the Smith Auto Company, or whoever hired the machine in question to the defendant, furnished with the machine the driver, but did not completely surrender to the defendant the control of the driver of the machine, except that it simply gave to the defendant the right to direct where the machine was to be driven, then, in that event, the driver would be the servant of the Smith Auto Company, and the defendant would not be responsible for any negligence, if you find there was any negligence."

The evidence, applied to the issue as above indicated, fully authorized the verdict against the undertaker; for as to the particular service, to wit, the employment by Greenberg & Bond Company of the chauffeur in charge of the car, the taxicab company had fully and

completely, surrendered, temporarily, all control of its servant to the undertaker.

Judgment affirmed.

STEPHENS, J., concurs.

JENKINS, P, J., disqualified.

(129 Va. 672)

SUSSEX COUNTY v. JARRATT.

(Supreme Court of Appeals of Virginia.
April 8, 1921.)

1. Taxation \S 297 — Commissioner without authority to lay levy.

A commissioner cannot lay a levy of any sort, his duties being to make assessments consequent upon a properly ordered levy whether made by the General Assembly, county board of supervisors, or city council.

2. Taxation \S 300—Statute relating to omitted taxes held not to permit board of supervisors to make levies for past years.

Code 1904, \S 508, as amended by Acts 1916, c. 491, relating to omitted taxes, levies, etc., and assessments thereof, relates to assessing officers only, and is intended to increase their powers of assessment so as to include antecedent years, but does not confer upon boards of supervisors the power to make levies for years that have passed.

3. Taxation \S 300—Statute held not to authorize nunc pro tunc levies for past years.

Code 1904, \S 508, as amended by Acts 1916, c. 491, relating to omitted taxes, does not afford to the commissioners the power to make a nunc pro tunc levy of taxes for past years; the loose use of the word "levies" in several places in the body of the act, in connection with the powers and duties of assessing officers, not being sufficient to support such construction.

4. Taxation \S 362—Statute construed as referring to act of officers collecting under assessment, but not to levying an assessment.

Under Code 1904, \S 508, as amended by Acts 1916, c. 491, proviso No. 2, relating to omitted taxes, a levy or collection of assessments plainly refers, not to the legislative act of imposing a tax, but to the act of an officer collecting the tax tickets that are issued pursuant to an assessment for "taxes alleged to have been omitted from the assessments prior to 1912," but does not permit a levy.

5. Taxation \S 362 — Commissioners not empowered by statute to tax property not assessed by proper tribunal.

Code 1904, \S 508, as amended by Acts 1916, c. 491, does not empower commissioners to assess property not charged with a tax by some proper tribunal.

6. Constitutional law \S 29 — Constitutional mandate that taxes shall be levied does not in itself impose a tax.

The mere mandate of the Constitution that taxes shall be laid on certain property by the General Assembly or board of supervisors does

not of itself impose the tax, though failure to do so may be a breach of official duty, so that some positive action to that end must be taken by the legislative body to levy a tax.

Appeal from Circuit Court, Sussex County.
Upon petition for rehearing. Petition denied.

For former opinion, see 106 S. E. 384.

SAUNDERS, J. In this case the plaintiff in error, the county of Sussex, has filed a petition to rehear in which it is suggested that in reaching its conclusions announced in the opinion in this case, the court overlooked, or disregarded, the statute of 1916 (Laws 1916, c. 491) relating to omitted taxes, levies, etc. This statute is not mentioned *eo nomine* in the opinion, but it was neither overlooked nor disregarded.

[1] Under familiar law, a commissioner cannot lay a levy of any sort. His duties are to make the assessments consequent upon a properly ordered levy, whether the levy was made by the General Assembly, the board of supervisors of a county, or the council of a city. This principle is recognized by the petition when it says:

"County and district levies are fixed and ordered by the board of supervisors, in obedience to legislative enactments. No tax, state or local, for current or antecedent years can be assessed, or levied, without legislative authority."

[2] So much of the act as is relied upon by the petition to rehear is as follows:

"Sec. 508. *Omitted Taxes, Levies, etc., How Assessed.*—If the commissioner of the revenue, examiner of records, or other assessing officer, commission or board, designated by law to assess persons, property (real, personal and mixed), taxes, levies, et cetera, ascertain that any person, or any real or personal property, or income, or salary, or license tax has not been assessed for taxation for any year by the state, county, district, city or town, or that the same has been assessed at less than the law required, for any year, or that the taxes, levies, et cetera, thereon, for any cause, have not been realized, it shall be the duty of the commissioner of the revenue, examiner of records, or other assessing officer, to list the same, and assess persons, property (real, personal and mixed), and levies at the rate prescribed for that year, adding thereto interest at the rate of six per centum per annum.

"Provided however—

"(1) That all assessments of intangible personal property, money and incomes for state taxes prior to the year nineteen hundred and three shall be conclusively presumed to be full, true and correct.

"(2) No municipal, county or district tax shall be levied or collected on any assessment of intangible personal property, money or incomes for taxes alleged to have been omitted from the assessments for the years prior to nineteen hundred and twelve."

The heading of the section is, "Omitted Taxes, Levies, etc., How Assessed." The act relates to assessing officers only, and is intended to increase their powers of assessment, so as to include antecedent years. Plainly, however, this statute does not confer upon the boards of supervisors the power to make levies for the years that have passed. This power might be afforded by the General Assembly, but it should be clearly given, not derived by doubtful implication.

[3] The petition to rehear insists that this statute does afford to the supervisors the power to make a nunc pro tunc levy, as will appear from the following citations from the petition:

"We respectfully submit that section 508, as amended by the act of March 22, 1916 (Acts 1916, p. 826), both authorizes and requires a levy, if necessary, to enforce the payment of omitted county and district levies for antecedent years back to and including the year 1912. * * *

"That it also authorizes the board (i. e., the board of supervisors) to make a further levy for those years (1912, 1913, 1914) if a further levy were necessary. * * *

"That the body of the act (Act 1916) without reference to the second clause of the proviso authorizes such acts by the board of supervisors as may be necessary to give effect to the obvious purpose of the statute."

We did not and do not find anything in the statute to justify these contentions. It is true that the word "levies" is used at several places in the body of the act, but it is in relation to and in connection with the powers and duties of assessing officers. These words so used, and used somewhat loosely and inaccurately, are not sufficient to support the construction that the General Assembly intended thereby to empower the boards of supervisors—the legislative bodies of the counties—to impose taxes upon property that had not been included in the levies of antecedent years. Hence, whatever may have been the intent of the orders of the board of Sussex county, of date December 20, 1917, and January 7, 1918, they are not "new orders laying levies upon bank stock for the years 1912-13-14."

[4] Petitioner seeks to find support for his contention, supra, in proviso No. 2 of the act. The language used in this proviso is singularly inapt, if it was intended by such language to give the power to order a levy to any official, or tribunal. It is true that the word "levy" is used, but it plainly refers, not to the legislative act of imposing a tax, but to the act of an officer collecting the

tax tickets that are issued pursuant to an assessment. An officer holding such tickets levies same upon the property of delinquent taxpayers. The language of the proviso is that—

"No municipal, county, or district tax shall be levied or collected on any assessment of intangible personal property," etc., "for taxes alleged to have been omitted from the assessments prior to 1912."

Taxes are not "levied on assessments"; assessments are consequent upon levies, using the word "levies" to refer to the legislative act of imposing a tax. Obviously this proviso means that if intangible personal property, alleged to have been omitted from the assessments for the years prior to the year 1912, is assessed, and tax tickets are made out pursuant to such assessments, such tickets shall not be levied and collected.

[5] The power of commissioners of the revenue to assess for omitted taxes in antecedent years is conceded in the opinion, in this case, but it was not considered that the act of 1916 empowered these officials to assess property not charged with a tax by some proper tribunal; and it is not now so considered.

[6] Petitioner to rehear renews its original contention that the word "may," in section 1040a of the Code of 1904, is mandatory, and should be read "must." For the purposes of this case, this contention was conceded in the opinion, but the mere mandate of the Constitution that taxes shall be laid on certain property by the General Assembly, or a board of supervisors, does not by itself impose the tax, though failure to do so may be a breach of duty by the officials charged therewith. Some positive action to that end must be taken by the legislative body, in this instance the board of supervisors. Hence we entered upon the inquiry whether as a matter of fact bank stock was locally taxed for the years in question. The court concluded, for reasons given in the opinion, and which need not now be repeated, that this stock was not taxed for county purposes during these years. Hence, in our view of the statute of 1916, this stock could not be either taxed, or assessed thereafter, by the local officials of Sussex county under authority, either of that, or any other, act.

The questions raised by the petition to rehear have been given careful consideration, but the conclusions heretofore reached in this case are believed to be sound, and to rest on reason and authority.

The petition is denied.

(88 W. Va. 246)

DAMECKI v. BILLS. (No. 4102.)(Supreme Court of Appeals of West Virginia.
March 22, 1921.)*(Syllabus by the Court.)*

1. *Lis pendens* ¶24(4)—One purchasing pending action of detinue is bound by judgment against his vendor.

One who purchases from a party to a pending action of detinue the subject-matter involved in the litigation takes it subject to the final disposition of the case, and is bound by the judgment that is entered against the party from whom he derived title.

2. Judgment ¶678(1), 682(2)—Binding on privies as well as parties; judgment in detinue binding on one subsequently purchasing property.

A judgment rendered by a court of competent jurisdiction, after service of process upon the parties to be affected thereby, is conclusive, not only upon those who are actually parties thereto, but also upon all who are in privity with them.

3. Detinue ¶26—Sheriff's return showing payment of alternative value does not prevent recovery of property when plaintiff refuses to accept value.

In an action of detinue to recover specific property, a sheriff's return on a writ of distringas, showing execution by taking the alternative value of the property, does not preclude a plaintiff, who declines to accept such alternative value, from obtaining the specific property under another writ subsequently issued.

4. Detinue ¶26—Plaintiff not required to accept alternative value until reasonable efforts to obtain property have failed.

A plaintiff in detinue is entitled to insist on having the specific property, if obtainable, and is not required to accept the alternative value of the property recovered, on a tender made by the sheriff, until reasonable efforts to obtain the specific property have failed; but he cannot have both the property and its alternative value.

(Additional Syllabus by Editorial Staff.)

5. Detinue ¶5—Judgment may be rendered for defendant entitled to possession, though possession not obtained legally.

In detinue, where it appeared that defendant was the owner of the property and justly entitled to the possession, the court might award it to him, though it appeared that he obtained possession under an alias execution on a judgment in a former suit given for enforcement to one not an officer of the circuit court.

Error to Circuit Court, Harrison County.

Action by Mikola Damecki against Joe Bills. Judgment for defendant, and plaintiff brings error. Affirmed.

Harvey W. Harmer and W. M. Conaway, both of Clarksburg, for plaintiff in error.

Clarence B. Sperry, of Clarksburg, for defendant in error.

LYNCH, J. Mikola Damecki, plaintiff below and in error here, complains of a judgment for defendant in an action of detinue instituted by him to recover possession of a Jersey cow held by the defendant. At the time of the institution of the action, April 3, 1919, plaintiff filed the affidavit and bond required by law as conditions precedent to taking immediate possession of the property claimed, but defendant likewise gave the bond authorized by statute and was permitted to retain the property pending final determination of the case. In addition to the general issue plea, defendant tendered and was permitted to file a special plea setting up the defense of *res adjudicata*, to which plaintiff filed a special replication, followed by defendant's rejoinder. On these pleadings the case was heard and determined by the court and judgment rendered for the defendant.

The facts set forth by the special plea, replication, and rejoinder respecting the issue of *res adjudicata* are these: On October 25, 1917, a year and a half prior to the bringing of the present suit, defendant Bills, instituted, before a justice of the peace, an action of detinue against Melvin Monroe to recover possession of the same cow. The trial therein had resulted in a judgment for plaintiff. From that ruling Monroe appealed to the circuit court, and on January 27, 1919, a jury again found for plaintiff, Bills, and the court February 7th, pronounced judgment in the form usual in actions of this character and in accordance with the verdict, to wit, that the plaintiff recover possession of the property, if recovery thereof can be had, and, if the property may not be had, then to recover its value, fixed at \$30, and the costs of the action amounting to \$112.75. On the 14th execution issued, following the alternative form of the judgment, and was placed in the hands of a deputy sheriff for levy. Five days later he returned the execution with the following indorsement:

"The within execution returned with \$142.75, principal and costs, the within described property not found. This the 19th day of February, 1919. Robert McClung, Deputy for Lloyd D. Griffin, Sheriff."

Upon Bills' refusal to accept the money in lieu of the cow, the officer deposited it with the clerk of the circuit court, where, presumably, it still remains. In the meantime, according to the allegations of the special plea, which are not denied in this respect, plaintiff Damecki "obtained possession of said property through an alleged purchase thereof subsequent to the institution of said

suit of Joe Bills against Melvin Monroe before R. E. Kidd, justice of the peace, and subsequent to the rendition of the judgment in favor of the said Joe Bills by the said justice; and the said purchase, or pretended purchase, was from the said Melvin Monroe * * * or some other person to whom the said Monroe had sold or pretended to have sold said property." Having learned that plaintiff was in possession of the cow, Bills caused a second execution to issue March 28th, which he placed in the hands of R. M. Noon, a constable, but not an officer of the circuit court, who four days later returned the cow to Bills, with the following return:

"Executed the within writ on the 1st day of April, 1919, by taking possession of animal, one dark red cow, described in said writ, and delivered the same personally into the possession of Joe Bills, the party described in said writ as entitled thereto"—properly signed.

Two days thereafter Damecki instituted the present action.

[1, 2] The facts set forth in the various pleadings respecting the issue of *res adjudicata* are, in our opinion, preclusive of plaintiff's right to maintain this action. They show that some time after the judgment for Bills was rendered by the justice in the case of Bills against Monroe the latter, directly or indirectly, sold or otherwise disposed of the cow to plaintiff. The exact date of its disposition, however, does not appear, and therefore we are unable to determine whether it was before or after the judgment of February 7, 1919, rendered by the circuit court on appeal. If prior thereto and while the case was pending, plaintiff, Damecki, purchased subject to the final determination of the cause, for the common-law doctrine of *lis pendens* has been held in this state to apply to actions or suits affecting personal property as well as to those concerning real estate. *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702; *Dent v. Pickens*, 59 W. Va. 274, 53 S. E. 154; *Bank v. Columbia Collieries Co.*, 75 W. Va. 309, 84 S. E. 914. See, also, *Rardin v. Rardin*, 85 W. Va. 145, 102 S. E. 295, for a general discussion of the common-law doctrine of *lis pendens*. On the other hand, if the cow was sold and acquired after final judgment in the former *detinue* action, the determination of its ownership is *res adjudicata* as to him. Claiming, as he does, under and by virtue of Monroe's right, title, and interest, he is in privity with him, and therefore bound by the adjudication adverse to the former's claim. 2 Black on Judgments (2d Ed.) § 549; 1 Freeman on Judgments (4th Ed.) § 162. See, also, *Gerber Co. v. Thompson*, 84 W. Va. 721, 100 S. E. 733, 7 A. L. R. 157.

[3, 4] But, contends plaintiff, because Bills sued out an execution on his former judgment, which the deputy sheriff executed by

collecting the alternative value of the cow, he is bound by such action of the court's officer and agent, though he did not accept the sum so collected and cannot now claim the specific chattel itself. Is the prevailing party in an action of *detinue* this estopped, by what an officer may do, to continue his efforts to locate and recover the specific subject-matter of the suit, to which the verdict and judgment entitle him? That there cannot, under the circumstances obtaining in this case, be an affirmative answer to that question, seems obvious. Bills promptly declined to accept the alternative value of the cow, and apparently used all reasonable means to locate and obtain possession of the animal itself. If the successful litigant be thus deprived of the right to enforce his claim to the specific property awarded him, that affords the unsuccessful claimant too great an opportunity, by way of concealment of the chattel from the levying officer, to compel the former to accept an ascertained cash value, often grossly inadequate compensation, instead of the chattel itself. The action of *detinue* thus would lose much of its force and value as a proceeding for the recovery of specific property. Of course, a plaintiff cannot have both the property and its value, but he cannot be compelled to accept the latter until he has had reasonable opportunity to enforce his primary right. *Ex parte Vaughan*, 188 Ala. 187, 53 South. 270; 18 C. J. 1023. The specific chattel may, for various reasons, be of infinitely greater value to the successful claimant than the alternative value placed upon it by court or jury. The opinion in *Ex parte Vaughan*, cited, a case very similar to this, contains the following statement with regard to enforcement of judgments in actions of *detinue*:

"This return of his [sheriff's], however, was not conclusive upon the plaintiff, so as to prevent her from subsequently obtaining the specified property under other appropriate writs to be thereafter issued. Plaintiff was not bound to accept the alternative value in lieu of the specific property, and thereby satisfy her judgment against defendant. * * * The plaintiff is not required in *detinue* suits to accept the alternative value, if tendered by the defendant or the sheriff. She may decline it, if offered, and insist upon having the specific property if it can be obtained, though she cannot, of course, have both. It is not for the defendant or the sheriff to say whether the plaintiff shall have the specific chattel or the alternative value as fixed by the judgment in *detinue*; but this is a question for plaintiff to decide."

[5] It is contended, however, that the alias execution was improperly given for enforcement to one who was not an officer of the circuit court, and therefore that defendant, Bills, unlawfully obtained possession of the cow in question. However that may be, the

animal was before the court in the present case for such disposition as it deemed just and proper in the light of the pleadings. It had full control to award it to one or the other of the contestants, and it matters little how defendant, Bills, obtained such possession, since he has shown himself to be in fact the owner of the cow and therefore justly entitled to possess it.

For the reasons assigned, we affirm the judgment.

(88 W. Va. 265)

FINE et al. v. ZIRKLE et al. (No. 4068.)

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(*Syllabus by the Court.*)

1. Mortgages \S 346—Trustee under deed by judicial proceedings may remove impediment to fair sale.

It is the right and duty of a trustee in a deed of trust securing payment of a debt, before selling the property conveyed by it, to cause removal of an impediment to a fair sale thereof, by appropriate judicial proceedings, when the circumstances are such as will likely prevent realization of a fair price therefor, and the other interested parties have not instituted such proceedings.

2. Mortgages \S 338—Sale by trustee without removing impediment to fair sale may be enjoined.

An attempted sale under such circumstances, without previous removal of the impediment, will be enjoined.

3. Mortgages \S 346—Facts held to show impediment to fair sale under junior deed of trust.

Sale of property incumbered by two deeds of trust, in a suit to enforce judgment liens thereon, to which the trustee and creditor in the junior deed of trust were not made parties, application of the proceeds of the sale on the debt secured by the senior deed of trust, and a subsequent conveyance of the property by the purchaser to strangers to all of the transactions, constitute an impediment to a fair sale thereof under the junior deed of trust.

4. Mortgages \S 338—Debtor under deed of trust held proper party to suit to enjoin sale thereunder.

In such case the debtor is a proper party to a suit instituted by the grantee in such subsequent conveyance to enjoin a sale of the property under the second deed of trust.

Appeal from Circuit Court, Jefferson County.

Suit by Reuben Fine and others against John H. Zirkle, trustee, and others, to enjoin a sale under a deed of trust. Decree for complainants, and from an order refusing to dissolve the injunction, defendants appeal. Affirmed.

A. C. McIntire and John H. Zirkle, both of Martinsburg, for appellants.

C. N. Campbell, of Martinsburg, for appellees.

POFFENBARGER, J. The appellants in this cause, one of whom is a trustee in a deed of trust involved and the other the trustee in bankruptcy of the creditor secured by that deed of trust, undertook to sell and cause to be sold the property therein conveyed, after it had been sold to persons under whom the appellees claim, by virtue of a decree in a suit to enforce judgment liens against the debtor, to which the trustee and his cestui que trust were not parties; and, on the bill of the appellees, the attempted sale under the deed of trust was temporarily enjoined and a motion to dissolve the injunction overruled. From the order refusing to dissolve it, this appeal was taken.

The property in question is an undivided one-fourth of a 200-acre farm situated in Jefferson county, W. Va., which was devised by William M. Shepherd, to four of his nephews, James H., Robert L., Francis H., and Alexander V. Shepherd. An undivided one-half interest therein was conveyed by Francis H. and Alexander V. Shepherd to George M. Beltzhoover and Clarence V. Martin, trustees, to secure a \$1,200 debt to the Jefferson Security Bank, a corporation, by a deed of trust dated September 30, 1909. It is claimed by the Shepherds that this debt was the debt of Alexander V. Shepherd, and that Francis H. Shepherd was his surety therefor. On September 1, 1910, Alexander V. Shepherd executed a deed of trust by which he conveyed his undivided one-fourth of the tract of land to John H. Zirkle, trustee, to secure to the National Commercial Company, a corporation, a debt amounting to \$464.71. Shortly after the execution of that deed of trust some small judgments were recovered against the grantor therein, and, in December 1910, O. Ferrari, one of the judgment creditors, instituted a suit in Jefferson county for enforcement of the lien of his judgment on the real estate of Shepherd, making the Jefferson Security Bank and its trustees parties. For some reason the National Commercial Company and its trustee were not made parties, although the deed of trust seems to have been recorded in Jefferson county. That suit was prosecuted to a decree of sale under which the debtor's cotenants, James H., Robert L., and Francis H. Shepherd, became the purchasers, at the price of \$1,200, the exact amount of the debt of the Jefferson Security Bank, out of which the costs and commissions were paid, and the balance, \$1,116.60, was credited on that debt. All of the judgments seem to have been paid by the debtor or some person for him before the sale, and the Jefferson Security Bank's debt was then the only one that had been decreed to be a

lien on the property. By a deed dated April 22, 1919, Francis H., James H., and Robert L. Shepherd conveyed the entire 200-acre tract of land to the appellees Reuben Fine and C. V. Oline for and in consideration of the sum of \$5 and other good and valuable considerations.

In 1917 the National Commercial Company became bankrupt, and A. C. McIntire was appointed its trustee in bankruptcy in the bankruptcy proceeding. At his instance the trustee in the deed of trust of September 1, 1910, advertised the one-fourth undivided interest of Alexander V. Shepherd in the 200-acre tract of land for sale at auction November 22, 1919. Thereupon the appellees herein, Reuben Fine and C. V. Oline, purchasers of the entire tract of land, instituted this suit to enjoin the sale, and an injunction was awarded on their bill November 18, 1919. A motion to dissolve it was made December 10, 1919, but it was continued to December 18, 1919. On December 10 Zirkle and McIntire, trustees, tendered their separate answers to the bill. On December 18 the motion was heard upon the papers previously filed, the affidavits of Reuben Fine, James H. Shepherd, and John H. Zirkle, and the petition of Alexander V. Shepherd, all of which were then filed, and continued. On March 2, 1920, it was overruled.

While there is some conflict in the pleadings and affidavits filed respecting the status of the National Commercial Company's debt, the relation thereto of the trustee, and his conduct with reference to said judicial sale, there is not much controversy, if any, respecting the other facts herein stated. Both of the answers of the trustees deny the validity of the sale in so far as it affects the rights of the National Commercial Company and the trustee in its deed of trust, and pray affirmative relief. Both admit the payment of \$230 on account of the National Commercial Company's debt and interest. John H. Zirkle, trustee, in an affidavit filed by him denies the averment of Alexander V. Shepherd's petition that accounts were assigned to him as collateral security for the balance of the debt. He admits that certain accounts were placed in his hands as an attorney by Shepherd for collection, but denies that they were taken as collateral security for the debt in question, and also charges that they were practically worthless.

It is hardly necessary to observe that the proceedings in the suit instituted by O. Ferrari against Shepherd and others and the sale made therein to the brothers of the debt or did not extinguish the deed of trust in favor of the National Commercial Company nor the debt thereby secured. As to that company and the trustee in its deed of trust, those proceedings and the sale were admittedly void. Being void and not merely erroneous, they do not protect the appellees, Fine and Oline, in so far as their purchase of

the 200-acre tract of land is dependent thereon. As to the National Commercial Company and its trustee, the court did not obtain jurisdiction, and, when there is a lack of jurisdiction, a purchaser is not protected. *Simmons v. Simmons*, 85 W. Va. 25, 100 S. E. 743.

[1, 2] It does not follow, however, that sale may be made under the deed of trust in the manner in which it was attempted. Though the judicial sale does not extinguish the debt nor the lien, it has created a situation that constitutes an impediment to a fair and just sale of the property. The title has been beclouded by the judicial sale, to say the least. There was a prior deed of trust which alone would not have constituted such an impediment. *George, Trustee, v. Zinn*, 57 W. Va. 15, 49 S. E. 904, 110 Am. St. Rep. 721. The sale probably did not extinguish that deed of trust nor the debt secured by it. By virtue of a sale made for satisfaction of that debt, the appellees, who originally were strangers to the debt as well as the land, claim title and may have at least an equity. If they should lose the land, they may be entitled to subrogation to the benefit of the prior deed of trust. They have acquired some rights. Their title is good against A. V. Shepherd and the Jefferson Security Bank. They may be able to invoke the protection of the prior deed of trust against these appellants. What has occurred affords ground for serious claims of right in the appellees. As interested parties, they are entitled to have their true status judicially ascertained and determined before a sale is made, not only that they may be the better able to protect their interests, but also that others, desiring to bid on the property, may know its legal status. There are few, if any, exceptions to the rule that property cannot be sold against the will of the owner or persons having interests therein, under circumstances that are likely to prevent a sale at a fair and reasonable price. An order of sale made under such conditions in a judicial proceeding is erroneous, and one attempted under a deed of trust will be enjoined. It is the right and duty of the trustee in a deed of trust to institute a suit to remove an impediment to a fair sale, and obtain an adjudication of the rights of the parties, before selling the property, when there is such an impediment, on failure of the other interested parties to do so. *George v. Zinn*, cited; *Curry v. Hill*, 18 W. Va. 370; *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775; *Hogan v. Duke*, 20 Grat. (Va.) 244; *Rossett v. Fisher*, 11 Grat. (Va.) 492.

[3] Enough has been indicated to make it manifest that the title to the land involved here as well as the interests of the parties concerned in it directly and indirectly are seriously embarrassed and beclouded by the judicial sale and the subsequent conveyance. A judicial proceeding participated in by all such parties is the only means of establish-

ment of their rights and equities and extinguishment of unfounded claims and contentions, growing out of the complicated situation, necessary to an unembarrassed and unhampered sale of the property, a sale under circumstances likely to bring a fair price.

It may be that such a sale could have been made before a sale was effected under the decree in the creditors' suit, as was suggested in *Laidley v. Hinchman*, 3 W. Va. 423. But the sale made, payment of the purchase money, distribution thereof, conveyance to the purchasers, and their subsequent conveyance to strangers create an entirely different situation to which the observation relied upon, if sound, is not applicable.

[4] No reason for denial of right in *Alexander V. Shepherd* to make himself a party to this is perceived. As he is the debtor and claims to have satisfied the debt or to have assigned certain accounts to the creditor, for collection and credit on the balance due, he is a necessary as well as a proper party to this suit. Even though he may not be able to maintain his claims and contentions, he is entitled to be heard. If this suit had been instituted by one of the appellants, as it should have been, failure to make him a party would have been manifest error in procedure. He would have been a necessary party, even though he had disclosed nothing by way of defense, because he is interested.

For the reasons stated, the decree complained of will be affirmed.

(88 W. Va. 281)

COCHRAN v. CRAIG et al. (No. 4175.)

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

1. Trial \S 89—Motion to strike out evidence, part of which was admissible, properly denied.

Motions made in the progress of a trial involving several issues to strike out certain portions of relevant, material, and probative evidence, appreciably tending to maintain some of the issues on the part of the adverse party, on the ground of its insufficiency for such purpose, are properly overruled.

2. Trial \S 89—Court cannot be required to test sufficiency of evidence of opposite party piecemeal.

A party to a trial before a jury has no right to require the court to pass upon or test the sufficiency of the evidence of the opposite party by piecemeal, unless, perhaps, in a case in which the evidence constituting the subject-matter of the motion to strike out or exclude is the only evidence tending to prove his opponent's case and is clearly insufficient. Ordinarily, he can require a judicial test of the sufficiency of evidence only by a motion to exclude all of it, a demurrer to evidence, or a motion for a new trial, made after verdict.

3. Trial \S 414—Introduction of evidence by defendant waiver of errors in overruling motion to exclude plaintiff's evidence.

If, after the overruling of a motion to exclude the plaintiff's evidence, interposed at the conclusion of the introduction thereof, the defendant introduces his evidence, he thereby waives the error in the ruling, if any, and cannot have a review thereof in the appellate court.

4. Assumpsit, action of \S 25—Proof sustaining substantial portion of estimated cost sued for admissible.

In an action to recover a sum of money equal to what certain work would have cost, if performed, upon the hypothesis of an agreement to pay such sum, proof of a substantial portion of such estimated cost is admissible, notwithstanding its insufficiency to establish the full or exact amount thereof, and the inability of the plaintiff to do so by other evidence.

5. Pleading \S 20—Party claiming alternative right of recovery may assert both claims in same action.

A party claiming an alternative right of recovery may assert and prosecute both claims in the same action, leaving it to the court and jury to determine which he is entitled to, if either, and proof of one of them constitutes no abandonment of the other.

6. Estoppel \S 83(3)—Representation that claim in action amounts to less than that sued for not an estoppel.

A representation that a claim in action amounts to a certain sum less than that sued for, not acted upon in any way, is not an estoppel. It is mere evidence to be taken by the jury for what it is worth.

7. Contracts \S 346(4½)—Recovery under quantum meruit admissible under declaration containing common counts as well as special counts.

If a declaration contains the common counts as well as a special count based upon an agreement therein alleged, evidence tending to prove a right of recovery on a quantum meruit is admissible, notwithstanding reliance in the trial upon evidence tending to prove the agreement alleged.

8. Evidence \S 542, 543(1)—Opinion as to value or quantity admissible if witness has more knowledge of subject than jurors.

To make the opinion of a witness as to value or quantity admissible in evidence, he need not be qualified in the highest degree, nor in any particular degree. It suffices that he has more knowledge of the subject-matter than jurors ordinarily have.

9. Evidence \S 151(2)—Plaintiff may testify he would not have made verbal contract if he had not understood it imposed certain obligations.

A plaintiff in an action to recover on a verbal contract may testify that he would not have made it if he had not understood it imposed a certain obligation upon the defendant.

10. Trial ⚡253(5)—Instructions authorizing jury to ignore defendant's counterclaim erroneous.

An instruction given in an action in which the defendant has asserted a claim against the plaintiff by way of recoupment or set-off, supported by evidence and exceeding the amount of the demand of the plaintiff, in such terms as require a finding in favor of the latter, if the jury believe his demand to be well founded, is erroneous and presumptively prejudicial, because it authorizes the jury to ignore the defendant's claim in arriving at their verdict.

11. New trial ⚡70—Trial ⚡139(1)—When evidence sustains verdict for plaintiff, direction of verdict for defendant and motion to set aside properly denied.

When the evidence adduced in a trial, considered as a whole, is sufficient to sustain a verdict for the plaintiff, requests for peremptory instructions to find for the defendant and a motion to set aside a verdict for the plaintiff are properly denied and overruled.

12. Logs and logging ⚡8(1)—Recovery of extra compensation under logging contract because of change in method held proper.

In an action to recover extra compensation for work done under a logging contract, upon the theory of a radical change in the method of doing the work, made by the contractee, after the commencement thereof, imposing very much greater cost of performance upon the contractor than would have been required if the work had been done as contemplated, and a modification of the contract so as to provide for such compensation, in view of such change, there may be recovery of the additional expense occasioned thereby, if the evidence is such as warrants a finding that the contract was made and subsequently altered agreeably to the theory and claim of the plaintiff, even though there was no agreement to pay for such extra cost, provided the declaration contains an appropriate common count.

13. Logs and logging ⚡8(5)—Evidence sustaining finding as basis for recovery of increased cost under modified logging contract.

If, in such case, the contract was verbal, and adopted for the purposes of the enterprise, subject to slight modifications, a prior written contract made between the parties for the purposes of a like enterprise fully executed and terminated, by the terms of which the contractor was required to deliver the logs within 75 feet of railroads to be constructed by the contractee, and under which, evidence adduced tends to prove, he had constructed such railroads into the timber as were reasonably necessary for convenient and economical stocking thereof, and there is evidence strongly tending to prove intent and purpose on his part, at the date of the making of the new contract, to construct a railroad clearly necessary for the purposes of the enterprise, in such sense, known to the contractor at the time, and his subsequent abandonment thereof, in consequence of which the contractor, in the discharge of his obligation to stock the timber, was compelled to log it by a route and to a point not

contemplated, at greatly increased cost, the jury are justified in finding that the contract imposed duty upon the contractee to build such railroad, and that, in accepting performance in a manner different from that contemplated and occasioned by his change of plans, he incurred an obligation to pay the resultant increased cost.

14. Exceptions, bill of ⚡20—Paper held a bill of exceptions sufficient as to form.

A paper bearing the style of a case, entitled "Defendant's Bill of Exceptions," containing the evidence in such case, motions made and passed upon, and what purport to be instructions, bearing the initials of the trial judge and notations of objections, rulings, and exceptions, and certified by the judge, under the style of the case, as the bill of exceptions of the defendants therein, and made a part of the record of the case by a vacation order, is a sufficient bill of exceptions.

15. Exceptions, bill of ⚡56(3)—Recitals held to make instructions incorporated in bill part thereof.

This recital in such certificate, "being the exceptions to the rulings and actions of the court in the progress of said trial, as shown above and above set out," makes the instructions so incorporated in such bill of exceptions parts thereof.

Error to Circuit Court, Pocahontas County.

Action by Robert Cochran against George F. Craig and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. A. Bratton, of Marlinton, and Price, Smith, Spilman & Clay, of Charleston, for plaintiffs in error.

F. R. Hill and L. M. McClintic, both of Marlinton, for defendant in error.

POFFENBARGER, J. The judgment for \$8,537.30, under review on this writ of error, was recovered in an action of assumpsit, as part of an amount claimed under an alleged modification of a logging contract fully performed by both parties; the work having been fully done and fully paid for, except in so far as this claim has been asserted upon the theory of a modification of the contract, allowing increased compensation to the contractor. In his declaration the plaintiff demanded \$10,636.84, and the defendants interposed a claim for \$18,481.48, by way of recoupment and set-off. The basis of this counterclaim is an alleged overpayment for the work done at the contract price. Nine of the fifteen assignments of error are based upon the overruling of motions of the defendants to strike out evidence and their objections to admission of evidence. Some of these, as well as the thirteenth and fourteenth assignments, the former based upon the rejection of peremptory instructions asked for by the defendants and the latter

upon the motion to set aside the verdict, involve the sufficiency of evidence. The twelfth relates to rulings upon instructions given.

For the purposes of the stocking of the timber involved here, which was taken from a 3,500-acre tract of land known as the "Clark and McCullough tract," and amounted to about 33,833,361 feet, the parties verbally agreed, April 2, 1915, or near that date, that a written contract between them dated April 1, 1912, under which the plaintiff had stocked the remaining portion of timber on a 10,000-acre tract owned by the defendants, known as the "Hoffman tract," and lying on the opposite side of the Greenbrier river from the "Clark and McCullough tract," should govern and control their rights and duties in the cutting and logging of the timber here involved, except in two particulars. The written contract had provided for payment of \$4.75 per thousand for the spruce timber and \$5 per thousand for the hardwood timber, and it was agreed that these prices should be increased \$1 per thousand, making the prices for all of the timber \$6 per thousand for the hardwood, \$5.75 for the spruce, and \$4.25 for the hemlock; the last-named price being that specified in the written contract. If this verbal agreement was not modified so as to provide for extra compensation, in view of an alleged alteration of the plans of the defendants, as is claimed by the plaintiff, the logging was fully paid for by the defendants, and the transaction completed and ended early in May, 1917, by payment of \$4,592.54 to the plaintiff.

Under the agreement thus made, it was the duty of the plaintiff to deliver the logs within 75 feet of the railroad tracks as constructed by the defendants. Before it was entered into, the defendants indicated the extent and locations of the railroad tracks they expected to construct. Lying along the northwestern side of the Greenbrier river, the tract of land was penetrated by four small streams, hollows, or ravines, known as the Arbogast, Reservoir, Waybright, and First Run. Railroads were to be and were built up those hollows from the main line running along the river. A part of the timber lay in the head of another hollow known as Bear Wallow hollow, which came to the river on an adjoining tract known as the "Boggs tract." The timber in that hollow could not be logged down the hollow otherwise than by passing over the Boggs land. No railroad was constructed up that hollow; wherefore the timber therein was hauled over the ridge and brought down what is known as First Run hollow. It amounted to a little over 2,000,000 feet, and compensation for the logging thereof is the subject-matter of the alleged modification of the contract and this action. The plaintiff contends his contract was made in view of clearly manifest purpose and intent on the part of the

defendants to obtain a right of way through the Boggs land and construct a railroad up Bear Wallow hollow, to which he was to deliver timber standing at the head or on the side thereof, and that his agreement based upon that assumption imposed duty upon the defendants to construct it. He claims that later they attempted to obtain a right of way over the Boggs land, but, disagreeing with the owners thereof as to the price of the right of way and some timber they desired to sell along with it, this purpose was abandoned, and that then an agent of the defendants agreed with him to pay for the stocking of the timber in that hollow a sum equal to the cost of the right of way, construction of the railroad, and removal thereof, in addition to the contract price, and, further, that if such sum did not cover the cost of such logging of the timber he was to be allowed the entire cost thereof. He claims it cost him \$21,179.82, on which he has allowed a credit of \$11,849.18, the amount paid him therefor under the contract at the prices agreed upon, and that there is a balance of \$9,330.64 due him, on which he has charged interest.

The defendants are partners doing business under the firm name and style of George Craig & Sons, and the firm is composed of George F. Craig, John A. Calhoun, and A. J. Cadwallader. For many years, perhaps from the beginning of its operations, the firm's timber business has been managed by George F. Craig. He claims to have made the contract involved here with the plaintiff. On the other hand, the plaintiff contends that George C. Craig, son of George F. Craig, under authority duly conferred upon him, or under circumstances justifying plaintiff's reliance upon his agency, made the contract and afterwards modified it as aforesaid. The defendants deny the agency of George C. Craig and right in the plaintiff to rely upon such agency, and also the making of the alleged modification by George C. Craig and any attempt by him to make it.

The firm's principal office was in Philadelphia, in which city George F. Craig, as well, perhaps, as the other members thereof, resided. At their large mills located in Pocahontas county, W. Va., a village called Winterburn grew up, and they maintained an office there. They employed a bookkeeper, Arbogast, a woods foreman, J. W. Bratton, a head sawyer, Weightman, and others. From 1907 until 1914 George C. Craig resided there, and was charged with certain duties in connection with the logging and mill operations. When he was first stationed there he was a young man just out of school, and one of the purposes in assigning him to that position was to give him business knowledge and experience. With the acquisition thereof, during that period of seven years, his authority may have been considerably increased from time to time. Nevertheless, it is in-

sisted by both himself and his father that his position was thoroughly subordinate and his powers as agent very limited. They say his powers extended only to the procurement of compliance with the contracts made by his father on behalf of the firm, and not to the making of contracts. In the latter part of the year 1914 he discontinued his residence at Winterburn, but did not entirely sever his connection with the business carried on at that place. On his departure therefrom his place was taken by a brother younger than he, Thomas R. Craig.

At the beginning of the transaction leading up to the Clark and McCullough enterprise the the firm did not own the timber on that tract, and did not acquire title thereto until some time in April, 1915. Its situation being such that it could be conveniently logged to their Winterburn mills, they began investigations respecting it in 1914, according to the testimony of the plaintiff. He finished his contract for the logging on the "Hoffman tract" some time in the fall of 1914, probably about September. He swears that in November or December, 1914, he and George C. Craig and J. W. Bratton went over the Clark and McCullough land and made a rough estimate of the amount of timber thereon, for use in the firm's deliberations upon the advisability of purchasing it; and that, in connection therewith, he was asked for the prices at which he would log the timber by George C. Craig, and that, in response to the inquiry, he proposed to log it at the prices and under the arrangement hereinbefore stated. He does not say Craig agreed on that occasion, on behalf of the firm, to pay the prices he had named; but admits that he told him he would report the proposition to the company. He denies that there was any further conversation or discussion with reference to the contract. George F. Craig admits that the plaintiff Bratton and his son George looked over the timber, in a general way, in 1914. He also states that on previous occasions he had negotiated with Clark for the purchase of the timber. If the plaintiff's proposal was made at the time stated by him, there seems not to have been any further discussion of it until about April 2, 1915. Between those two dates the plaintiff had assisted in making another and more thorough estimate of the timber, which was reduced to writing, dated April 1, 1915, and signed by him and J. W. McCullough and J. S. McQuown. When it was completed and signed or was ready for reduction to writing, he was called to Philadelphia. The title to the timber had not then been acquired, but an agreement for the purchase thereof was made about that time. The negotiations had so nearly approached consummation that George F. Craig felt warranted in contracting for the logging of the timber. According to his own testimony, the contract he made with the plaintiff was very informal. He

admits the terms of the written contract of April 1, 1912, were not discussed in detail. He merely says he contracted with the plaintiff to cut and log the timber on the basis of the contract of April 1, 1912, with an increase of \$1 per thousand for the hardwood and spruce timber. On the other hand, the plaintiff says the terms and conditions of the contract were not discussed at all, and that George F. Craig simply said to him, "Start on the job as soon as you can;" or, "You can start this job as soon as you like?"

George C. Craig admits that he went over the land with the plaintiff in November, 1914, and took his offer to do the logging at the increased prices named and communicated it to his father. He denies, however, that he made the contract and also that he had any authority to do so. From what has been stated, it is obvious that there is very little conflict in the testimony as to the manner in which the contract was made. The parties differ in their testimony as to who made it on behalf of the firm, whether George C. Craig or George F. Craig. In other words, the plaintiff's theory is that George C. Craig made it and reported it to his father, while the defendants claim he simply took and reported an offer which they, through George F. Craig, accepted, April 2, 1915.

Since there is no controversy as to the original contract, except in so far as the plaintiff claims it impliedly obligated the defendants to build the railroad up Bear Wallow hollow, the conflict in the evidence as to who made it on behalf of the firm has no important bearing on anything other than the extent of the agency of George C. Craig. If he had power to make it and did so, he had power and authority, no doubt, to interpret and modify it. If, on the other hand, he merely took the plaintiff's proposition and communicated it to his father for acceptance or rejection, the circumstance does not tend to prove the agency imputed.

There is sharp conflict in the testimony of the plaintiff and George C. Craig, as to what was said and not said concerning the intention of the defendants to extend their railroad up Bear Wallow hollow. They agree that they were in that hollow and looked over the ground in November or December, 1914. The plaintiff says it was agreed between them that the railroad would be built up to a point known as the Jess McLaughlin camp, and that the land above that camp was too steep for further extension. Craig says the land was too steep from the mouth of the hollow up to the camp. He further says he ascertained the grade by means of a lock level, and informed the plaintiff that the road could not be so extended. This the latter flatly denies, saying no levels were taken, that the grade was not ascertained, and that it was not steeper than other places on which roads had been built under the old contract. An-

other witness swore the grade was not over 6 per cent., nor as steep as other grades on which railroads were built under the contract. The plaintiff's testimony conflicts also with that of George F. Craig as to what he said about the building of the road. The latter says he was on the Boggs land in the spring of 1916, and then told the plaintiff the road would not be built. This the former positively denies. This testimony conflicts with his son's, for it proves the building of the road was contemplated and the purpose not abandoned until the spring of 1916. Moreover, he did not say he declined to build on account of the grade. His testimony indicates a decision on account of the length of the road. He does not claim to have been in the hollow at all. As a document confirming his statement respecting the construction of the railroad to McLaughlin camp, the plaintiff relies upon a letter from the defendant apparently written by George C. Craig, dated March 8, 1915, and advising the plaintiff of the coming of a contractor intending to bid on the work, and directing him to take the contractor over the route of the proposed road, "including the line over the old Horton grade." The Horton grade was an abandoned railroad bed running along the right-hand side of the river and extending up into the Boggs land, at least as far as the mouth of Bear Wallow hollow. It did not extend to the Jess McLaughlin camp, which was up in the hollow. It covered about half of the distance from the boundary between the Clark and McCullough land and the Boggs land and the McLaughlin camp. The probative value of this letter is denied in the argument on the ground that the Horton grade did not reach the camp. This circumstance does not wholly disprove its value. The Horton grade went up into the Boggs land and beyond the Clark and McCullough land. There could have been no reason for extension of the road to the mouth of the hollow other than to make it a means of getting the timber out of that hollow. The import of the letter is that there was a proposed road at that time, and that it extended over the Horton grade and into the Boggs land. As to this, the letter was general, and likely based on the assumption of the plaintiff's knowledge of the meaning of the terms "including the line over the old Horton grade." It meant whatever they had previously agreed upon or discussed as that line.

The circumstances attending the negotiations resulting in the contract for the building of the railroads are relied upon by the plaintiff as tending to prove intent and purpose on the part of the defendants to extend the road to the McLaughlin camp. They were constructed by a firm known as Notarianni & Aiello, under a contract dated April 3, 1915, which did not specify the locations of the roads to be built. It provided in general terms for the construction of about

6 miles of railroad, at \$2,000 per mile for grading and \$525 per mile for track laying and surfacing. The prospective contractors for this work had gone over the ground with the plaintiff, by direction of the defendant, in March, 1915, and among other locations shown them was the one in question. Aiello, one of the contractors, says he and the plaintiff went to the camp and came down the hollow to the river, and that, while showing him that route, plaintiff had said the railroad was to be built there. Under the contract of April 8, 1915, railroad was built to the extent of 6.96 miles, but it did not go to the McLaughlin camp nor cover the Horton grade beyond the boundary line.

Aiello testifies that when they came to that line in the construction of what is called the river line railroad, in May or June, 1915, Bratton, the woods foreman, came to them and ordered them to stop at that point, saying they were unable to secure a right of way through the Boggs land. George C. Craig admits that in May or June of that year he saw one of the owners of the Boggs land and negotiated with him for some timber thereon, not particularly for the right of way, and that he saw him only once, and on the road between Winterburn and Franklin. He also admits that there was some correspondence concerning the matter. The plaintiff says that in June, 1916, Boggs and George C. Craig had an interview respecting the right of way, at Winterburn, and that Craig, expressing disgust at the conduct of Boggs, had said he could not do anything with him, which meant, or may have meant, that he was unable to obtain a right of way from him. Thereupon the plaintiff, according to his testimony, proposed to put the logs over the ridge, if the defendants would give him what the railroad would cost, and Craig replied: "If you will put them over the hill, we will pay you what the railroad would cost, and if it costs more, we will pay you." As has been stated, George C. Craig expressly denies this, and, of course, if the agreement was not made, it was never reported by him. George F. Craig admits negotiations with Boggs for the timber and for a right of way prior to July, 1915. He offered \$600 and Boggs wanted \$1,000, which he was unwilling to pay. Notwithstanding the failure thereof in May or June, 1915, while the railroad contractors were still there, George F. Craig, as has been stated, testifies that in the spring of 1916, after their departure, he and the plaintiff and Bratton went upon the Horton grade and looked the ground over, and that he then and there decided not to build the road. The railroads built were completed in September, 1915. As will be observed, there is a discrepancy here in dates; the plaintiff saying his agreement, on failure to obtain the right of way, was made in June, 1916, and George C. Craig saying the negotiations for the right of way were had and failed in June,

1915. Reconciliation of this conflict, as well as all others, was a question for the jury, of course.

There is no claim on the part of the plaintiff that his alleged agreement of modification was ever brought to the attention of George F. Craig by him, in any way, until after the completion of the work, and the latter denies that it was. He specifically states that neither the plaintiff nor his son, George C. Craig, ever mentioned the matter to him. It was brought to his attention, however, immediately after the work was completed, by a letter dated May 7, 1917, acknowledging receipt of a check for the balance due. In that letter the plaintiff said, "When George C. is at home you can write me and I will come over and we can settle the Run hauling;" by which he admittedly meant the Bear Wallow hollow hauling. The suggestion of this claim, so made, does not seem to have occasioned any surprise on the part of the defendants, for on May 11, 1917, plaintiff was invited to come, after having given a few days' notice of the time of his arrival. At that time nothing was said about the counterclaim of the defendants which later became a subject of negotiations. Between that date and February 20, 1919, the date of the rejection of the plaintiff's claim, he made two or three trips to Philadelphia in an effort to obtain an adjustment of the matter. Craig knew in a general way what the plaintiff claimed, but says he was not informed as to the real basis of it until the occasion of the last trip. Cochran says the Craigs were evasive and avoided a settlement. They deny this, but a jury might well say they manifested no purpose to allow his claim without abatement, and yet that they did not reject it. In December, 1917, they introduced into the negotiations their set-off or counterclaim, and from that time both were under consideration, until the purpose of the plaintiff to bring this action became apparent. Then they informed his attorney by letter that the logging contract had been closed and settled in full April 30, 1917, except as to a charge for a carload of lumber shipped to the plaintiff May 29, 1917.

As matter tending to refute the good faith of the plaintiff's claim and contradict or negative the inferences arising in his favor from circumstances, the defendants invoke the monthly settlements and payments, and the final settlement and payment, without mention, until the receipt of the last check, of the claim now asserted. Uncertainty of the basis of his claim, or lack of full disclosure thereof, is also relied upon. George F. Craig swears he was not informed as to the exact nature thereof until the last interview between them was held, though he admits he knew something additional or extra was claimed and discussed. In the last interview he says what the railroad

would have cost was claimed and \$5,000 or \$6,000 indicated as the amount. He admits that he neither admitted nor rejected the claim when asserted, but he says he told the plaintiff he would get the boys, including plaintiff's son, together and take up the proposition "as a whole and do whatever was right about it," evidently meaning both claims. It is said the claim for full reimbursement for the cost of taking the timber out over the ridge, whether it exceed what the railroad would have cost or not, is an afterthought, and was never disclosed until this action was commenced. The basis of his claim, as set forth in a letter written by his attorney February 18, 1919, was limited to what the railroad would have cost.

George C. Craig was clearly an agent of the defendants. He was clothed with some authority. As the extent thereof was not defined by any written instrument and had not been otherwise clearly stated, it depended upon the facts and circumstances known to the plaintiff and the defendants. In the transaction here involved he was sent to the scene of the operations frequently and upon important missions, and apparently had considerable authority, as clearly appears from the facts hereinbefore stated. He gave the plaintiff frequent and important directions. Although he had not made any of the former contracts with the plaintiff, he had grown in age and experience at the time of the making of the one here involved, and had been intrusted, in later years, with more important matters than he had formerly handled. If right of recovery depended solely upon proof of his actual or apparent authority, however, the evidence thereof adduced and relied upon might not be sufficient to sustain a verdict, and, for that reason, it might have been the duty of the court to strike it out upon the motions made for such relief. But the existence of such authority as is claimed is not the only theory of right of recovery. There is clear evidence of acquiescence by silence and entertainment of the claim, after knowledge thereof, which might justify a finding of ratification of the alleged contract, if made without authority. Then there is still another theory of right of recovery, yet to be mentioned. As they are in the case and were before the jury, and the facts and circumstances relied upon as proof of actual or apparent authority in George C. Craig constitute some evidence thereof, the court properly overruled the motions made to eliminate that and much other evidence pertaining to the claim, and apparently dependent upon the agency, such as what the railroad would have cost, the cost of logging the timber over the ridge, and the making of the alleged agreement of modification.

[1, 2] Evidence cannot be struck out on the ground of slightness of its probative value, unless elimination thereof is decisive of the whole case. The trial court cannot be

required, in the progress of a trial, to stop and weigh and pass upon the evidence piecemeal, or reject certain portions thereof on the ground of insufficiency, if it is relevant, material, and appreciably probative. *State v. Clifford*, 59 W. Va. 1, 19, 23, 52 S. E. 981. Such procedure would introduce insufferable delays and confusion, endanger the rights of the parties, and likely invade the province of the jury. Parties to actions of this class are entitled to have their cases tried by juries and to have all relevant and probative evidence passed upon by the juries in the first instance. Presumptively, the jury will properly weigh and dispose of the evidence, whether heavy or light. The function of the court in the test of the sufficiency of evidence intervenes after verdict, or upon a motion to strike out all of it before verdict, or upon a demurrer to the evidence upon the theory of its insufficiency as a whole, not insufficiency of mere scraps or parts thereof. Such elimination of clearly insufficient evidence might not be reversible error under all circumstances, but a party cannot require it.

[3] The overruling of a motion to strike out all of the plaintiff's evidence, made at the conclusion thereof, is assigned as error. As the defendants afterward introduced their evidence, they waived the error in the overruling of the motion, if any. *Trump v. Tidewater, etc., Co.*, 46 W. Va. 238, 32 S. E. 1035; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

[4-6] Evidence of what it would have cost to build the railroad in question was objected to on the ground of insufficiency, abandonment of right to recover on that basis, possibility that such cost might have exceeded the cost of the work, and representation that the claim was for only \$4,000 or \$5,000. The objection was properly overruled. The contract price per mile of the road built, except as to bridges, the length of the road, and a substantial increase in wages and the cost of materials between 1915 and 1916 were proved. Though this evidence did not fix a definite sum as the cost, it reasonably and fairly proved a large sum of money entering into the cost, and the plaintiff could not be denied right of recovery on the ground of inability to prove the entire or exact amount thereof, if he made good his claim of a contract. It is immaterial that what the railroad would have cost might have exceeded the cost of the logging. If the contract was made as claimed, the plaintiff was entitled to recover it, nevertheless. There was no abandonment of this claim. Assertion of the alternative claim is not inconsistent with adherence to it, if that would be material. The law does not compel a plaintiff to elect at his peril between alternative claims. He may assert both, leaving it to the jury or court to say which he is entitled to. There is no element of estoppel in the representation that the claim amount-

ed to only \$4,000 or \$5,000, if made. It was not acted upon in any way to the detriment of the defendants. As mere evidence, it was to be weighed by the jury with all the other evidence.

[7] An objection to evidence of the additional cost of logging the timber over the hill, on the ground of lack of a claim of right to recover on a quantum meruit, overlooks the presence of the common counts in the declaration and the legal proposition that deviation from the contract admittedly made by an alteration of the character of the work after it was made, greatly increasing the cost thereof, may have conferred right of recovery on that basis. Besides the evidence tending to prove the alleged modification of the contract, there is an abundance of evidence tending to prove the admitted contract was entered into upon a representation of purpose and intent to build the railroad in question, and in reliance upon previous interpretation of the adopted written contract as to the duty of the defendants respecting the building of railroads thereunder. It suffices at this stage of the opinion to note the presence of such evidence. The question of its sufficiency comes up later.

[8] Aiello's opinion that the cost of building the road in 1916 would have been 50 per cent. or 60 per cent. more than in 1915, was clearly admissible, notwithstanding he had done no construction work in West Virginia in 1916. That circumstance went to its weight, not its admissibility. As a contractor, he was familiar with general commercial and industrial conditions. A witness need not be qualified in the highest degree, nor in any particular degree, to make his opinion on a question of value or quantity admissible. *Comstock v. Droney Lumber Co.*, 69 W. Va. 100, 71 S. E. 255. It suffices that he has some peculiar qualification, more knowledge of the subject than jurors are supposed ordinarily to have.

[9] Nor was the plaintiff's statement that he would not have taken the contract at the prices agreed upon if he had not understood the road was to be built inadmissible. Though in the nature of self-serving evidence, it was not an extrajudicial declaration. It is part of his testimony, laying emphasis upon what he claims to have been a part of his contract. It deals with his understanding of it, his intention and purpose. No rule forbidding such evidence has been adverted to in argument, and we have discovered none.

[14, 15] Coming now to the rulings on instructions, it is necessary first to dispose of a contention on the part of the defendant in error that the instructions were not made part of the bill of exceptions. Indeed, it is insisted upon highly technical and unsubstantial grounds that there is no bill of exceptions. It would subserve no good pur-

pose to analyze and refute this argument by demonstration and authority. A paper containing all of the evidence, motions, rulings thereon, and the instructions, and styled "Defendant's Bill of Exceptions," was certified by the trial judge as a bill of exceptions, and a vacation order makes it a part of the record. That is sufficient. In that paper the instructions are copied, with the objections, exceptions, rulings, and the initials of the judge written on them. These are referred to in the judge's certificate in these words: "Being the exceptions to the rulings and actions of the court in the progress of the trial, as shown above and above set out." These words refer to everything that precedes them, in so far as they are applicable, and they are obviously applicable to the indorsements on the instructions copied in the paper. Those indorsements record objections, rulings, and exceptions.

[11] The correctness of only one of the two instructions given for the plaintiff is questioned. It submitted to the jury the question of George C. Craig's agency and the issue as to whether he had made the alleged agreement and directed them, in the event of their finding for the plaintiff on those issues, to return a verdict in his favor and assess his damages at such sum as the evidence, in their opinion, warranted, but not to exceed the amount claimed in the declaration. It was a binding instruction and wholly ignored the issue as to the claims asserted by the defendants by way of recoupment and set-off. The evidence adduced in support of these claims had a clear tendency to sustain them. Whether they were valid was a question for the jury in the first instance, as were all other issues in the case. The defendants claim the amount of lumber sawed from the logs should have exceeded the quantity indicated by the scale under Scribner's Rule, by from 10 per cent. to 15 per cent., and adduced evidence that it had done so in the timber taken from the Hoffman land. Plaintiff's attention was repeatedly directed to the fact that his scale was running too high during the progress of the work. According to the evidence of the defendants, the lumber realized from the timber stocked by the plaintiff from the Clark and McCullough land did not overrun the scale at all. In resistance of this claim, the plaintiff assailed the correctness of the scale of the timber from the Hoffman land, and charged that quantities of timber had been left in the woods along the railroads and that logs had been lost from the mill pond or dam by reason of a flood in the river. In view of this evidence pro and con, neither court nor jury could properly ignore the issue.

If we could say that plaintiff had clear right to recover on the claim set up by him, that would not preclude the possibility of right in the defendants to part or all of their claim asserted against him. Nor can it be

said the instruction did not literally require a verdict for the plaintiff on the whole case, if the jury were satisfied of the agency of George C. Craig and the making of the alleged agreement, and that necessarily precluded allowance of a large part of the claim of the defendants, which was nearly double that of the plaintiff. It was not in terms limited to the plaintiff's claim. In express terms, it hypothetically required a finding for the plaintiff on the whole case, but the vice of it was its failure to exclude the claim of the defendants in the hypothetical statement. If the set-off was valid in toto, there could have been no verdict for the plaintiff.

[10] Such an instruction is erroneous and presumptively prejudicial. *Wiggin v. Marsh Lumber Co.*, 77 W. Va. 7, 87 S. E. 194; *Stuck v. K. & M. R. Co.*, 78 W. Va. 490, 89 S. E. 280; *Snider v. Robinett*, 78 W. Va. 88, 88 S. E. 599; *Petry v. Cabin Creek, etc., Co.*, 77 W. Va. 654, 88 S. E. 105. It is not justified by the principle or rule enunciated in *Leros v. Parker*, 79 W. Va. 700, 91 S. E. 660. In that case, the instructions submitted conflicting contentions to the jury, hypothetically. Inconsistency in the theories advanced in them was relied upon as vitiating them. Here only one side has been submitted by a binding instruction which completely ignores one of the defenses.

[12, 13] Exceptions were taken to the refusal of two instructions offered by the defendant, each of which would have directed the jury to find against the plaintiff, if given. They were properly refused. The contract as originally made between the parties was thoroughly informal. It verbally adopted the terms and provisions of a previous written contract between them, with two modifications as to prices. Under that contract, according to direct and positive evidence, railroads had been built by the defendants to such extent and in such manner as to bring them within reasonably convenient reach of the timber, when it was practicable to do so. As previously construed, it required the building of a railroad up the hollow in question. For about half of the distance the grade was clearly not too steep, for a railroad had been operated on it. As to the balance of the distance, there is clear and positive evidence that the grade was not too steep. The jury could have found it was not. They could have found, also, that when the plaintiff's offer to do the work was made and accepted, whether accepted by George C. Craig or his father, construction of the road was contemplated. There is no pretence that intention to build it was abandoned earlier than the month of June, 1915, two months after the contract was made. The plaintiff Bratton and George C. Craig had examined the location in 1914. In March, 1915, he had been directed to take the prospective contractors over it and he did so. Within a few days afterward the verbal con-

tract was made, and it was silent as to the construction of that railroad as it was respecting the others. Presumptively, the defendants knew the plaintiff was basing his contract on his belief that they would build that road, and the jury could say they intended to accept the offer as he made it. He knew how the former contract had been interpreted and executed in respect of the furnishing of railroad facilities, and had no reason to suspect that a different interpretation would be put upon it, or that it would be performed in a different manner. It is conceded that George C. Craig had supervising or administrative authority within the contracts made by his father. It was his business to require compliance therewith. That authority apparently, if not actually, included power to interpret provisionally, if not absolutely, the contracts in force and effect between the parties. Considered in the light of previous experience under the logging contract, it could have been treated by the jury as clear justification of plaintiff's reliance upon George C. Craig's representation that the road in question would be constructed. It is immaterial that only "about six miles" of road was contracted for. The plaintiff was no party to that contract. Nor does it matter that nearly seven miles was built. Silence of the logging contract as to what roads should be constructed and where is not conclusive. It implied that there should be railroads constructed by the defendants. Reason would suggest that it further implied an obligation to construct such roads as were reasonably necessary to convenient and economic logging of the timber, when practicable. There is evidence that it was so construed in the stocking of the timber from the Hoffman land. It would be as easy in logic and law to absolve the defendants from duty to build any railroads at all as to relieve them from reasonable duty in that respect. In view of all this, it is obvious that the jury was justified in finding, or could have found, that the contract, as made, provided for construction of the railroad in question.

The material alteration made in their plans by the defendants, necessitating departure from the contract by the plaintiff, if so made, at great additional expense to him, imposed upon the former the legal duty of compensating him for his additional outlay in the execution of his contract as altered in performance by reason of their change of plans. *Facey v. Coal & Coke Ry. Co.*, 75 W. Va. 134, 83 S. E. 301; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934; *Wood v. Ft. Wayne*, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. Ed. 416; *Wolff v. McGavock*, 29 Wls. 290; *Salt Lake*

City v. Smith, 104 Fed. 457, 43 C. C. A. 637.

Having thus demonstrated the propriety of the rejection of the peremptory instructions asked for and the overruling of the motion for a new trial, we deem it unnecessary to inquire whether these rulings can be justified upon any other ground, such as the validity of the alleged agreement of modification or ratification thereof as an unauthorized agreement by silence or acquiescence after knowledge. On these issues there may be additional or different evidence on the new trial to be awarded, and the latter has not been very fully developed. While George F. Craig knew the plaintiff claimed extra compensation, it does not appear just when he was advised that the claim was based upon the alleged special agreement therefor. Ratification of an unauthorized agreement, by conduct, can be effected only after full knowledge of the facts. *Thompson v. Laboringman's Manufacturing Co.*, 60 W. Va. 42, 51, 53 S. E. 908, 6 L. R. A. (N. S.) 311. There was no duty on the part of the defendants either to affirm, deny, or waive authority in George C. Craig to make the alleged agreement, until they knew he had made it or a claim of liability was asserted thereon.

Failure to invoke the legal principle upon which the rejection of the peremptory instructions and the denial of a new trial are sustained and reliance upon other propositions does not preclude application thereof. Litigation is not, and ought not to be regarded as, a contest presided over by the court and determinable by the skill of the actors, as in the case of a game. A correct ruling based upon a wrong or untenable reason should always be upheld, and when the rights of the parties have been dealt with and results declared upon inapplicable legal principles, so as to work deprivation of right or infliction of wrongs, the reviewing court, on discovery thereof, should correct the procedure and either adjudge the rights of the parties upon correct principles or remand the cause, with directions to the trial court for procedure agreeable to such principles, unless some insuperable obstacle to such action has intervened, and that is our practice.

In our opinion, the conclusions here stated cover and dispose of all the assignments of error that have been relied upon in argument, and sufficiently define the principles involved for the purposes of further procedure.

For the error in the giving of plaintiff's instruction No. 2, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(87 W. Va. 558)

STATE v. KNOSKY. (No. 4159.)(Supreme Court of Appeals of West Virginia.
Jan. 25, 1921.)*(Syllabus by the Court.)*

1. Intoxicating liquors \S 13—State legislation enforced though additional offenses and punishments created thereby.

The general prohibition law enacted by Congress does not provide an exclusive remedy for the enforcement of the provisions of the eighteenth amendment to the Constitution of the United States. By the very terms of that amendment, not only Congress, but the several states, are given power to enforce its provisions against the sale or manufacture of intoxicating liquor, and any state legislation in aid of that general purpose will be enforced, notwithstanding offenses may be created and punishments provided in addition to those offenses created and punishments prescribed by the general prohibition law enacted by Congress.

2. Criminal law \S 1213—Intoxicating liquors \S 242—State law prohibiting manufacture held not to impose excessive, cruel, or unusual punishment.

Section 37 of chapter 108 of the Acts of 1919 does not prescribe punishment out of proportion to the character and degree of the offense therein mentioned, or cruel or unusual punishment, in violation of section 5 of article 3 of the Constitution of this state.

3. Intoxicating liquors \S 137—Desert, secluded, hidden, or solitary "place" held to refer to immediate vicinity wherein illicit still operated.

The language "any desert, secluded, hidden, secret or solitary place," used in section 37 of chapter 108 of the Acts of 1919 in defining what shall constitute a moonshine still, is not used to indicate the exact apartment or room in which the operations are carried on, but as referring to the immediate vicinity, region, or locality in which such still is operated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Place.]

4. Intoxicating liquors \S 137—Operation of still in defendant's own home in settled community held not operation of moonshine still.

One operating a still for the manufacture of intoxicating liquors upon the stove in the kitchen of his own home, in a settled community close to a public road, is not guilty of operating a moonshine still under the provisions of section 37 of chapter 108 of the Acts of 1919, but is guilty under section 3 of that act.

Lynch, J., dissenting.

Appeal from Circuit Court, Hancock County.

Frank Knosky was convicted of having in his possession and operating a moonshine still, and he appeals. Reversed and remanded.

J. B. Levy, of Weirton, and E. A. Hart, of New Cumberland, for plaintiff in error.

E. T. England, Atty. Gen., R. A. Blessing, Asst. Atty. Gen., and Jno. T. Simms, of Charleston, for the State.

RITZ, P. The defendant was indicted, tried, and convicted under the provisions of section 37 of chapter 108 of the Acts of 1919, for having in his possession and operating a moonshine still, and was sentenced to confinement in the penitentiary for a term of two years, and to pay a fine of \$300.

It appears from the evidence that the sheriff of Hancock county had information that the defendant was engaged in the unlawful manufacture of intoxicating liquors, and with a view of investigating the complaints he, with one or more of his deputies, went to the residence of the defendant. It appears that the defendant resided with his family, consisting of himself, his wife, and four children, in a small house on a farm containing about 140 acres, the house being, according to the witnesses, from 300 to 500 feet from the public road which passes the place. The defendant rented this house and farm from the owner, who reserved a room in the same for his own use, which was at the time being occupied by him. When the sheriff approached the house from the road, he saw two men leaving the same from the opposite side, and when he and his deputies reached the house and entered the kitchen of the same they discovered therein a still, such as is used for the manufacture of spirituous liquors, sitting on the stove in the defendant's kitchen in full operation. They also found a keg of manufactured liquor in an adjoining room and a gallon jug of the same liquor about two-thirds full, as well as a large amount of raisin mash ready to be used in the process of manufacture. The sheriff testified that he made an inspection of the liquor being produced at the time by the still, and found that it is what is popularly called "raisin jack," or "pick handle," or "white mule," and that it was intoxicating. Upon the trial of the case the defendant introduced no evidence to contradict the testimony of the sheriff, which was fully corroborated by one of his deputies who accompanied him.

Upon this writ of error the defendant insists that the judgment against him should be reversed, and relies upon three grounds therefor: First, that the adoption of the Eighteenth Amendment to the Constitution of the United States, and the passage of the federal prohibition law for the enforcement of the same, superseded all state laws having for their purpose the enforcement of prohibition; second, that the punishment provided for the offense inhibited by section 37 of the act above cited is cruel and unusual, and in violation of the Constitution of this state; and, third, that under the evidence the defendant was not guilty of operating a moonshine still within the meaning of said sec-

tion 37, but that, if he was guilty of anything, he was guilty under section 3 of the act.

[1] The defendant's first contention is without merit. The Eighteenth Amendment to the federal Constitution in terms provides:

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

It cannot be denied but that the purpose of of the Eighteenth Amendment was to secure practical prohibition, and it is quite as plain from the language above quoted that the intention was to confer, not only upon the Congress, but upon the several states, the power, not only to enforce, but to enact such legislation as might tend in that direction. The adoption of this amendment was at least to some extent an innovation on what had been theretofore considered to be within the exclusive jurisdiction of the several states, and no doubt the Congress, in submitting this amendment, believed that the enforcement of the prohibition provided by the amendment could be better secured, in some instances at least, by the action of state authorities. It will be noticed that the language used does not limit the states to the enforcement of such laws as may be passed by Congress for the effectuation of the purpose of the constitutional amendment, but confers upon the states power to enforce the amendment by appropriate legislation. This plainly gives to the several states power to adopt such means by way of legislation as will best meet the obstacles existing in each locality to the enforcement of the law. The fact that some states may make an offense not included within the general prohibition law enacted by Congress can make no difference so long as the general purpose is kept in view. There is some discussion of this concurrent power conferred upon the Congress and the several states in the case of *Rhode Island v. Palmer*, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946, and related cases, decided by the United States Supreme Court, and reported in the *Advance Opinions* of July 1, 1920.

[2] Nor is there merit in the contention made that the punishment prescribed by section 37 of chapter 108 of the Acts of 1919 is out of proportion to the character and degree of the offense, or is cruel or unusual, and for that reason in violation of the Constitution of this state. The power of the Legislature to prescribe the punishment for offenses is very broad, and much must be left to the judgment of that body as to what punishment will be adequate for the purpose of deterring others from the commission of crime, and for the reformation of the offender. This question is elaborately discussed by Judge Brannon in the case of *State v. Woodard*, 68 W. Va. 66,

69 S. E. 385, 30 L. R. A. (N. S.) 1004, and by Judge Robinson in the case of *State v. Graham*, 68 W. Va. 248, 69 S. E. 1010, 40 L. R. A. (N. S.) 924. Those opinions furnish a sufficient answer to the assignment of error upon this ground.

[3] The third contention made by the defendant is that the evidence does not make him guilty of the offense interdicted by section 37 of the act. It appears from an examination of chapter 108 of the Acts of the Legislature of 1919 that by section 3 any person who engages in the manufacture of intoxicating liquors (other than by moonshine still) shall be guilty of a misdemeanor for the first offense, and, if found guilty of a subsequent offense, of a felony, and punished as provided in that section. This section by itself does not inhibit the manufacture of intoxicating liquors by moonshine still, and, unless there had been other legislation, those engaged in such manufacture would not be punishable under the act. But the exception contained therein was for the purpose of reserving this manufacture by moonshine still for further treatment by the legislative authority, and under section 37 of the act such manufacture is inhibited, and is made a felony punishable by confinement in the penitentiary for not less than two nor more than five years, and a fine of not less than \$300 nor more than \$1,000. It will thus be seen that the Legislature has classified the manufacture of liquors into those produced by moonshine still and those produced otherwise. Section 37 goes further and defines what shall constitute a moonshine still. This provision is:

"For the purposes of this act, any mechanism, apparatus or device that is kept or maintained in any desert, secluded, hidden, secret or solitary place, away from the observation of the general public, for the purpose of distilling, making or manufacturing intoxicating liquors, or which by any process of evaporation, separates alcoholic liquor from grain, molasses, fruit or any other fermented substance, or that is capable of any such use, shall be taken and deemed to be a 'moonshine still,' and the owner or operator of any such 'moonshine still' shall be deemed a 'moonshiner.'"

It is argued by the learned Attorney General that the proof in this case brings the defendant within the definition of a moonshiner as prescribed by the statute, that his kitchen in his residence is a desert, secluded, secret, or solitary place within the meaning of that statute, and that therefore the conviction of the defendant under the same was proper. It must be borne in mind, in seeking the construction of this section, that all manufacture of spirituous liquors is inhibited by the act, and, this being true, it could hardly be expected that one engaged in such manufacture would set up a still in the face of the public. This would lead to certain

detection, and as certain punishment. Illicit business is carried on, not for the purpose of detection, but ordinarily for the purpose of profit, and can only be reasonably successful by escaping detection, at least for a reasonable time, so that we are justified in the assumption that any one who engages in the business of manufacturing intoxicating liquors will, to the extent that he is able, secure himself from detection by those charged with the execution of the law. It therefore follows that, if this statute is to be construed as making any one a moonshiner who manufactures liquor in any place not open to the public gaze, then all persons engaged in this business will fall within the definition, and the Legislature would be open to the charge of having done an entirely futile thing in inhibiting the manufacture of liquor other than by moonshine still, for there would be no offense to fall under that provision of the act. The word "place" used in section 37 has a little broader meaning than the room in which the actual manufacture is being carried on. It means that the house or building itself shall be in a secluded place; the word "place" being used more in the sense of the immediate neighborhood, region, or vicinity than in the sense of the particular room or apartment in which operations are conducted. We know as matter of fact, and the Legislature was not without the same knowledge, that what was ordinarily termed "moonshine" was such liquors as were manufactured in the fastnesses of the mountains and other secret and hidden places, where there was great difficulty of detecting it, and this was the popular meaning of the term. The language used by the Legislature in defining it indicates to our minds that this was the sense in which the Legislature intended it should be used. We do not mean to say that one could not be guilty under section 37 unless it was shown that he carried on his operations in the seclusion of the woods or mountains. There may be just as effective means used in centers of urban population. Such a still might be operated in abandoned coal mines, or in abandoned buildings, or means might be taken by the owner or operator to provide a specially hidden place of manufacture, such as by excavating a cave, or in some similar manner, and it may be that all of these things would fall within the definition of a moonshine still. The principal purpose, however, of the Legislature undoubtedly was to include that class of cases where the operations are extensively carried on in out-of-the-way places, and in neighborhoods not frequented by the general public, and by people of more or less desperate character, where the officers, in the execution of the law, would likely meet with resistance in bringing the transgressors to justice, such

as has often been met within the past history of the execution of the liquor laws. From the language used we cannot attribute to the Legislature the intention to make it a felony punishable as prescribed in section 37 for a man to engage in the manufacture of liquor in his own home without taking any extraordinary means to conceal it. We are forced to this conclusion from the fact that to give the statute any other construction would make meaningless its inhibition against the manufacture of liquor other than by moonshine still; for, if the construction insisted upon by the state is sustained, there would be no manufacture except by moonshine still. It may be that all persons who engage in the illicit manufacture of liquors should be severely dealt with, but the Legislature has seen fit to divide them into two classes, making one more odious than the other, and it is beyond our province to abolish the distinction thus made.

[4] We are persuaded that the evidence in this case, which is uncontradicted, does not prove the guilt of the defendant under section 37, but that he is guilty, if at all, and upon this we of course express no opinion, of the offense interdicted by section 3 of the act.

It therefore follows that the judgment of the circuit court of Hancock county will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

(88 W. Va. 251)

THORNE v. CITY OF CLARKSBURG.
(No. 4105.)

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

1. Constitutional law §34—Jury §19(1)—Provision for assessment of damages to private property taken held self-executing.

The last clause of section 9 of article III of the Constitution of this state relating to the taking or damaging of private property for public use, providing that when required by either of the parties the compensation therefor shall be ascertained by an impartial jury of twelve freeholders, properly construed, is so far self-executing as to entitle them in a suit at common law for compensation for property not taken but damaged, to have the damages assessed by such impartial jury of twelve freeholders.

2. Constitutional law §29—"Provision self-executing." If right or duty given enforceable without legislative enactment.

The principal test for determining whether a constitutional provision is self-executing is that the right it gives or the duty it imposes may be enforced without the aid of legislative enactment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Self-Executing.]

3. Eminent domain §295—Where assessment by jury of freeholders denied, presumption is that plaintiff was deprived of constitutional right.

Where in a suit for compensation for private property taken or damaged for public use either of the parties thereto has plainly demanded and been denied the right to an impartial jury of twelve freeholders, it will be presumed that the jury was not so composed and that the party so demanding was deprived of a constitutional right.

Error to Circuit Court, Harrison County.

Action by Metta V. Thorne against the City of Clarksburg. Judgment for plaintiff for insufficient relief was set aside on plaintiff's motion, a new trial was awarded, and defendant brings error. Affirmed.

Homer Strosnider and F. O. Sutton, both of Clarksburg, for plaintiff in error.

Smith & Jackson, of Clarksburg, for defendant in error.

MILLER, J. On the trial of an action on the case for damages alleged to have been sustained by plaintiff from the lowering of the grade of the street in front of her property in the city of Clarksburg, the verdict of the jury was in favor of plaintiff for \$355.41, which verdict was on motion of plaintiff set aside, and a new trial awarded. From that judgment defendant obtained the present writ of error.

The principal ground relied on to sustain the judgment is that plaintiff was entitled to have the compensation for the damages sustained by her ascertained by an impartial jury of twelve freeholders, as provided by section 9 of article III of the Constitution of this State; and this was the ground upon which the record shows the circuit court was persuaded to award a new trial.

The provision of the Constitution relied on is as follows:

"Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law: Provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders."

Plaintiff's bills of exceptions numbers 1 and 2 show: First, that after the case had been called for trial and before the jury was impaneled, the plaintiff demanded a jury of twelve freeholders to try the case, which demand the court refused, and declined to permit none but freeholders to qualify as

jurors to try the case, to which action of the court the plaintiff excepted; second, that when the case had been so called for trial and while the jury was being impaneled to try the case and after the court had concluded propounding interrogatories to the jury for the purpose of qualifying them, and after a jury of twenty had been sworn to answer questions, the court turned to counsel and asked if they desired to have the jury asked any further questions, and that thereupon the plaintiff by counsel requested that the jury be asked whether they were freeholders and that each juror be asked whether he was a freeholder, there then being twenty in the box and being interrogated and qualified as aforesaid, which request of the plaintiff by counsel the court refused, and declined and did not ask the said jurors or any of them whether he was a freeholder, to which action of the court she again objected and excepted.

In support of the original rulings of the court denying the plaintiff the right to a jury of twelve freeholders counsel for the city rely mainly on two propositions, namely: First, that the last clause of section 9 of article III of the Constitution is not self-executing, but addressed to the Legislature, and that the Legislature not having enacted any general law to carry said provision into effect, as it had by chapter 42 of the Code (secs. 1690-1727), where land is to be taken or damaged for public use by condemnation, plaintiff was not entitled to a jury of freeholders; second, that as the plaintiff had had a trial before a common-law jury, she had been denied no right, wherefore there was no error in the original rulings of the court denying her a jury of freeholders.

[1] It is contended that the constitutional right to a jury of freeholders when private property is to be taken or damaged for public use by condemnation was made effectual by the provisions of chapter 42 of the Code, but the proposition contended for is that when the property is to be damaged but no part of it taken, the only remedy given for the wrong is an action on the case at common law with the intervention only of a common-law jury, such as was had in this case. In the one case it is said the Legislature has provided the manner in which the compensation to the owner shall be ascertained, that is, upon petition by the condemnor, after effort to agree with the owner, the appointment of commissioners of freeholders by the court as provided, to ascertain what will be a just compensation, and upon demand by either party after report by the commissioners, by the impaneling of a jury of freeholders in such manner as the court shall direct, as provided by section 17 of said chapter 42 (sec. 1716); but that in the other case no method of deter-

mining the compensation having been provided by law, the common-law remedy alone must be relied on and pursued. In *Supervisors of Doddridge County v. Stout*, 9 W. Va. 708, a case which arose and was determined according to the law in force prior to the Constitution of 1872, it was decided that the case was properly determined as provided by the provisions of chapter 42 of the Code, the only method then prescribed for ascertaining the compensation to the owner of the land to be taken, and that the new provision of the Constitution of 1872 giving the right to a trial by a jury of freeholders, not being self-executing and not carried into effect by appropriate legislation, could have no application. In *Johnson v. City of Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779, the proposition relied on was that the first clause of said section 9, article III, prohibiting the damage as well as the taking of private property for public use without compensation, was self-executing; and it was decided, contrary to the contention of counsel for defendant, that it was; but it was decided that the second clause thereof, saying that "when private property shall be taken, or damaged, for public use, or for the use of such corporations, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: Provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders," was not self-executing, but required legislation to carry it out. The distinction made between these two clauses was that the first clause gave and protected the right of the owner to compensation, but that the second was addressed to the Legislature, and it having made no provision where the property is damaged only, the common law alone can be resorted to to redress the plaintiff's wrong. But that case does not hold that when the right is being redressed by a common-law action for damages to property taken, the provision for a trial by a jury of twelve freeholders may not be invoked, and that so much of this provision of the Constitution is not self-executing. No legislation providing for additional machinery for carrying this provision into effect is necessary; the provision simply adds an additional qualification to the jurors; and we think so much of that section as pertains to the qualification of the jurors ought to be construed as self-executing. Jurors so qualified could be drawn from the regular panel summoned for the term at which the trial is to be had, or from other jurors summoned pursuant to law.

[2] One of the well recognized tests for determining whether a constitutional provision is self-executing is that the right or duty which it imposes may be enforced without the aid of legislative enactment. 6 R. C. L.

§ 55, p. 59, citing *Davis v. Burke*, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249, and numerous other cases. In the latter case the Supreme Court quotes from *Cooley's Constitutional Limitations*, the following:

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential"—followed in *Tampa Water Works Co. v. Tampa*, 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170.

And for a clear statement of this general rule, see 12 C. J. 729.

In *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783, cited in 6 R. C. L. § 55, p. 59, it is said to be a generally recognized rule that legislation is unnecessary to enable the courts to give effect to constitutional provisions guaranteeing the fundamental rights to life, liberty and the protection of property. This was the rule or principle applied in *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396, where, because there was no physical taking of the property but the damages about to be inflicted amounted to a practical taking thereof, and the statute providing no way whereby the damages could be determined or secured before the taking, it was held that equity would intervene to protect the owner and to direct an issue of quantum damnificatus to be tried by a jury of twelve freeholders, as provided by the Constitution and statute. And the same practice was recognized and approved in *Ward v. Ohio River R. R. Co.*, 35 W. Va. 481, 489, 490, 14 S. E. 142. The fact that the Legislature has omitted for so many years to make special provision for ascertaining compensation to the owner for property damaged but not taken by condemnation argues strongly that no legislation was regarded necessary to protect one in his constitutional right to a jury of freeholders; otherwise the legislative branch of the government would be convicted of a purpose to withhold this constitutional right. And if legislation had been attempted, the proviso of section 9 of article III would constitute a complete limitation upon the power of the Legislature to enact any law which did not protect the owner in his right to a jury of freeholders when demanded. Applying this test, if this provision of the Constitution can be given reasonable effect without legislation, it ought to be regarded as self-executing. Such is the rule of construction everywhere, as established by the more re-

cent decisions. Formerly, when, as in the case of the federal Constitution and of those of some of the states, they amounted practically to mere outlines of government, addressed to the legislatures and to control legislation, the provisions were manifestly not self-executing, but required legislative action to carry them into effect. *Winchester v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153. The provision now under consideration amounts to more than a mere address to the law-making power; it secures a very substantial right and imposes a duty, not only upon the Legislature, but upon the courts, that the compensation for property taken or damaged, when demanded, shall be ascertained by a jury of freeholders. For the foregoing reasons we are of opinion that the circuit court committed no error in setting aside the verdict and awarding the plaintiff a new trial. By denying her a jury of twelve freeholders, twice demanded, she was denied a very substantial right, guaranteed her by the Constitution, self-executing in its nature and requiring no legislation to give it effect.

[3] It is said by counsel for defendant that there is nothing in the record showing that the jury which tried the case were not qualified freeholders, and that the presumption is that they were freeholders. In *Supervisors of Doddridge County v. Stout*, supra, it is said that it was as much the duty of the defendant as of the court to see that all the commissioners were freeholders. In this case the demand of the plaintiff was twice rejected by the court. The court refused to require a jury of freeholders. Presumptively, therefore, they were not all freeholders. If no demand or objection had been made, the rule of *Ohio River R. R. Co. v. Blake*, 38 W. Va. 718, syl. 3, 18 S. E. 957, would apply. It is said that when counsel were inquired of, before the jury were sworn, whether they desired to make any further inquiry, they should have availed themselves of the opportunity offered to inquire whether the jury were freeholders, and not having done so, they must be regarded as having waived the right. But two requests having previously been made, is it to be presumed the court would have receded from its former rulings? Besides, as the court below set aside the verdict on the ground that it had erred in denying plaintiff her constitutional right, the presumption is rather that the court was advised that the jury was not lawfully constituted, after demand for a jury of freeholders.

Counsel for plaintiff, during the trial, appealed to the court to change or modify the rule promulgated in prior decisions here and elsewhere for measuring the compensation to the owner when property is taken or damaged for public use. The suggestion was

that in determining the damages, the evidence should be limited to the value of the property immediately before the damage is done and immediately after, but before completion of the proposed improvement, by the laying of cross-ties and rails in the case of a railroad, and in the case of improvement of streets and alleys of a municipality before the concrete base and brick or other surface of street paving is laid; this for the purpose of avoiding the difficulty of distinguishing between general and special benefits in ascertaining damages recoverable in such cases. The rule most recently stated is that:

"The true measure of damages to property abutting on a public street, occasioned by a change in the grade thereof, is the difference between the value of the property immediately before, and its value immediately after, the street improvement, special or peculiar, but not general, benefits to the property being considered and included in the latter value." *Jones v. City of Clarksburg*, 84 W. Va. 257, 99 S. E. 484.

For the reasons there given, which need not be repeated here, we adhere to that rule and see no reason for accepting the suggestion of a change.

We, therefore, affirm the judgment.

(88 W. Va. 343)

EVANS v. KIRSON et al. (No. 4109.)

(Supreme Court of Appeals of West Virginia.
March 24, 1921.)

(Syllabus by the Court.)

1. Landlord and tenant §166(5)—Owner liable for injuries to tenant's property by freezing and bursting of water pipe.

The owner of a building, containing store-rooms or apartments leased to various tenants, who permits the water to remain in the pipes of a vacant portion of the building in his possession and control, without exercising reasonable precaution to prevent its freezing when the temperature probably may endanger it, is liable to the tenant of a lower floor whose property is injured by the freezing and bursting of a water pipe under such circumstances, unless relieved therefrom by the contributory negligence of the tenant.

2. Landlord and tenant §168(2)—Tenant failing to shut off water to prevent freezing held not contributorily negligent.

Where the owner of such a building has installed therein but one stopcock or valve located in the basement, which when closed shuts off the water from the entire building, a tenant, having exclusive possession and control of the first floor and basement, who knows of the vacancy of the two upper floors of the building, is not contributorily negligent in failing to close such valve on an evening when the temperature is such as to endanger freezing, when he does not know that the stopcock controls the water

over the entire building, but believes it to relate only to his own leasehold.

3. Landlord and tenant \Leftrightarrow 169(11)—Tenant's contributory negligence in not closing valve covering water supply held for jury in action for damage from water.

Where the testimony is conflicting as to the tenant's knowledge that the stopcock or valve governs the water supply over the entire building, and as to his authority to close it, the solution of the conflict so presented is peculiarly within the province of a jury, and its finding, in the absence of a clear preponderance of evidence to the contrary, and of prejudicial error during the course of the trial, cannot properly be disturbed.

4. Trial \Leftrightarrow 253(9), 296(4, 5)—Instruction ignoring contributory negligence held erroneous, and not cured by other instructions.

Where contributory negligence is relied on in defense of an action for wrongful injury, an instruction, directing a finding in favor of the plaintiff on certain facts therein set forth, but omitting any reference to the facts tending to establish contributory negligence, and entirely ignoring such defense, is erroneous, and cannot be cured by other instructions given in behalf of either party.

Error to Circuit Court, Berkeley County.

Trespass on the case by James F. Evans against Noah Kirson and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

D. W. Snyder, Jr., and H. H. Emmert, both of Martinsburg, for plaintiff in error.

Martin & Seibert, of Martinsburg, for defendants in error.

LYNOX, J. The judgment complained of on this writ plaintiff recovered in an action of trespass on the case for damages sustained by him as a result of an injury to his property, consisting of pool tables, by water escaping from bursted pipes in the two upper stories of a three-story brick building owned by defendants. The latter leased to plaintiff the first story and basement for a period of two years from April 1, 1916, at a monthly rental of \$80. The upper stories were not occupied by tenants at the date of the accident, but seem to have been used by defendants for storage purposes. The pipes were a part of the plumbing system installed in the building. They connected with the city's water mains by means of a service pipe which entered the basement of the building, and thence carried the water throughout its several parts. The only provisions made to stop the water flow into the several portions of the building were located, one at the connection with the water main outside, for the convenience chiefly of the officials in charge of the city's water supply, the other in the basement on the inside of the building, for the convenience of the owner or tenant. By means of either it was

possible to shut off the water from the entire building.

Saturday night, January 5, 1918, was intensely cold, and as a natural consequence the water in the pipes installed in the two upper stories froze, there being no artificial heat to prevent freezing, and exerted such pressure that the piping system yielded and broke or split, and thereby caused a leakage and drainage into the room occupied by the lessee. He did not discover the leakage until Sunday evening, when he casually entered the building and found his property seriously injured.

His right to recover compensation for the injury done is based upon the assumption that defendants owed him the duty to protect his property from the danger incident to freezing and bursting pipes in either of the upper stories, by the installation of appliances to cut off the flow of water into such rooms and apartments as were unoccupied by tenants, or by other reasonable means sufficient to furnish similar protection. Defendants to defeat recovery in the action contend that, as there was accessible to plaintiff a stopcock or valve in the basement, it was his duty to close it when he left the building Saturday night, as at that time he must have realized the imminence of the danger because of general weather conditions, and his failure to exercise that precaution constituted contributory negligence on his part, precluding recovery of compensation for his loss. Apart from questions pertaining to the right to file and prove, by way of set-off to plaintiff's claim, rentals due under the terms of the lease and unpaid when the case was tried, excessiveness of the verdict, and the giving and refusal of instructions, the issues to be determined upon this review are as we have stated them to be.

The question of the extent of the landlord's duty to prevent freezing and bursting of water pipes in these parts of the building under his control has never before been presented to this court, so far as we are able to ascertain. But in *Charlow v. Blankenship*, 80 W. Va. 200, 92 S. E. 318, L. R. A. 1917D, 1149, we held that a lessee might maintain an action to recover damages for the failure of his lessor to exercise due care and diligence in making repairs to that part of the building which he retained in his possession and control, or for the negligent use by the lessor of such part of the building. The present case, however, goes further than that cited, in that here there is no evidence showing that any part of the plumbing system was in a state of disrepair.

[3] It seems that plaintiff did not know that the stopcock or valve in the basement under his control operated to cut off the water from the entire building. True, defendants testify that they had informed him on numerous occasions of its true function, and

authorized him to close it in cold weather, but plaintiff flatly denies that he had such information or admonition, and states that he thought it controlled only the water in the poolroom, and deemed it unnecessary to exercise further precaution as to that part of the building because he had left it supplied with heat amply sufficient to protect his property from damage. His conduct at the time of the discovery of the leak tends strongly to support his testimony in this respect; for immediately upon seeing the torrent, as he terms it, pouring through the ceiling onto his tables, he obtained a wrench and rushed upstairs seeking to gain entrance into the second floor room and hoping to find a shut-off there. But discovering the door padlocked, he went to the basement and spent considerable time looking among the maze of pipes for a stopcock other than the one of which he had knowledge. Not finding any, he turned off his, and then for the first time, he says, discovered that it controlled the water, not only in the poolroom, but throughout the entire plumbing system. Of course defendants positively assert that they frequently had given plaintiff such information, but opposed to this is plaintiff's equally positive denial, accompanied by conduct which the jury could say supported his contention. At any rate, the question of plaintiff's authority and knowledge in this respect was presented for the consideration of the jury by defendants' instruction No. 4, clearly calling to their notice defendants' theory of contributory negligence, and as the verdict solved that question in plaintiff's favor, it cannot be disturbed at least on that ground. Of course, if the latter had known that the valve under his control governed the water supply in the building, as he later discovered it did, and had received authority to turn it off in cold weather, as defendants say he had, he might perhaps have been chargeable with contributory negligence in failing to exercise his right and duty, especially since he seems to have known of the vacancy of the two upper floors, and that the turning off of the water would cause no inconvenience to an occupant of the upper floors. However, we express no definite opinion as to that.

A brief review of a few selected authorities dealing with analogous situations in other jurisdictions may be instructive. The case of *Hunter-Smith Co. v. Gibson*, 119 Va. 582, 89 S. E. 886, is confidently relied on by defendants as decisive of this case. There, as here, plaintiff occupied a room on the ground floor of defendants' three-story building, but, unlike this case, the upper floors were also occupied by tenants. The entire structure was supplied with water through a service pipe leading into the basement, which was within plaintiff's exclusive possession and control. In it, as well as in the storeroom above, were stopcocks by means of which the water could be cut off from the entire build-

ing. There was also a shut-off valve on the second floor, but none on the third where the freezing occurred. Plaintiff based his claim for damages upon the failure of the owners to provide a cut-off for each floor to enable its occupant to avoid injury in cold weather. In holding the defendants not liable for the resulting damage to the goods of the plaintiff, the court found him guilty of such negligence as precluded right to compensation, in that he failed to use the means at hand for his own protection. But there is also this further dissimilarity between the facts of the two cases. Plaintiff appears to have known that the stopcocks in the basement and on the first floor controlled the entire water system of the building, for, it seems, they had been used on other occasions to prevent just such an accident. He attempted to justify his failure to exercise due caution for his own safety because of the presence of tenants of other floors, but this attempted justification the court brushed aside, holding it to be unavailing. Whatever might be our views under facts similar to those revealed in the *Virginia* case, it is sufficient to say that each is clearly distinguishable from the other. Moreover, in the former case cited defendants did not have possession and control of the part of the building in which the break occurred, as they did in this case.

Buckley v. Cunningham, 108 Ala. 449, 15 South. 826, 49 Am. St. Rep. 42, is another case that tends to support the theory relied on to defeat recovery by plaintiff. Tenants of the first floor of defendant's building conducted therein a millinery business. Other stories, two in number, were unoccupied, and therefore in the lessor's possession and control. There was no cut-off inside the building, and none outside except the city valve. The plumbing admittedly was good and free from defects. On an extremely cold night, however, the pipes in the vacant upper stories burst and flooded plaintiff's shop. In reversing a verdict for the latter, the court held that defendant was under no duty to provide valves by which to shut off the water from unoccupied rooms under his control, so long as the plumbing was adequate in other respects, as the tenants, at the time they rented the premises, knew there were no such appliances, and with such knowledge accepted the tenement at a rental based upon the condition as it then existed, and thereby assumed the risk incident to the absence of such equipment. This case represents an extreme view of the reciprocal rights and duties existing between landlord and tenant, and we are not disposed to adopt its conclusions in this instance.

On the other hand, there are several adjudications in support of plaintiff's contention as to the legal duty existing under such circumstances and in harmony with the conclusion we have reached. *Kecoughtan Lodge, etc., v. Steiner & Kaufman*, 106 Va. 589, 56

S. E. 569, 10 Ann. Cas. 256, involved an action by the occupant of the ground floor of a three-story building owned by defendant to recover damages caused by the freezing and bursting of a water pipe near a toilet on the second floor. There was conflict in the testimony as to whose duty it was to cut off the water from the toilet, plaintiff's evidence tending to show that defendant employed a janitor whose duties included the one in question, while defendant's testimony tended to establish that the toilet was under the exclusive control of tenants occupying the first and second floors, whose duty it was to shut off the water on such occasions. But the jury having found in favor of the former, the court declined to disturb the verdict.

In *Moroder v. Fox*, 155 Wis. 503, 143 N. W. 1040, L. R. A. 1917B, 238, plaintiff, a tenant occupying the ground floor of a building, sued for injuries caused to his goods as a result of the freezing and bursting of a pipe in a vacant flat on the second story, the third floor being occupied. One water cut-off was provided for the entire building, and that was located in the basement, to which plaintiff and defendant had equal access. A clause in plaintiff's lease required him "to turn and let the water out of the pipes on said premises whenever it shall be necessary to do so to prevent it from freezing or injuring said pipes and property." The court held that clause applied only to plaintiff's premises, and did not require him to shut off the water from the entire building, and found the defendant liable for the damage originating in the vacant flat, saying:

"Knowing that the premises were vacant and unheated, and that the water pipes running through the same to supply the flat on the third floor with water were uncovered and unprotected from frost, it was negligence to allow them so to remain during the winter time."

Two members of the court, however, concurred in a dissenting opinion. For cases announcing similar principles, see *Le Vette v. Hardman Estate*, 77 Wash. 320, 137 Pac. 454, L. R. A. 1917B, 222; *Martindale Clothing Co. v. Spokane & Eastern Trust Co.*, 79 Wash. 643, 140 Pac. 909; *Dreeves v. Schoenberg*, 82 N. J. Law, 335, 82 Atl. 530, and also monographic notes in L. R. A. 1917B, 244, and 17 N. C. C. A. 115, 126, et seq., annotating and discussing many other cases relating to the general subject of the liability of a lessor for damage to goods of a tenant caused by leakage from water fixtures.

[1, 2] From the authorities cited and referred to the consensus of judicial opinion seems to be that the owner of a building, containing storerooms or apartments leased to various tenants, who permits the water to remain in the pipes of a vacant portion of the building in his possession and control, must exercise such reasonable precaution as will tend to prevent its freezing when the temperature

probably may endanger it. This he may do by the installation of sufficient appliances to cut off vacant rooms from the general plumbing system, by heating them, or in any other manner reasonably sufficient to safeguard tenants of lower floors. Of course, if the tenant is contributorily negligent in failing to use existing appliances within his control and which he is authorized and required to use, he may be barred from a recovery for the resulting damage. And where he knows of the vacancy of the floors above him and is aware that he possesses the means and authority to shut off the water from such portions, there may, or may not, devolve upon him a duty to use the appliances at his disposal, as held in *Hunter-Smith Co. v. Gibson*, 119 Va. 582, 89 S. E. 886, cited. But though plaintiff probably knew that the upper stories were unoccupied, the jury's finding negatives any such knowledge on his part that the stopcock in the basement controlled the entire building, and in view of the conflicting testimony that finding cannot be disturbed. Hence in this case we are confronted by a breach of duty on the part of defendants, unrelieved by any finding of contributory negligence by the plaintiff—a situation which imposes upon the former liability for the injury and damage resulting to the latter.

Complaint is made of the court's refusal to give instructions Nos. 1, 2, 3, and 5, requested by defendants. No. 1, directing a verdict for defendants, was rightly refused for reasons already stated. The rest were amply covered by No. 4, given, which presented to the jury the question of plaintiff's contributory negligence.

[4] Plaintiff's instruction No. 1, however, was improperly given. It was a binding instruction, directing the jury to find for the plaintiff if from the evidence they believed that defendants did not use due and ordinary means to prevent the escape of the water. It wholly ignored the theory of contributory negligence in failing to close the stopcock in the basement, as disclosed by defendants' instruction No. 4. Binding instructions ignoring vital issues in a case should not be given, even though such issues are presented by other separate and distinct instructions. *McCreery's Adm'x v. Ohio River R. Co.*, 43 W. Va. 110, 27 S. E. 327; *Britton v. South Penn Oil Co.*, 73 W. Va. 792, 81 S. E. 525; *Petry v. Cabin Creek Consolidated Coal Co.*, 77 W. Va. 654, 88 S. E. 105; *Stuck v. K. & M. Ry. Co.*, 78 W. Va. 490, 89 S. E. 280; *State v. Price*, 83 W. Va. 71, 97 S. E. 582, 5 A. L. R. 1247.

Defendants also assign as erroneous the refusal of the court to permit them to file a statement of two months' rent, due them at the date of the trial, by way of set-off to plaintiff's claim for damages. They do not press the point in this court, however, and hence in accordance with our rules it is deemed to have been waived and abandoned.

Nor is it necessary to discuss the alleged

error of the jury in calculating their verdict, disclosed, as defendants contend, by the paper pinned to and returned with it. The verdict is general, and does not in any manner refer to the paper, and no order made the latter a part of the record until after the jury had been discharged. Moreover, the new trial which we are compelled to award renders unnecessary any decision on that point.

For these reasons, we reverse the judgment, set aside the verdict, and remand the case for a new trial.

(88 W. Va. 270)

MATHENY v. WHITE. (No. 3557.)

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

1. Taxation \S 788(3)—To invalidate tax deed, former owner must show defect or wrongful act in assessment or sale of such character as to invalidate proceedings.

As section 29 of chapter 31 of the Code (sec. 1088) makes a tax deed regular on its face prima facie evidence against the former owner of the land conveyed by it, that the material facts therein recited are true and that such estate as is mentioned in section 25 of said chapter vested in the grantee therein, the former owner, in order to prevail in an attack upon such a deed, must allege and prove a defect or some wrongful act in the proceedings under which the land was assessed, returned delinquent and sold, of such character as will invalidate it.

2. Taxation \S 688—Mere defect in list returning land delinquent insufficient to overthrow tax deed.

A mere defect in a list returning land delinquent for nonpayment of taxes does not constitute ground for overthrow of a deed made in pursuance of a sale based thereon, provided it is not such as precludes the view that the paper is such a list, for it falls within the curative provisions of section 25 of chapter 31 (sec. 1084).

3. Taxation \S 788(9)—Excerpt from conclusion of delinquent tax list held insufficient for overthrow of tax deed.

Production of a mere excerpt from the conclusion of a delinquent list several pages in length, showing only a recapitulation of the contents thereof, by districts, cities, and towns, under an incomplete subheading which, if complete, would indicate a recapitulation of a list of lands returned as having been improperly placed on the land books or as being unascertainable, but over an affidavit appropriate to a list of lands returned delinquent for nonpayment of taxes, is not sufficient to overthrow a deed made pursuant to a sale based on such list, on the ground of lack of a return of delinquency for nonpayment of taxes.

4. Taxation \S 788(9) — Delinquent tax list held insufficiently established to authorize overthrow of a tax deed.

Nor is such list shown to be a list of lands returned as having been improperly placed on the land books or as being unascertainable, by indorsement thereon and recordation therewith, of an attested copy of an order of the county court of the county in which it was returned, indicating that it was presented, examined, approved, and allowed as such a list, because such attested copy is no part of the list nor of the proceedings of record in the clerk's office of the county court, pertaining to the assessment return and sale of the land.

5. Taxation \S 788(9)—Attested copy of county court order indorsed upon copy of delinquent list sent to state auditor may constitute sufficient certification of allowance of list.

Such attested copy, however, indorsed upon the copy of the list sent to the state auditor, by the clerk of such court, constitutes a sufficient certification of the allowance of the list, and the list so sent up may show by its contents that it is a list of land delinquent for nonpayment of taxes and has been misdescribed in the attested order performing the function of a certificate, wherefore such excerpt from the list is not sufficient to prove lack of certification thereof.

6. Taxation \S 788(9)—Attested copy of county court order on delinquency list held insufficient to prove lack of presentation to county court and approval by it.

Being no part of the proceedings of record in the clerk's office of the county court, pertaining to the delinquency and sale of the land, such attested copy of a court order, appearing on the list, does not prove lack of presentation to the county court and examination and approval thereof by it, as a list of lands delinquent for nonpayment of taxes.

7. Taxation \S 788(9) — Proof as to mode of recordation of delinquency list held insufficient to enable court to say that list for each year not transcribed into book provided therefor.

Proof that the delinquent lists of a county are kept by the clerk of its county court, in separate bound books, by years, the list for each year constituting one book and each book being so labeled as clearly to indicate its character and contents, is too uncertain and indefinite, as to the mode of recordation, to enable the court to say the list for each year is merely bound and labeled and not transcribed into a book provided for the purpose.

8. Taxation \S 656—Rule for determining the time for sale of delinquent lands stated.

Properly interpreted, the provisions of section 6 of chapter 31, of the Code (sec. 1084), prescribing the time for sales of delinquent lands, do not authorize a sale of such lands on the second Monday in December, if a term of the circuit or county court of the county is held in said month or the preceding month, on the first day of which sale cannot be made by reason of lack of time for posting and publication of notice, after receipt of the lists, where-

fore the sale should be made on the first day of a circuit or county court for such county, whichever is held first, in the succeeding year, and a sale made on such court day, under such circumstances, is valid as to the time of sale.

9. Statutes §185 — Unnecessary Implication cannot stand against express terms evincing contrary legislative intent.

In the interpretation of a statute, an unnecessary implication cannot stand against express terms evincing legislative intention contrary thereto.

Appeal from Circuit Court, Kanawha County.

Proceedings by William A. Matheny against John Baker White to vacate a tax deed. Decree for defendant, and complainant appeals. **Affirmed.**

McClintic, Mathews & Campbell, of Charleston, for appellant.

Henry S. Cato, of Charleston, for appellee.

POFFENBARGER, J. The decree of the common pleas court of Kanawha county, which the circuit court of that county refused to disturb by the award of an appeal therefrom, brought up by this appeal, dismissed, on final hearing, a bill filed for the purpose of vacation of a tax deed conveying to the appellee, White, a tract of 7½ acres of land, based on a sheriff's sale thereof for nonpayment of taxes for the year 1904.

The tax deed was obtained October 24, 1911. Tellitha J. Gillispie and her husband, claiming some interest in the tract of land, executed a deed, December 18, 1911, conveying 5 acres thereof to J. G. Carper. On the next day, Carper and his wife executed a deed purporting to convey to the said Gillispie and her husband the undivided one-half of the 5 acres. On March 29, 1912, White and the Gillispies and the Carpers executed a lease on the 7½ acres to E. A. Mead, J. H. Mead, and L. M. Whan, for oil and gas purposes. White had previously executed a lease on the same land to the Hamilton Company, which afterwards came into the hands of the William Seymour Edwards Oil Company. Not long before the tax deed was obtained, oil was discovered in the neighborhood of the land, and, since this controversy arose, a well of small production has been drilled on the land. Before he took his deed, Col. White claims to have advised the owners of their right to redeem and given them a fair opportunity to do so. That ample time was allowed is clear. After obtaining it, he conveyed the surface to plaintiff's mother for a merely nominal consideration, if any at all.

As no demurrer was interposed to the bill, its sufficiency seems to be conceded. The answer is very full and complete. It fully, clearly, and specifically denies every allegation of fact relied upon for the establishment

of invalidity of the deed. Some of the numerous grounds of assault upon that instrument have completely failed and are no longer relied upon.

The argument submitted to sustain six of the seven assignments of error found in the brief filed for the appellant is based largely upon an exhibit filed with the bill, which, on its face, purports to be only a part of a record or paper, and admittedly is only a part thereof. A witness testifies that it is a certified copy of a part of the delinquent list for 1904. The document from which it was taken, as now found in the clerk's office of Kanawha county, is described as being a bound book, 20 or 24 inches long and about 16 inches wide, and is designated the delinquent list for the year 1904, by a label or mark placed thereon.

The first thing on the exhibit is this incomplete caption:

"List of Property on the Land Book, for the County of Kanawha—Thereon or Not Ascertainable for the Year 190—."

Following that are the headings of columns for names of persons charged with taxes, the estates held, the quantities of land, the descriptions and locations of the land, the distances and bearings from the courthouse and the different funds for which taxes are charged. Under the designation "Grand Recapitulation" are the names of the magisterial districts, cities, and towns of the county, opposite to which are columns of figures showing the aggregate amounts of taxes for which delinquent returns were made. This is followed by an affidavit admittedly made in the form prescribed by the statute. Lastly, it sets forth what purports to be an attested copy of an order entered by the county court of Kanawha county, on July 24, 1905, saying:

"This day came J. A. Jarrett, sheriff of this county, presented to the court a list of real estate which is improperly placed on the assessor's books, or is not ascertainable with the amount of taxes charged on such property for the year 1904, verified by his affidavit thereto appended, which said list being examined by the court, and found to be correct, is therefore allowed."

The statute contemplates three delinquent lists: (1) A list of lands improperly placed on the land books or not ascertainable; (2) a list of other real estate delinquent for nonpayment of taxes; and (3) a list of persons and property other than real estate. The first two of these lists have different headings, but the form of verification of each is exactly the same. Code, c. 30, § 21 (sec. 1043). The blanks for these lists are furnished by the state authorities. Only real estate returned in the second list is subject to sale, and the heading of the exhibit is relied upon

as showing return of lands required to be embraced in the first.

As the statute does not authorize sale of lands returned in the first one of the three lists, but does authorize sale of those required to be returned in the second, the heading of the exhibit and the court order thereon certified are treated in the argument, as proof that only one list was returned, a list of lands improperly charged or not ascertainable, and that no list showing a return of lands delinquent for nonpayment of taxes was made out and filed. Upon this assumption, it is contended that the list returned constituted no basis for a sale; that no list authorizing sale was preserved and recorded by the clerk; that no such list was presented to the county court or examined by it; that no such list was certified to the auditor, by the clerk of the court; and that the auditor did not certify to the sheriff, for sale, lands returned delinquent for nonpayment of taxes, but did attempt to certify for sale lands improperly charged or not ascertainable.

[1] Regular and accordant with statutory requirements, on its face, the tax deed is prima facie proof that all statutory provisions essential to a sale of the land thereby conveyed were complied with and that such title as it purports to convey vested in the grantee. Code, c. 31, § 29 (sec. 1088). Hence, in every attack upon such a deed by the former owner of the land, he must affirmatively show, in order to prevail, that some essential step in the proceedings was omitted or some vitiating act performed. *Hogan v. Piggett*, 60 W. Va. 541, 56 S. E. 189; *Mosser v. Moore*, 56 W. Va. 478, 49 S. E. 537; *Dequasie v. Harris*, 16 W. Va. 345. Recognizing this rule, the plaintiff has attempted to establish lack of a return of delinquency of the land in question, for nonpayment of taxes.

The exhibit relied upon as proof of such omission is clearly not sufficient. As the oral evidence discloses, it is a certified copy of the whole or part of one sheet or page of a document sufficient in volume to constitute a bound book found among the records of the clerk's office of the county court, and presumptively the last page thereof. If it were read in connection with all that precedes it, and in the light thereof, it might turn out to be, in its incomplete heading, and in the copy of the court order indorsed thereon, a misdescription and a misnomer of an otherwise complete and perfect list of lands returned for nonpayment of taxes. And, notwithstanding the certificate of what purports to be a copy of the court order therein set forth, there may be an order of the court, showing presentation, examination, and allowance of the list, as one of lands returned delinquent for nonpayment of taxes. In other words, the numerous sheets on which the lands were entered and returned, constituting the list, may have been properly headed, "List of Real

Estate in the County of Kanawha Delinquent for Nonpayment of Taxes Thereon for the Year 1904," and the recapitulation made upon a blank intended for the other list, the list of lands improperly charged, and the affidavit appended thereto. In such case, the list itself would be properly headed and be complete, perfect, and unclouded, but for this incomplete expression, "List of Property on the Land Book, for the County of Kanawha—Thereon or Not Ascertainable for the Year 190—," at the end thereof and above the recapitulation. As has been stated, the affidavit is, in terms, the one prescribed for the list of lands returned for nonpayment, wherefore there is no defect in it. The erroneous designation of the recapitulation is not controlling, for the statute does not in terms require a recapitulation. Besides the heading on the exhibit is incomplete. It names no year, and another blank is unfilled. Read in connection with what may have been a dozen or more other and preceding pages properly and fully headed, it could not be regarded as anything other than an erroneous caption of the recapitulation, not the list, left or entered thereon by mistake. If it could not be wholly disregarded, it would constitute nothing more than a slight defect in the list.

The attested copy of the court order appended to the list, as shown by the exhibit, and describing it as a list of lands improperly charged or not ascertainable, may be disregarded upon the inquiry as to the character of the list returned, because the statute nowhere requires its indorsement on, or recordation with, the delinquent list. After the list has been approved by the county court, it is the duty of the clerk to certify a copy thereof to the auditor and record the original. Code, c. 31, § 24 (sec. 1083). He is not required to indorse any certificate or court order upon the original. Hence, this attested copy of the order is no part of the proceedings of record in the clerk's office of the county court.

Though there may have been but one affidavit to the list from which the exhibit was taken, that fact does not disprove sufficiency of the list. Only one list of real estate may have been returned, and that may have been one of lands delinquent for nonpayment of taxes.

[2] If the list returned was such as we have shown it may have been, a merely defective one, the defect therein would not justify vacation of the deed. It is expressly and clearly cured by section 25 of chapter 31 of the Code (sec. 1084), saying:

"And no irregularity, error or mistake, in the delinquent list, or the return thereof, or in the affidavit thereto, * * * shall, after the deed is made, invalidate or affect the sale or deed."

[3-5] Treated as the clerk's certificate of the list to the auditor, the attested copy of

the court order is sufficient. A manifestly erroneous designation of the list in a clerk's certificate could not change its character. It would correctly define itself by its contents, even though a single erroneous expression therein should be inconsistent therewith. The order or certificate says the list was presented, examined, found to be correct, and allowed, and the erroneous designation thereof, in the case supposed, would be corrected by its true character as disclosed by its contents. The statute requires certification of copies of the lists, but it prescribes no form of certificate. A copy of the court order allowing the list is usually indorsed upon the original, copied with it for the certificate and recorded, but it can operate only as a certificate, for the reason already stated. It is, however, an indorsement upon the copy, signed by the clerk, saying the list was presented, examined, found to be correct, and allowed. Then the document so certified proves itself, as to its character.

What has been said fully disposes of the contention that the auditor's certification of the lands in the list, to the sheriff, for sale, as being delinquent for nonpayment of taxes, was unauthorized and invalid. What is relied upon as proof of return of a list on which a sale could not be predicated and certification thereof to the sheriff is wholly insufficient for that purpose.

[6] There is no proof that the county court did not approve and allow the list as one of lands returned for nonpayment of taxes. Despite the attested copy indorsed on the exhibit, there may have been a court order so allowing it, and the proof does not negative its existence. The court ought not to be asked to infer nonexistence thereof from the exhibit, because, if it does not exist, the fact could have been shown. *Stout v. Sands*, 56 W. Va. 663, 669, 49 S. E. 428. Strictly speaking, the attested copy should not have been on the original list. The order should have been sought in the order books of the court.

[7] Nor is there clear evidence that the list was not properly recorded. Though one witness was made to say the original list was merely bound, instead of transcribed in a book, by assumption that it was, in questions propounded to him, he distinctly said there was a book in the office of the kind required by law to be kept for recordation of such lists. Another witness said the book from which the exhibit was taken was "a book such as we record the delinquent lists in each year." Both described it as a book labeled as the delinquent list for 1904, and say there was a book of that kind for each year. If what is claimed is true, it was susceptible of clear proof in less than a dozen words, and the burden of proof thereof was on the plaintiff. It is not the province of courts to raise out of equivocal expressions what is manifestly susceptible of positive proof if it exists. *Stout v. Sands*, cited.

[8] The remaining inquiry is whether the land was sold at a time prescribed by law. If it was not and the fact appears in the proceedings of record, the irregularity is fatal. It is not cured by any statute. *Hardman v. Brannon*, 70 W. Va. 726, 75 S. E. 74. Although the statute required delivery to the sheriff of the auditor's list containing the land in question, on or before November 1, 1906, it was not delivered earlier than November 3, 1906. At any rate, there is a preponderance of evidence against delivery before the last-mentioned date. That delivery was too late to enable the sheriff to sell at the November term of the county court, or the December term of the circuit court of Kanawha county, held in that year. It was advertised for sale on December 11, 1906, under the impression that sale thereof could be made on the second Monday of said month; but there were errors and irregularities for which such sale was abandoned, notice of a continuance thereof until February 11, 1907, given, and the property readvertised for the time and in the manner prescribed by law. The sale seems to have been advertised for the second Tuesday, instead of the second Monday, in December, and the notice published only in Sunday issues of a daily paper. If the statute authorized sale on the second Monday of December, under the circumstances, the list may have been received in time for sale on that date; but our interpretation of the statute renders it unnecessary to pass upon that question.

Section 6, c. 31, Code (sec. 1064), requires sale to be made "on the first day of the next November or December term of the circuit or county court of the said county, whichever may be held first after the posting of said list and the publication of said notice as herein required: or if no term of either court be held in said county in November or December; then on the second Monday in December next thereafter." An exception is pro-

"If the lists herein named be not received by the sheriff in time to publish such notice and make such sale in the month of November or December, as herein provided for, then said sale shall be commenced on the first day of a circuit or county court for such county, whichever may be held first, in the year next after the publication of such notice of sale."

[9] If the lists were not received in time to sell in November or December, within the meaning of these provisions, then the second notice of sale, fixing upon February 11, 1907, as the time, and the sale made thereunder, were valid, for that day was the first day of the first term of court held in the succeeding year. Under the circumstances, the statute would not have been literally followed by a sale on the second Monday in December. Sale on that day can be made only when no circuit or county court is held in November or December. In this case, there was a term

of court in each of those months. If the terms of the exception could be ignored, those of the other provision might be interpreted as authorizing sale on the second Monday in December, in case of failure to receive the lists in time for a sale on a court day in November or December, when there is such a term. But the terms of the exception forbid such interpretation. In other words, they forbid modification of the meaning of the words of the main provision, by implication. They say the exception shall be operative and controlling, unless the lists shall have been received in time to advertise and sell as provided in the section, that is, on a court day in November or December, or on the second Monday in December, if no court is held in November or December. The phrase, "as herein provided for," found in the exception, extends its operation to all cases not falling within the terms of the general provision. If a term of court is held in either of the months named, and the lists are not received in time therefor, the general clause does not say the sale may be made on the second Monday in December. Sale can be made on that day, agreeably to the words of the general provision, only in the event that no court is held in November or December, and the exception makes the words, "if no term of either court be held in said county in November or December," binding, by reference thereto and adoption thereof. A mere unnecessary implication cannot stand against express words. *Waggy v. Waggy*, 77 W. Va. 144, 87 S. E. 178; *Bank v. Thomas*, 75 W. Va. 321, 83 S. E. 985; *Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320, Ann. Cas. 1917D, 695.

From this conclusion, it results that the sale was made on the day authorized by law, after due advertisement and posting of the list, and it is immaterial that there were mere purpose and preparation to sell on a different day.

Seeing no error in the decree complained of, we will affirm it.

(88 W. Va. 242)

MURPHY v. KARNES. (No. 4074.)

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

Executors and administrators \S 17(2)—
Grandfather held entitled to appointment in
preference to stranger.

The principles announced in the case *In re the Administration of the Estate of Joel Stollings*, 82 W. Va. 18, 95 S. E. 446, affirmed and applied.

Error to Circuit Court, Morgan County.

Petition to county court by John K. Murphy against Hiram Karnes, administrator.

Judgment for defendant on appeal to circuit court, and petitioner brings error. Reversed and remanded, with directions.

A. C. McIntire, of Martinsburg, and G. McIntire-Weaver, of Berkely Springs, for plaintiff in error.

LIVELY, J. A. R. Barnes, a resident of Morgan county, died intestate on November 7, 1918, leaving a widow, Bessie Fortney Barnes, and one child, Ada, about three years of age. Several hours afterwards, on the same day, the widow, Bessie Fortney Barnes, died intestate, leaving surviving her, Ada, the three year old child, begotten by A. R. Barnes, and two other children, Flora Fortney and Madeline Fortney, both under fourteen years of age, children by a former deceased husband. On the 12th day of November, 1918, the infant child Ada died. The three deaths were caused by the terrible epidemic of influenza which prevailed that year, and left so many broken homes and bleeding hearts. On the day of the death of the infant Ada, Jonas H. Karnes, on his own motion, was appointed administrator of the estates of A. R. Barnes and Bessie F. Barnes, and qualified, giving bond in the penalty of \$1,500, which appointment was confirmed by the county court on January 20, 1919. Karnes was no relation either by blood or marriage to the decedents, and was not a creditor nor in any way interested in the administration of the estates. On the following day John K. Murphy, who is the grandfather of the infants Flora and Madeline Fortney, appeared before the county clerk and moved the revocation of the appointment of Karnes as administrator, and asked to be appointed in his stead. This motion was resisted by Karnes, who had been also appointed guardian of the infant distributees. Thereupon the clerk revoked the appointment of Karnes, but refused to appoint Murphy, or reappoint Karnes, who then asked to be reappointed upon motion of himself as guardian. The parties then agreed to submit their claims for administration to the judge of the circuit court upon an agreement of facts. The judge declined to take jurisdiction, and on the 27th day of September, 1919, John K. Murphy presented his formal petition to the county court, alleging that he was the next of kin of the infant distributees and the only adult distributee of the estates, that the appointment of Karnes was unlawfully made, and, although revoked, he (Karnes) was continuing to act as administrator, that petitioner had never declined to qualify in his own right or on behalf of the infants, his grandchildren, that he is the next of kin to the infants, and, in case of their demise, would inherit the entire estates, and praying that he be appointed as administrator. To this petition Karnes appeared at a session of the

court held on October 4, 1919. The hearing was continued until October 11, 1919, but it appears that on October 4, 1919, Hiram Karnes was appointed administrator of the estates. At the next hearing of the petition on October 11, 1919, Jonas H. Karnes nominated Hiram Karnes, his brother, as administrator, and the court again appointed Hiram Karnes as such, over the objection of Murphy, the grandfather. Afterwards Hiram Karnes qualified as administrator and gave bond in the penalty of \$2,000. An appeal was allowed from the order of the county court upon petition of Murphy, duly verified, setting out the proceedings in full with attested copies of the various orders of the county court as exhibits; and on January 17, 1920, upon argument of counsel, the court dismissed the appeal as improvidently awarded, and awarded costs against the petitioner. From this order of the circuit court plaintiff obtained this writ of error.

The statute authorizing the granting of letters of administration, sections 4 and 5 of chapter 85, Code (secs. 3991, 3992), in part reads:

"Administration shall be granted to the distributees who apply therefor, preferring first the husband or wife, and then such others entitled to distribution as the court shall see fit. If no distributee apply for administration within 30 days from the death of the intestate, the court may grant administration to one or more of his creditors, or to any other person. * * * If a will of the deceased be afterwards admitted to record, or if after administration is granted to a creditor, or other person than a distributee, any distributee who shall not have before refused, shall apply for administration, there may be a grant of probate or administration in like manner as if the former grant had not been made, and the said former grant shall thereupon cease."

The defendant Hiram Karnes filed no answer or plea to the petition of the plaintiff either in the county court or circuit court. No evidence was taken so far as the record discloses. There is no intimation that the grandfather is unfit for the trust. The petition alleges that he is the nearest of kin to the infants, and will be the sole heir of the estates in case he should survive them. He has been taking care of them since the untimely death of the parents, and is bound to them by ties of blood, love, and affection.

He avers his readiness and ability to execute the necessary bond. Should he have preference over the stranger in the administration of this important trust and in its preservation for the benefit of the children, and for his own possible inheritance? Reason answers in the affirmative. The statute accords with reason. Its terms clearly indicate that those having an interest in the estate as distributees shall be preferred to the strangers. This court has held that it is mandatory upon the county court to appoint a distributee upon his application if he be a fit person and able to qualify. Should the distributee not desire the appointment, or be unable to give bond, he may designate the person to be appointed. *Taylor v. Virginia-Pocahontas Coal Co.*, 78 W. Va. 455, 88 S. E. 1070. But the infants are of tender years, and for that reason cannot nominate an administrator. In such cases the general rule is that the person who is nearest to the distributee in blood, affection, and interest is entitled to the administration. This court has held that, if the distributee be a minor of such tender years as to be unable to designate a person for the trust, the mother, as the natural guardian, custodian, nearest relative, and prospective heir may demand the administration in her own name in its behalf, and it then becomes the duty of the court, having jurisdiction, to grant it to her upon proper application, if she be a suitable person and able to qualify. In *re Estate of Joel Stollings*, 82 W. Va. 18, 95 S. E. 448. The same reasons would dictate the appointment of the grandfather, where the mother and father are both dead, and he is the custodian of the infants and their prospective heir. The principles announced by Judge Poffenbarger in the *Stollings Case*, cited, govern this case.

The county court erroneously refused the appointment of John K. Murphy as the administrator of the estates upon his petition, and the circuit court erred in dismissing his appeal, and thereby refusing to grant him the proper relief. The case will be remanded to the county court of Morgan county, with direction to grant administration of the estates of Albert R. Barnes, deceased, and of Bessie Fortney Barnes, deceased, to John K. Murphy, plaintiff in error, when he executes proper bonds and takes the prescribed oaths.

Reversed and remanded.

(181 N. C. 166)

**GRAY v. CENTRAL WAREHOUSE CO.
et al. (No. 222.)**(Supreme Court of North Carolina. April 6,
1921.)**1. Warehousemen ⇨8—Owner of property affected with public use must treat all users impartially.**

The owner of any business affected with a public use, so long as he devotes his property to such use, must treat with absolute impartiality all who apply to him for service.

2. Injunction ⇨136(1)—Tobacco buyer entitled to temporary injunction against exclusion from warehouse pending determination of charges against him.

A tobacco buyer is prima facie entitled to attend tobacco sales in public warehouses and to bid therein, and the warehousemen will be temporarily restrained from interfering with such right pending the final trial at which the sufficiency of the warehousemen's grounds for excluding him will be determined.

3. Warehousemen ⇨3—Tobacco warehouses are public and affected with a public use.

Tobacco warehouses, which are essential to the conduct of the most important agricultural pursuit in the state, and which have been regulated by statute since the earliest colonial times, and are now regulated as to charges, transaction of business, and accounts by G. S. §§ 4926-4930, 5124-5126, and required to take out a license by section 7839, are public warehouses engaged in business affected with a public interest.

4. Warehousemen ⇨8—Public warehouse cannot discriminate against any seller or buyer.

A public warehouse company cannot discriminate by rejecting or excluding any one therefrom as seller or buyer.

5. Warehousemen ⇨8—Public warehouse cannot exclude buyer for nonmembership in board of trade.

A public warehouse cannot exclude therefrom a buyer for the reason that he was not a member of or had been excluded from a board of trade.

Appeal from Superior Court, Lenoir County; Connor, Judge.

Action by George W. Gray against the Central Warehouse Company and others. From an order continuing until trial a restraining order against defendants, they appeal. Affirmed.

This is an action by George W. Gray, alleging that since 1914 he has been engaged in the business of buying tobacco sold on the floors of the tobacco warehouses located in Kinston, N. C., and up to 1920 had bought large quantities of tobacco, and that the buying of leaf tobacco upon warehouse floors is the principal business and occupation of the plaintiff, who has a license from the United

States government to buy leaf tobacco; that the persons, firms, and corporations named as defendants compose a voluntary association known as the Kinston Tobacco Board of Trade, which consists of several warehouses doing respectively business in said town as the Central Warehouse Company, Farmers' Warehouse Company, Atlantic Warehouse, Knott Bros. Warehouse, Eagle Warehouse Company, and the New Brick Warehouse Company; that under a rule of the said Board of Trade no person could buy tobacco on said warehouse floors unless he were a member of the Kinston Tobacco Board of Trade; that heretofore and up to 1920 the membership fee of the said Kinston Tobacco Board of Trade was \$25, which sum was so small that any person desiring to buy tobacco could easily become a member of the Board of Trade with the right and privilege of buying tobacco, but on August 23, 1920, the said Board of Trade, the plaintiff not being present and having no notice, adopted a rule fixing the membership fee at \$500 and raising the annual dues from \$18.50 to \$49.50, and also adopted a rule that failure to pay within 10 days after notice would forfeit membership. The plaintiff further averred that, though a member of the Board of Trade, he was not present at said meeting and had no notice thereof, and the Board of Trade, composed of 34 members, increased the membership fee to \$500, which was exorbitant and excessive, and was intended to reduce competition among the buyers by limiting the number of competing bidders; that the dominant and controlling members of the said Kinston Board of Trade are the representatives of the Imperial Tobacco Company, Export Tobacco Company, Liggett & Myers Tobacco Company, and the American Tobacco Company, and the warehouses in said town, and that the purpose of the said tobacco companies was, by diminishing competition among buyers, to purchase the tobacco upon the warehouse floors at the lowest possible price, with the result that said tobacco companies would obtain tobacco at a less price than it was reasonably worth, and in this way the tobacco growers in that section of the state are compelled to take less for their tobacco than the same is fairly worth, it being the purpose and object of said combination of manufacturers to purchase the tobacco at the lowest possible price by eliminating the independent buyer or reducing the strength and number of the independent buyers, and that for that purpose said companies gave notice through the president of the Kinston Tobacco Board of Trade, he being one of the buyers for the Export Tobacco Company, to each of the said warehouses, that if any of the said warehouses accepted any bid from the plaintiff for tobacco on the said warehouse floor, then the said tobacco

companies—i. e., the Imperial Tobacco Company, the Export Tobacco Company, Liggett & Myers Tobacco Company, the American Tobacco Company, and the other companies above named—would withdraw their buyers from said market and the floors of said warehouse offending and not buy any tobacco offered for sale thereon, and he avers that the reason assigned for refusing the plaintiff's membership, which was that he had "nested" tobacco, was a pretext, and he was found guilty without giving the plaintiff an opportunity to be heard or requesting him to give information though the charge was untrue and false; whereupon the plaintiff brought this action for damages to his reputation and character and humiliation for such unjust expulsion, and denies that the defendants had the right to exclude him from buying on the floors of said warehouses, and asked for an injunction to compel them to accept bids made by him for tobacco sold upon their said warehouse floors and deliver upon payment therefor. The defendants answered, denying some of the allegations and admitting others, and the court in its judgment granted an injunction to the hearing, finding as facts that—

"The defendants, Central Warehouse Company, Farmers' Warehouse Company, Atlantic Warehouse Company, Knott Bros. Warehouse, Eagle Warehouse Company, and the New Brick Warehouse, are each and all public tobacco warehouses, doing business as warehousemen in the city of Kinston, and that each and every one of the said warehouses declined and refused to admit the plaintiff, George W. Gray, dealer in leaf tobacco, holding registration under United States statute marked Exhibit A, and filed in the record, to purchase or bid for tobacco upon the warehouse floors of the said respective warehouses for the reason that the said George W. Gray was not a member of the Kinston Tobacco Board of Trade, the plaintiff having been expelled upon the charge of nesting tobacco, and the court being of the opinion that the said defendant warehouses above named cannot refuse to permit plaintiff to bid whether the allegations of their answers are true or not," and restrained the above-named warehouse companies and other persons named in the complaint from preventing "the said George W. Gray, the plaintiff, to bid for tobacco offered for sale upon the floors of the said respective warehouses at public auction, and to buy the same when his said bid is the highest bid therefor, and to deliver the same to him upon the payment therefor," and "consideration of the issues raised by the pleadings is continued to be heard and to be determined in due course and practice of this court, and the cause is retained for further orders."

From this order continuing this restraining order to the hearing the defendants appealed.

Cowper, Whitaker & Allen and Rouse & Rouse, all of Kinston, for appellants.

Powers & Elliott, of Kinston, and James S. Manning, of Raleigh, for appellee.

CLARK, C. J. The only question presented is whether under the allegations of the complaint and admissions in the answer, and on the facts found by him, his honor was justified in entering the order appealed from.

The Kinston Board of Trade is a voluntary organization, and they had the right to exclude or expel the plaintiff from membership therein with or without cause, and his honor properly held that he did not pass upon that question, but, inasmuch as the defendant warehouse companies were operating their property "affected with the public use," he rightly held that they had no power to exclude the plaintiff from buying because he was or was not a member of that organization.

The plaintiff's cause of action is not because of his exclusion from the Board of Trade, but because he was forbidden to buy on the floor of the warehouses, and damages for such interference with his business, and because of the humiliation and damages to his business by the publicity given to the allegation that he had been expelled for improper conduct. This raises issues of fact for the jury on the question of damages and whether the allegation by the Board of Trade that he had been guilty of "nesting" tobacco was truthful or not. These issues were continued to the trial to be passed on by the jury. But the court held that whether he was a member of the Board of Trade or not did not entitle the defendants to exclude him as a buyer, and his honor properly continued the order restraining the defendants from excluding the plaintiff as a buyer until the hearing. The order appealed from provides that "the plaintiff is to be accepted as a buyer only when his is the highest bid and on payment."

[1, 2] If any one applies to a railroad or a ferry for the transportation of himself or the carriage of freight, or to an innkeeper, or sends his corn to a public mill or his tobacco to a public warehouse, or applies to the owners of a gas or electric power plant or any other business "affected with a public use," it has always been a principle of the common law, and never more necessary than now, that he is entitled to absolute impartiality as to the charges and treatment. If a passenger misconducts himself, those in charge of the train can put him off, and the same is true as to any other business affected with the public use. If in this case at the trial it shall be found that the plaintiff as a seller "nested" his tobacco, it would prevent any recovery for damages on the charge of humiliation caused by the publicity given by the defendants in making public that matter, for the truth is a defense to libel. Whether, if true, such conduct authorized the defendants to exclude the plaintiff as a buyer, is a matter which may come up on appeal from the verdict at the trial, but we hold that his

honor was eminently correct in holding that, as long as that matter was undecided, the defendants had no power to exclude the plaintiff from being a buyer at their public sales, and the injunction until the hearing was properly granted.

In *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490, the duty imposed upon public warehousemen for sale of tobacco is thus summed up:

"When a warehouseman for the public sale and purchase of tobacco undertakes to sell at auction, and to conduct the business of a public warehouseman, he assumes an obligation to serve the entire public. He has no right to select his own bidders, nor can he refuse to receive the tobacco of producers when shipped to him. He can no more refuse to sell the tobacco of the producer at auction, or deny the right of any to bid * * * when offered, than the owner of a stage or steamboat line may decline to take passengers, or the owner of wine houses refuse to receive the wine of others on storage. He cannot escape the obligation imposed by the reason of the statute and the common law, by changing his appellation from warehouseman to commission merchant."

There is stated as authority for this the principles of the common law:

"The selling of tobacco at auction at tobacco warehouses is a business affected with the public interests, and [those] carrying it on are under duties and obligations by common law * * * to carry it on in a way that is reasonable and beneficial to the tobacco trade, and therefore they cannot discriminate or exclude buyers or sellers."

This proposition is sustained by *Cooley*, Const. Lim. (7th Ed.) 870 et seq., and notes. The same subject is thoroughly discussed by *Waite*, Chief Justice, in *Munn v. Illinois*, 94 U. S. 125, 24 L. Ed. 77, where it is held that—

"It has been customary in England from time immemorial and in this country from its first colonization to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

And the doctrine is there traced back to Chief Justice Hale. It is there also stated that it was held to apply to warehouses in *Aldnut v. Inglis*, 12 East, 527.

The same statement as to the common law as to the many different businesses where property is affected with a public use forbidding discrimination in prices or otherwise is to be found in *Bacon's Abridgment*, *Walt's Actions and Defenses*, and *Aldnut v. Inglis*, 12 East, 527 (already quoted), and *Freund on Police Power*, §§ 372-394.

In *Head v. Mfg. Co.*, 113 U. S. 17, 5 Sup. Ct. 441, 28 L. Ed. 889, *Munn v. Illinois* was reaffirmed as to a water mill and milldam being affected with a public use, forbidding any discrimination as to the patrons or charges, and at pages 17 and 18 are given the states

which have by statute enlarged the common-law power in this respect, and among them this state.

One of the most informing decisions on this subject is *Publishing Co. v. Ass'n Press*, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184, which held:

"The obligation of a corporation charged with a public interest does not arise from, nor rest upon, contracts made by it in conducting its business, but grows out of the fact that the corporation is discharging a public duty or private duty, which has been so conducted that it has become affected with a public interest."

To the same purport is *State v. Edwards*, 86 N. C. 666, as to gristmills. In *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757, the doctrine was applied to public warehouses, and *Munn v. Illinois* was reaffirmed. It had already been reaffirmed as to elevators in *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460, affirmed on writ of error 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247.

The same principle as to all agencies "affected with a public use" was restated in *Milldam Corp. v. Newman*, 12 Pick. (Mass.) 477, 23 Am. Dec. 622. The same rule was applied to gas companies (*Shepard v. Gas Co.*, 6 Wis. 546, 70 Am. Dec. 479), and to stockyards (*Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196), to market houses (*Gale v. Kalamazoo*, 23 Mich. 345, 355, 9 Am. Rep. 80, in a learned opinion by Chief Justice Cooley). That an auction house was held for public use was laid down in 70 E. C. L. 54. The application of this doctrine to common carriers and other public utilities has been too often and too fully recognized to require any citations. We have recently applied it to electric power companies. *Public Service Co. v. Power Co.*, 179 N. C. 18, 101 S. E. 593; *Railroad v. Power Co.*, 180 N. C. 422, 105 S. E. 28; *Griffin v. Water Co.*, 122 N. C. 208, 30 S. E. 319, 41 L. R. A. 240; and other cases.

[3] Tobacco warehouses are public warehouses under the laws of North Carolina. Since 1895 the Legislature of North Carolina has regulated the warehouse charges, requiring that the tobacco shall be weighed by a person duly sworn, and that every warehouse proprietor shall render to each seller of tobacco a bill of charges of fees for the same and subjecting said proprietors to penalties for violations of the provisions of said statute (C. S. 5124, 5125, 5126), and since 1907 has required them to keep an account of the sales upon the floors and report the number of pounds sold each month to the Commissioner of Agriculture at Raleigh, who is required to keep record thereof and publish same in a bulletin, with penalty for failure to observe the statute both as to the warehouses and the Commissioner of Agriculture (C. S. 4926, 4927, 4928, 4929, 4930); and since then Laws 1919, c. 90, now C. S. 7839, requires that every

tobacco warehouse shall take out a license, which "shall be a personal privilege and shall not be transferable," specifying also the amount of tax and the duty of the Commissioner of Agriculture and the appointment of traveling auditors, and making violations of the statute a misdemeanor, thus taking over the supervision of the business by the state.

Indeed, as far back as the history of the state extends the business of tobacco warehouses has been, if not a public duty, always "affected with a public use." The laws of North Carolina from 1689 to 1790 have been compiled as State Records, vols. 23, 24, and 25, by the writer of this opinion, and in the index thereto, in the last-named volume, it appears that no less than 75 statutes were enacted prior to 1790 in regard to tobacco warehouses requiring inspection, regulation, and fixing charges in such business. To the fullest extent, therefore, their regulation and control by the public has been recognized and enforced in this state.

In fact, there is no subject in which the protection of the producers against extortion and combinations to reduce prices is more important. It appears from the official reports of the United States and state governments that North Carolina in 1919 was the fourth state in the Union in the value of its agricultural products, coming after Illinois, Iowa, and Texas only. In that year the cotton crop of this state was 857,000 bales, bringing approximately \$154,000,000 at the current price of 86 cents. The tobacco crop for the same year was 326,000,000 pounds, bringing, at an average price of 50 cents, \$163,000,000, being in excess of the value of the cotton crop of the state. In 1920, according to the government and state reports, the cotton crop of the state was 936,000 bales, which at 15 cents brought only approximately \$70,200,000, while the tobacco crop of 421,000,000 pounds (in which North Carolina led all the other states), at an average price of 21½ cents brought in \$90,515,000. It thus appears that the tobacco crop of the state exceeds in value even the cotton crop, and whether the charge is true or not that the excessive reduction in the price of tobacco was caused by combinations among the buyers, it is easy to see that, if the conduct of warehouses is left to the warehouses, and either on their own motion or upon pressure from the large tobacco manufacturing companies they can exclude any one from being a buyer either upon the charge of some previous moral delinquency, especially before conviction in court, or by requiring buyers to become members of a board of trade at high cost, or in any other manner, the result will be to place the tobacco farmers of the state absolutely at the mercy of these gigantic corporations, and would reduce the farmers, while nominally owners of their land, to become in reality mere tenants at

will of these great monopolies, and therefore peasants. The entire history of the state and the statutes on this subject as well as our present statutes place the regulation of tobacco warehouses not under private control as defendants have assumed in this case, but under the control of the public authority. If they can exclude any one from being a buyer, upon one pretext or reason, they could do so upon any others, but, being public warehouses, they cannot forbid any one to be a buyer or seller any more than a quasi public corporation like a railroad could refuse any one from being a shipper or a traveler over their lines upon an allegation of moral delinquency or failure to belong to some prescribed association. The matter however, does not need discussion, as it has been fully decided.

In *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490, it is held:

"One who assumes to carry on the business of a public warehouseman for the purchase of tobacco and the public sale thereof at auction is bound to serve the public without discrimination, and may not select his bidders nor reject any producers."

In the course of that opinion the court says:

"Since the formation of the state government the sale of this great staple has been fostered and protected by legislation. The rights and duties of the warehousemen, the buyers and sellers, and all the officers connected with the warehouses, have been defined by statute, and no commodity has received the same protection in the way of either general or special legislation. Nine-tenths of the tobacco is sold at auction, with the right unquestioned, until the present controversy, of all parties to enter the warehouses as buyers or as sellers, by their warehousemen as their agents, and competition left unrestricted, save the option on the part of the owner to approve or reject the bid. There is no provision, it is true, in any of the statutes now in force, or that existed prior to the law as we now find it, compelling the producer of tobacco to take it to the warehouses in the city of Louisville, or to expose it for sale at public auction; but such warehouses have been always regulated by law for the benefit of the producer, as well as those who are the proprietors of these warehouses, and the latter have assumed an obligation to the public that exists so long as they continue public warehousemen. They have assumed a quasi public character under the protection of the law, and will not be allowed to exercise all the privileges that have heretofore belonged to warehousemen, and evade all the duties and responsibilities of their position by the passage of a resolution disclaiming that they are operating their houses in the capacity of warehousemen, but as commission merchants."

This opinion from Kentucky, which is second only to this state in the production of tobacco, further says:

"The case of *Munn v. State of Illinois*, 94 U. S. 113, bears directly upon the question raised in this case. In that case it was claimed that the exercise of the legislative power of the state of Illinois was in violation of the Constitution of the United States in attempting to regulate by statute the maximum charges for the storage of grain in warehouses at Chicago and other places in the state—in which grain is stored in bulk, and the grain of different owners mingled together. The right of private property, and to deal and trade as these warehousemen might see proper with those who applied to them to store their grain, was insisted upon in that case; but it was there held [by Waitt, C. J., quoting Sir Matthew Hale in England] that 'property does become clothed with a public interest when used in a manner to make it of public consequence and effect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control.' There is manifest distinction between the manner in which the business of selling tobacco at these warehouses is conducted and those who are engaged in the ordinary business of commission merchants. These warehousemen now have, and always did have, in this state, public duties to perform, and to attempt to control by legislation the ordinary business of mercantile establishments in the same manner as the duties of these warehousemen are defined and regulated would be in violation of both the federal and state Constitutions. If the 14 warehouses in Chicago can be regulated in their charges because of their relation to the public, the 10 warehouses in the city of Louisville can be regulated in the same manner, and because the statute of this state is more liberal in its provisions toward the owners of these public warehouses than that of the state of Illinois is no argument in favor of the right of the appellants to relieve themselves of the duty they owe to the public. It is a conceded fact that more than five millions in value of tobacco annually find its way from the producer to the warehouses in that city. The great part of this product is grown within the state, and the producer almost of necessity compelled to place his tobacco under the control of and for sale by these several warehousemen at public auction. All this tobacco must necessarily pass through these warehouses, subject to such charges as are reasonable and proper, and to say that the proprietors, with such relations to the public, can forbid buyers to enter their auction room, and to deny to any but members of the Board of Trade or applicants for membership the right to make purchases, is a palpable disregard of the duty they owe to the individual patron as well as to the public, and, in the absence of any statute, is in violation of the rule of the common law. Such a public duty may be imposed on these warehousemen in express terms or by implication, but, whether so imposed or not, it arises from the facts of this case. This doctrine has been discussed and in effect

settled long before the rule established in *Munn v. State of Illinois*, and upon the doctrine of the common law in reference to common carriers, such as steamboats, railroads, express companies, stage lines, warehouses, etc. If a public warehouseman can refuse to sell the tobacco of the producer at auction, or deny the right of any one to bid for it when offered but those whom he selects or permits to bid, why may not the owner of a steamboat or stage line, without excuse, decline to take the passenger, or the owner of the wine warehouse to receive the wine of others on storage? The steamboat is the private property of the owner; but he has engaged in a public employment, and so is the warehouseman, although not of the same character; but the undertaking of each is affected with a public interest, and for that reason the steamboat is compelled to take freight and passengers, and the warehousemen to receive and store and sell at auction the tobacco of the owner, and all are allowed to enter and compete as bidders."

[4] A public warehouse company cannot discriminate by rejecting any one as seller or buyer. This is an obligation imposed on public warehousemen both by common law as well as by statute. 40 Cyc. 404; 27 R. C. L. 951. Up until *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, the railroads contested the right of the government to fix their rates, prescribe their schedules, or otherwise regulate their operations, but that case settled the contest in favor of the public, and since then regulation has been extended, and it is now undisputed. An examination of that case will show that the doctrine was derived by analogy from the common-law right to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like; to regulate their charges, prescribe the accommodation to be furnished and the articles to be sold, and above all the prohibition of any discrimination in the facilities to be furnished to all alike and the charges to be made.

[5] The correctness of his honor's continuance of the injunction is in no wise affected, as he properly held, by the consideration whether the plaintiff was justly expelled from the Board of Trade or not, and it is not a matter of consideration, even at the trial, except upon the issue as to damages for the humiliation caused by making the charge public, if it was untrue. The injunction was continued for the valid reason that the defendants could not exclude him from being a buyer because he was not a member of the Board of Trade, which is entirely independent upon his having been properly excluded or not. The injunction was continued upon the ground that, the warehouses being affected with a public use, the owners could not require any discrimination by rejecting those who were not members of a certain organization or requiring that such bidders should have paid a specified sum be-

fore they could join that organization, which would be a further hindrance to a numerous body of buyers. It is to the public interest that buying shall be a privilege open to all the public. If the warehouse owners could require that the bidder must belong to a Board of Trade to entitle him to be a buyer, they could require that he should belong to any other organization or be a member of any church that they might designate. If they could require him to pay \$500 to become a buyer, they could require him to pay \$5,000. In short, if the public warehouses could make any requirements which are a discrimination, they could so narrow and so restrict the number of buyers that the competition would amount to nothing, and the farmers who raise and offer tobacco for sale would be compelled to take whatever was offered. In this lies the vital importance of this principle of the common law in its application to this case and all other cases of public utilities or where private property is "affected by a public use."

Many principles of the common law have been eliminated or modified by the experience of the ages, with the advance of civilization, but those that have stood this test have preserved the standing of the common law as the foundation of much of our liberty. Among these last there is no principle more important to the public welfare than to preserve to every individual, however humble, the right that in dealing with public utilities and businesses "affected with a public use" there can be no discrimination against any individual in regard to uniformity of charges and impartial treatment. This principle is more important now than ever and has been widened, and not restricted, by the courts and by statute. Its assertion by every one is as commendable (and even more necessary to the public welfare) as the resistance of Hampden to the collection of ship money or of the colonists to the stamp tax. In this particular matter we know that the great tobacco companies have been exceedingly profitable and that their methods were declared illegal by the Supreme Court of the United States by an unanimous opinion, *U. S. v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, quoted in *Public Service Co. v. Power Co.*, 179 N. C. 32, 38, 101 S. E. 593. One of them upon a capital beginning with \$350,000 gathered in a very few years an aggregation of \$350,000,000, in addition to heavy dividends all along, being \$1,000 collected from the public for every \$1 the owners of the company had put into the business; and we know even now more than one of them has been recently declaring 200 per cent. dividends and more, while at the same time those who produced the tobacco are in the direst straits, in many instances not being able to defray even

the expenses for the cultivation, and the fertilizer, for their product. If the tobacco warehouses can make discrimination of the kind used against this plaintiff, the producers of tobacco are henceforth hopelessly and absolutely in the power of these great corporations who control the warehouses and can prescribe, as in this case, regulations that will rule out "independent" buyers and prevent the organization of small competing companies.

In the early history of this state, as set out in the compilation of our early laws, 23, 24, and 25 State Records, the tobacco warehouses were operated under state ownership. The present regulation is that of supervision of a business "affected with the public use." Should any seller or buyer misconduct himself as by fake sales or fake purchases or otherwise, his conduct is a matter to be settled by prosecution for disorderly conduct or other misdemeanor in the courts. The public warehouseman himself has no such power and cannot punish him by prohibiting any seller or buyer from taking part in the sales conducted in said warehouse. To permit this would be to lay wide open the road to the exercise of an undue restriction upon trade which, always forbidden by the common law, is now indictable under both state and federal laws. Whether in this case there has been a combination attempting to restrict the number of buyers is a matter which can be settled only by proceedings under the state or federal statutes and is not before us.

This matter has been too often discussed and is too fully settled to require an extension of this discussion. In *Munn v. Illinois*, supra, the question was the application of the principles of the common law to elevators which had a monopoly of the grain business, as the public warehouses have in this state a monopoly of the sales of tobacco, and if the warehouses in Kinston can exclude any one, at their will, from buying or selling, all could do so. It is not necessary that there should be statutes regulating on the part of the public the conduct of these public warehouses further than the common law or the statutes have already done. It is sufficient to say that those operating them cannot impose rules or regulations which will exclude any one from selling or buying thereon equally with every one else and on the same terms. They cannot make different charges to any one nor exclude any one.

This action is brought for damages. The allegations that the plaintiff's expulsion was upon an unjust and unproven charge of misconduct causing humiliation, and that being prevented from buying has caused him pecuniary loss in his business and humiliation, are denied and are issues of fact to be settled by the jury at the trial. The judge,

however, properly granted an injunction against restraining the plaintiff from being a buyer on the floor of any warehouse operated by the defendants, and in doing so he has rendered a distinct service not only to the largest agricultural interest in the state, but to the state at large.

The defendants rely upon *Godwin v. Carolina Telephone & Telegraph Co.*, 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, where the court upheld the refusal of an application for mandamus to place a telephone in a house where unlawful business was carried on if an aid in carrying on the illegal business, but otherwise the corporation could not refuse the applicant. The court in that case was careful to say that, while a common carrier was not required to carry a passenger to aid in an illegal escape, or to do an illegal act, it could not refuse to convey him because he had done an illegal act. In this case the buying by the plaintiff was a perfectly lawful act in which any one was entitled to share, especially one who held, as the plaintiff did, a federal license. The defendants could not reject or refuse any one the right to sell or to buy at a public warehouse sale or require any qualification such as membership in a board of trade or any other that would not be valid if required by a public mill or a common carrier. It is true a railroad company is a quasi public corporation, and a telephone company is a public utility, but a public warehouse is at least "affected by a public use" like public mills, innkeepers, and others. It is not necessary that there shall be statutory regulations, but it is essential that there shall not be regulations by those operating public utilities or business "affected by the public use" which will permit discrimination against any one. These requirements are based upon the principle, "*Salus populi suprema est lex*;" that is, that the public welfare is the highest law.

The question here presented is one of the utmost importance, not only because it presents a principle that has been recognized as settled law for centuries, but because of its great importance from a politico-economic standpoint, and that proposition is that public utilities, and wherever private property, by the nature of its employment, has become "affected with a public use," the owners thereof cannot discriminate as to charges or treatment of the public who are from the nature of the business invited to make use thereof. There is probably no principle of the law whose maintenance in its integrity is more important to the welfare of the public than this, or whose disregard will bring greater disaster.

Government is instituted for the protection of all men and all legitimate businesses, especially the weak against the strong. One

buyer could not successfully contend against a combination of buyers, or of the owners of the warehouses, which is the only place where tobacco can be sold or bought, and to permit discrimination would be to place this great agricultural industry in the absolute power of any combination which by reducing the number of buyers and admitting only those acceptable to great combinations would place the producers of tobacco at their mercy.

For the same purpose of protecting the producer in the sale of the cotton crop, the General Assembly enacted the Cotton Warehouse Act (Laws 1919, c. 168, now C. S. 4907-4925), which was held valid. *Bickett v. Tax Commission*, 177 N. C. 433, 99 S. E. 415.

Affirmed.

WALKER and ALLEN, JJ., concur in result upon the ground that the case ought to be more fully developed and the issues raised by the pleadings determined before an expression of opinion on the legal questions discussed before us.

HOKE, J. (concurring). I concur in the disposition made of this appeal by which the injunction is continued to the hearing and in the opinion that these warehouses dedicated by the owners or management to the public marketing of tobacco are effected with a public use and interest so as to become the subject of reasonable public regulations. And I am inclined to the opinion that the regulations now established by the Kinston Tobacco Board, as to the selection and qualification of these buyers, may be too restrictive, reserving final decision on that question, however, until the facts are more fully disclosed at the hearing, I am of opinion further that, subject to such reasonable rules and regulations as may be established by the public agencies, and when not interfering with same, the authorities in control and management of these warehouses have the power to establish for themselves such reasonable rules and regulations as may be required to promote business efficiency and insure fair and honest dealing in the transactions occurring there, and the same may extend to the exclusion of an individual buyer or seller who has been properly shown to be guilty of dishonest practices on the warehouse floor, and such as tend to destroy the confidence of the public and patrons in the integrity of their management and of the business methods under their supervision and control. On perusal of the record it is alleged in the answered of defendant's and duly verified that the plaintiff who had been a member of the Board of Trade privileged to sell and buy

In these warehouses after a full and impartial hearing had been found guilty of "nesting tobacco" at one of these warehouse sales, this being a practice by which the tobacco offered for sale is so packed as to deceive bidders and give a false impression of its value, and that he was expelled from his membership and excluded from buying for that reason and pursuant to a rule to that effect established by the governing board. If these allegations should be established on the hearing, whatever may be the rights of the public and patrons generally, I am of the opinion that the present claimant as an individual buyer has been properly excluded, and I am well assured that no court should lend its aid to restore him to a participation in the warehouse privileges. Public policy requiring that these warehouse sales should be kept free from unreasonable restrictions, and the pertinent facts being in dispute, I think plaintiff *prima facie* has the right to take part and have his bids duly considered, and that his position should be maintained to the hearing. *Tise v. Whitaker*, 144 N. C. 508, 57 S. E. 210; *Cobb v. Clegg*, 137 N. C. 153, 49 S. E. 80. But, there being material issues raised on the pleadings which may affect both the question of liability and the amount of damages, I am of the opinion that the order must be without prejudice and subject to the determination of these issues at the final hearing. Although this may be to some extent in the nature of a mandatory injunction, the authorities hold that a preliminary order is at times permissible in such cases, and I think this course should be pursued in the present instance. *Keys v. Alligood*, 178 N. C. 16, 100 S. E. 113; *High on Injunctions* (4th Ed.) § 4.

STACY, J. (concurring). I think the plaintiff *prima facie* is entitled to the privileges of a buyer upon the warehouse floors of the defendants, which have been dedicated to the public marketing of tobacco. I am also of the opinion that the regulation fixing membership in the Kinston Board of Trade as a prerequisite to the privilege of buying at such warehouses is unreasonable and void. However, the duty which the defendants owe to the public of maintaining a free and open market is coequal with their obligation to support and promote the principles of honesty, integrity, and fair dealing in their business. Both affect the public interest. Hence, it appearing that material issues are raised by the pleadings which may bear upon the question of liability as well as the issue of damages, I concur in the result, and agree that the restraining order should be continued without prejudice and subject to the determination of these pertinent issues at the final hearing.

(181 N. C. 204)
ROBERTS et al. v. UTILITY MFG. CO.
 (No. 285.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Dismissal and nonsuit \Leftrightarrow 56—Pleading \Leftrightarrow 218(4)—Action to be dismissed where misjoinder is both as to parties and causes of action.

Where there is a misjoinder both of parties and causes of action, the court in sustaining demurrer cannot order the action to be divided under C. S. § 516, but must sustain the demurrer and dismiss the action.

2. Action \Leftrightarrow 50(1) — Parties \Leftrightarrow 15 — Complaint held bad for misjoinder of parties and causes of action.

Complaint alleging breach of contract made by defendant with one plaintiff and assigned by such plaintiff to a second plaintiff, and as a second cause of action a breach of a separate and distinct contract made by the defendant with both of the plaintiffs, and as a third cause of action a breach of a contract made by the defendant with the first plaintiff, held bad for misjoinder of parties and causes of action since all three causes of action do not affect both plaintiffs, as required by C. S. § 507.

Appeal from Superior Court, New Hanover County; Craumer, Judge.

Action by Owen H. Roberts and another against the Utility Manufacturing Company. From a judgment overruling a demurrer to the complaint, the ground of demurrer being that there is a misjoinder of parties and causes of action, defendant appeals. Reversed.

Langston, Allen & Taylor, of Goldsboro, for appellant.

Rodgers & Rodgers, of Wilmington, for appellees.

ALLEN, J. The causes of action that may be joined are classified in section 507 of the Consolidated Statutes, which concludes:

"But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action."

[1] It is also well settled that an action cannot be divided under section 516 when there is a misjoinder both of parties and of causes of action, and that in such case the demurrer must be sustained and the action dismissed. *Cromartie v. Parker*, 121 N. C. 198, 28 S. E. 297; *Morton v. Telegraph Co.*, 130 N. C. 302, 41 S. E. 484; *Thigpen v. Cotton Mills*, 151 N. C. 97, 65 S. E. 750; *Campbell v. Light & Power Co.*, 166 N. C. 488, 82 S. E. 842.

Applying these principles, it is clear that the demurrer ought to have been sustained.

[2] There are two plaintiffs, Owen H.

Roberts and D. B. Roberts, and there are at least three causes of action set out, all of which do not affect all of the parties to the action as required by the statute.

The plaintiffs allege: First, a breach of a contract made by the defendant with O. H. Roberts and assigned by him to the other plaintiff D. B. Roberts; next, a breach of a separate and distinct contract made by the defendant with both of the plaintiffs; and, in the third place, a breach of a contract made by the defendant with the plaintiff O. H. Roberts.

Reversed.

(131 N. C. 183)

MUNICK v. CITY OF DURHAM et al.
(No. 332.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Appeal and error \Leftrightarrow 927(3)—Plaintiff's uncontradicted testimony taken as true on appeal from judgment of nonsuit.

On appeal from judgment of nonsuit granted on plaintiff's uncontradicted testimony, the testimony will be taken as true, with all the inferences from it in the most favorable light to the plaintiff.

2. Assault and battery \Leftrightarrow 12—Tender of 50 cents in pennies in payment of bill no justification for assault.

The tender of 50 cents in pennies in payment of a \$4.50 water bill did not justify an assault upon the consumer by the superintendent of the water plant, though the pennies were legal tender only to the amount of 25 cents, under U. S. Comp. St. § 6574.

3. Municipal corporations \Leftrightarrow 747(2)—City liable for assault on water consumer by superintendent of city's water plant while acting as city's agent in collecting water bill.

City operating water system was liable for assault by superintendent of the waterworks on consumer's tender of 50 cents in pennies in payment of water bill, since the assault was made by the superintendent while acting in his capacity as agent for the city, and since the city operated such water plant in its business capacity and not in its governmental capacity.

4. Master and servant \Leftrightarrow 306—Principal liable for assault by agent.

The principal is liable to one who, coming on principal's premises in connection with business dealings or by invitation, is assaulted by one of its agents.

5. Municipal corporations \Leftrightarrow 847 — Board of water commissioners required to protect one on its premises by invitation.

It was the duty of the board of water commissioners of a city, not only to refrain from assaulting or injuring one who has been invited upon its premises, but also to protect him from any violence which it could reasonably have foreseen if offered by others.

Appeal from Superior Court, Durham County; Calrut, Judge.

Action by H. Munick against the City of Durham and the Board of Water Commissioners. Judgment of nonsuit, and plaintiff appeals. Reversed.

The waterworks in the city of Durham are owned by the municipality and are operated by it under the supervision of the defendant board of water commissioners. Among their employees was one Harvey Bolton, who had general charge and supervision of said water system, and among whose duties it was, assisted by others under his supervision, to keep the books continuing the accounts against all customers purchasing water, to render statements to said consumers for the water used by them and collect all sums due, and to give receipts upon payment of said bills. This is an action by the plaintiff against the city for damages for assault and battery upon him by said Bolton.

The plaintiff, H. Munick, testified:

"I live on Poplar street and conduct a grocery store. I have been living in Durham 11 years, coming here from New York. I came to New York from Russia, and am a Jew. I am married and have a family of four. I own my home and two more houses and buy water from the city of Durham. On April 17, 1919, I went to the water company's office, taking a bill which they had sent me for \$4.50. No one was with me. I had been there a number of times before and paid my bills. Sometimes I would send the money and pay the bills by the children and sometimes I would take it myself. This time I took it myself. When I came to the office I saw only the lady who collected. This was in the spring of the year, about 12 o'clock, but I do not recall the day of the week. I do not know the name of the lady, but I took the money and the bills in my hand and handed them to the lady. I took from my pocket 3 paper dollars, 1 silver dollar, and 50 cents in pennies, and gave it to the lady with the bills. The 50 cents in pennies was in one package and were not loose. They were rolled up like the bank fixes them. I got the pennies in my retail business. The lady receipted my bills and I put them in my pocket and started to leave the office. I did not go outside of the door, and in about five minutes Mr. Bolton, who is manager of the water company, came in the office.

"I was standing beside the window which is the regular place to pay bills when he came in. I had the bills then in my pocket and the book-keeper started counting the pennies. Mr. Bolton came in and asked the lady, 'What are you counting? Nickels or dimes?' She told Mr. Bolton, 'Mr. Munick gave me 50 pennies.' Mr. Bolton then came around the counter inside the office to the desk where she was. I was on the outside by the front door. Mr. Bolton took the pennies and pushed them off the counter onto the floor where I was standing. He was at the back end of the counter and I was at the front, and he pushed all of these pennies on the floor, and came from the inside

to where I was and said, 'Munick, pick up those pennies. They belong to you.' I said, 'Mr. Bolton, those pennies belong to you, not to me.' Mr. Bolton said, 'Munick, pick up those pennies; they belong to you.' I told him, 'The bill is paid and those pennies belong to you.' That is all I said to him. I said, 'Those pennies are just as good as the dollars.' Mr. Bolton then locked the front door and took me by the jacket and called me 'God damned Jew,' and said, 'Give me back my bills.' I did not say anything and he hit me in the face. I did not resist, and the door was locked and I could not get out. The pennies were still on the floor. After he slapped me another man came to pay his bill, and Mr. Bolton opened the door and let him in and the man then went out. Mr. Bolton was standing close to me and did not give me a chance to get out. Then I said, 'Please turn me loose, I have to go home.' I do not know where the other man was then.

"When this other man went out Mr. Bolton locked the door again, took me by my jacket, and pushed me in the back room where the tools belonging to the city water company were. I said, 'Please turn me loose;' begging him to turn me loose. I do not remember how many times. He did not close the door when he pushed me in the back room. The front door was closed but not the door in the back room. When he got me in the back room he took his two hands about my neck and choked me. He was standing in front of me and I said, 'Please turn me loose. I've got to go home.' He turned me loose for about five minutes, and then took hold of me again and choked me fast, until it interfered with my breathing. It hurt me and I told him to please turn me loose. When he turned me loose the second time he called to some one to bring a towel. A gentleman brought the towel and he took that towel and put it over my face. This interfered with my breathing, as I could not breathe with it over my face. A little later I told him, 'Maybe I got a dollar. I will take back the pennies, Mr. Bolton, turn me loose.' I started looking in my pockets and I found one paper dollar, and said, 'I am glad I got one dollar to settle with you.' Mr. Bolton took that dollar and gave me back the 50 pennies. I took them and Mr. Bolton opened the front door and said, 'Get out of here, and don't come no more to pay your water bill.' That is all he said to me, and I left his office.

"I had been feeling mighty bad. I do not know how long I was in there, but I begged Mr. Bolton to turn me loose, as I was sick and could not stand it. I had some kind of sickness in my head. I was back there in the office being subjected to this treatment about one half hour from the time I went in. I went to Mr. Lunsford's office and asked him to phone for me a doctor. I do not know what Mr. Lunsford said. He was busy in his office. I left his office and went home. I used to trade with Mr. Lunsford. I did not see a doctor. The treatment I had received made me sick. When he choked me it hurt me for from eight to ten days. His finger prints where he choked me could be seen on my neck by everybody for eight or ten days. Everybody asked me what was the matter. It made me feel very bad when he cursed me. I had Mr. Bolton indicted, and he was in court, and the court found him

guilty and fined him. He did not resist. I have Mr. Lunsford, Mr. Speed, and Mr. Draughan for character witnesses."

On cross-examination, he said:

"I used to come to this water company's office before this, but had never been treated by any one that way before, and had never heard of any one being treated that way before or after I went there. This is the first time. I put my money on the counter and the young lady took the money and signed my receipt and gave me a receipt and I put it in my pocket. I paid my bill in full and all my matters were closed with the city. Mr. Bolton got mad because I paid the pennies. I was on the inside. I got to the door on the inside, and Mr. Bolton locked the door so I could not get out. I had never heard of folks being locked in; that was an unusual sort of thing. I do not know what he did with the key. I could not get out, and did not try. He grabbed hold of me and I said, 'Please turn me loose.' He got madder and madder all the time. I was yelling, and he got the towel to stop me from yelling. The young lady was inside the office while this yelling was going on. She was not doing anything. I do not know who the man was that brought the towel, but he worked in the office. He did not do anything but give the towel to Mr. Bolton. I do not know his name. He was white and not a very heavy man. I do not know him. I did not try the door. Mr. Bolton opened the door for another man who paid his water bill, and then Mr. Bolton locked the door again. The man who brought the towel stayed there in the back. He just gave the towel to Mr. Bolton and nothing else. The young lady who I gave the money to did not do anything. She stayed there in the office looking through the window. She was there while Mr. Bolton was cursing me, where she could hear it. I indicted Mr. Bolton in the recorder's court. He pleaded guilty, and I am suing the city, whose agent he was."

J. O. Lunsford testified that he had known the plaintiff for 12 or 15 years; had sold him flour for several years, and knew his general character and it was good; that on the day of this occurrence the plaintiff told him about having this trouble in the water company's office.

A. J. Draughan also testified that he had known the plaintiff 10 or 12 years; that he had sold him goods, and knows his general character and that it was good.

At the close of the above testimony the defendant offered no evidence, but moved for judgment of nonsuit, which was granted, and the plaintiff appealed.

R. O. Everett and William G. Bramham, both of Durham, for appellant.

S. C. Chambers, of Durham, for appellees.

CLARK, C. J. [1] The testimony for the plaintiff presents one of the most singular occurrences that has come to this court. The defendant offered no evidence, and the nonsuit was granted on the uncontradicted testi-

mony for the plaintiff as above set out. It is therefore taken as true, with all the inferences from it in the most favorable light to the plaintiff. But, indeed, there seems to be but one that could be drawn from it. The plaintiff, an old and feeble man, went to the water company on receiving a notice sent by it to pay his bill. He handed the clerk the money and she gave him a receipt. A part of the payment was 50 "pennies," that is, one-cent pieces, wrapped up together. While he was standing there and she was counting the pennies the manager of the water company came in, knocked the pennies off the counter on the floor, cursed the plaintiff, calling him a "G——d d——n Jew," told him to pick up the pennies, struck him, pulled him into another room, struck him repeatedly, interrupted this to admit another patron, and after the latter went out the superintendent resumed his beating of the plaintiff, who offered no resistance and begged to be turned loose to go home, shook him, choked him, put a towel over his face suffocating him, and finally, when the plaintiff tendered a dollar bill, he told him to take his pennies and to leave and not come back.

[2] The official (Bolton) was indicted in the criminal court and convicted and merely fined. Taking this occurrence to be as stated by the plaintiff, who is not contradicted and who proved a good character, a more brutal and unprovoked assault could not be presented. It was absolutely without justification. The pennies, under the United States statute, were a legal tender to the amount of 25 cents (U. S. Compiled Statutes 1918, § 6574), and if the clerk had objected the water company could not have been compelled to receive beyond that sum in pennies but it was no offense to tender a larger sum in one-cent pieces, and the lady clerk accepted them; and even if the tender of 50 of them was for any reason objectionable (which does not appear), it certainly did not justify the treatment the plaintiff received.

There is no explanation of the conduct of the company's superintendent, and the only provocation given which we can infer from the language used by Bolton is the fact that the plaintiff was a Jew. He made no other charge. The treatment which the plaintiff received is paralleled by that which is portrayed by Scott in *Ivanhoe* in the treatment of Isaac of York seven centuries ago, and by Shakespeare as meted out to Jews in the Merchant of Venice, also centuries ago. The world has long outlived this treatment of an historic race, except, perhaps, in "darkest Russia" when under the Czars. When Disraeli, later Prime Minister of the British Empire, was reproached in Parliament for being a Jew, he made the memorable reply, "When the ancestors of the right-honorable

gentleman were painted savages roaming naked in the forests of Germany, my ancestors were princes in Israel and high priests in the temple of Solomon."

Every voter, every witness, and every official takes an oath upon a sacred book, every sentence and word in which was written by a Jew. When the Saylor was incarnated after the flesh he was of the tribe of Judah, and His mother, whom a great church holds immaculate, if not divine, has her name borne by millions throughout the civilized world. Whatever the shortcomings of any individual, it is strange that in this day of enlightenment such prejudices as were shown in this case should survive against the race to which the plaintiff belongs. This plaintiff proved, without contradiction, a good character, and certainly there is no evidence which justified in any degree the brutal assault made upon him, for which no excuse is offered. For some unexplained reason, the brutal assailant, though convicted, was punished only by a fine. It is to be presumed, however, that the city discharged him from its service.

[3] The ground upon which the nonsuit was asked and allowed, as presented in this court, is that the defendants and the city of Durham are not responsible for the act of its agent, Harvey Bolton, superintendent of the waterworks, or that at least in making the assault he was not within the scope of his authority, in that he had no instructions from the defendants to commit such violence. At the time that the assault was made by the said Harvey Bolton he was acting in his capacity as agent. Had he been acting for a water company under private ownership, it could not be contended that the corporation would not be responsible. He was there in the prosecution and furtherance of the duties assigned to him by the defendant municipality. *Roberts v. Railroad*, 143 N. C. 179, 55 S. E. 509, 8 L. R. A. (N. S.) 798, 10 Ann. Cas. 375. Indeed, the facts are very similar to those in *Bucken v. Railroad*, 157 N. C. 443, 73 S. E. 137. "Acting within the scope of employment means while on duty." *Cook v. Railroad*, 128 N. C. 336, 38 S. E. 926.

In *Ange v. Woodman*, 173 N. C. 33, 91 S. E. 536, it is said:

"It is now fully established that corporations may be held liable for negligent and malicious torts, and that responsibility will be imputed whenever such wrongs are committed by their employees and agents in the course of their employment and within its scope * * * in many of the cases, and in reliable text-books * * * 'course of employment' is stated and considered as sufficiently inclusive; but, whether the one or the other descriptive term is used, they have the same significance in importing liability on the part of the principal when the agent is engaged in the work that its principal

has employed or directed him to do and * * * in the effort to accomplish it. When such conduct comes within the description that constitutes an actionable wrong, the corporation principal, as in other cases of principal and agent, is liable not only for 'the act itself, but for the ways and means employed in the performance thereof.'

In 1 Thompson, Negligence, § 554, it is pointed out that, unless the above principle is maintained:

"It will always be more safe and profitable for a man to conduct his business vicariously than in his own person. He would escape liability for the consequences of many acts connected with his business, springing from the imperfections of human nature, because done by another, for which he would be responsible if done by himself. Meanwhile, the public, obliged to deal or come in contact with his agent, for injuries done by them must be left wholly without redress. He might delegate to persons peculiarly irresponsible the care of large factories, of extensive mines, of ships at sea, or of railroad trains on land, and these persons, by the use of the extensive power thus committed to them, might inflict wanton and malicious injuries on third persons, without other restraint than that which springs from the imperfect execution of the criminal laws. A doctrine so fruitful of mischief could not long stand unshaken in an enlightened jurisprudence."

This court has often held the master liable, even if the agent was willful, provided it was committed in the course of his employment. *Jackson v. Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

[4] Indeed, the doctrine goes further, and the principal is liable if one coming on the premises in connection with business dealings, or by invitation, is assaulted by one of its agents. This is settled by the leading case of *Daniel v. Railroad*, 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485, and the numerous citations to the case in the Annotated Edition. Indeed, the same ruling has been uniformly made and was reaffirmed at this term in *Clark v. Bland*, 106 S. E. 491.

Not only is the corporation liable for injuries thus committed by its agents, but "it is the duty of a carrier to protect its passengers from injury, insult, violence, and ill treatment from its servants, other passengers, or third persons." *Seawell v. Railroad*, 132 N. C. 859, 44 S. E. 611, citing numerous cases. Indeed, as far back as 1883, *Ruffin, J.*, in *Britton v. Railroad*, 88 N. C. 554, 43 Am. Rep. 749, in terms ever since deemed settled law, said:

"The carrier owes to the passenger the duty of protecting him from violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's negligence in this particular when, by the exercise of proper care, the acts of violence might have been foreseen and prevented."

This is cited with approval in *Seawell v. Railroad*, supra. The same rule applies to any other corporation. In that case the passenger was assaulted by a mob, and the defendant was held liable because four employees were present and it was shown that none of them "made the slightest attempt to protect the plaintiff," and, indeed, there was "evidence that two of them actively participated in, or at least encouraged, the assault." This case was reheard and reaffirmed (183 N. C. 517, 45 S. E. 851), the court saying:

"A careful examination of all the authorities shows no case, and the appellants cite none, in which, under similar circumstances, the railroad company has not been held liable, unless it exerted what power it could to protect the passenger from the mob. * * * The cases are uniform, fastening liability upon a common carrier for failure to extend such protection as it can to a passenger against a mob," citing numerous cases.

[5] That the corporation is liable for the mistreatment of one invited upon its premises as this plaintiff was, or even if it fails to protect him as far as it can from violence by others while upon its premises, is beyond controversy. Indeed, the principle is so well settled that it needs no citations of authority.

We apprehend, however, that his honor did not consult the plaintiff upon any views to the contrary, but doubtless upon the ground that the city was not liable. That contention by the defendant is equally untenable. In *McIlhenney v. Wilmington*, 127 N. C. 149, 37 S. E. 188, 50 L. R. A. 470, it is said:

"The law is too well settled to admit of debate. It may, on a review of the authorities, which are uniform, be thus stated: When cities are acting in their corporate character, or in the exercise of powers for their own advantage, they are liable for damages caused by the negligence or torts of their officers or agents; but where they are exercising the judicial, discretionary, or legislative authority conferred by their charters, or are discharging their duty solely for the public benefit, they are not liable for the torts or negligence of their officers, unless there is some statute which subjects them to liability therefor," citing numerous cases.

The distinction is very broad and clear and is settled by all the authorities substantially as follows: Wherever a city is exercising a governmental function or police power, it is not responsible for the torts or negligence of its officers, in the absence of a statute imposing such liability; but when it is acting in its business capacity, as in operating a water or lighting plant, or other business function, it is liable for the conduct of its agents and servants exactly to the same extent that any other business corporation would be liable under the same circumstances. The distinction thus laid down in

McIlhenney v. Wilmington has been often cited with approval.

To sum up: The assault upon the plaintiff was of the most brutal and unprovoked nature. Indeed, there is no evidence set up in this case that tends to palliate or mitigate the assault, which, it appears, was entirely unprovoked. There is no question that Bolton was the officer of the corporation and was acting in the discharge of his duty, and that the plaintiff was on the premises at the invitation of the corporation, and, further, it was the duty of the corporation, not only to refrain from assaulting or injuring the plaintiff while there, but to protect him from any violence which it could reasonably have foreseen if offered by others; and, still further, the city operating the water plant in its business capacity and not under its governmental or police power, on these facts the same liability was imposed upon the city as if it were a business plant.

The judgment entering a nonsuit must be reversed.

(181 N. C. 500)

WARE v. SOUTHERN POWER CO.
(No. 357.)

(Supreme Court of North Carolina. April 13, 1921.)

1. Appeal and error \S 1002—Verdict on conflicting evidence not disturbed.

A verdict on disputed fact issues will not be disturbed.

2. Appeal and error \S 1033(8)—Party not entitled to complain of error in his favor.

Where, in a suit to cancel a right of way deed and an agreement for compensation on the ground of fraud, all issues were decided in defendant's favor, but he tendered a sum for which plaintiff took judgment, though he was not entitled to such a judgment under the pleadings, plaintiff could not complain, though costs were taxed against him.

Appeal from Superior Court, Rockingham County; Finley, Judge.

Action by W. P. Ware against the Southern Power Company. From a judgment for plaintiff for an amount tendered by the defendant, plaintiff appeals. No error.

Civil action brought to set aside a deed for a right of way over plaintiff's lands and an agreement fixing the compensation or amount of damages therefor, plaintiff alleging that his signatures to said instruments were procured by the false and fraudulent representations of defendant's agent. Upon issues joined, the jury returned the following verdict:

"(1) Was the execution of the damage agreement referred to in the pleadings procured by

fraud and misrepresentation as alleged in the complaint? Answer: No.

"(2) Was the execution of the right of way deed referred to in the pleadings procured by fraud and misrepresentation as alleged in the complaint? Answer: No.

"(3) What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: —."

Defendant admitted that under the contracts it was indebted to the plaintiff in the sum of \$20 and tendered judgment for this amount. His honor gave judgment in favor of plaintiff for \$20, but taxed him with the costs. Plaintiff appealed.

J. M. Sharp, J. R. Joyce, and E. B. Ware, all of Reidsville, for appellant.

Manly, Hendren & Womble, of Winston-Salem, and W. S. O'B. Robinson, Jr., of Charlotte, for appellee.

PER CURIAM. [1] The controversy between the parties in this action narrowed itself on the trial to questions of fact, which the jury have answered in favor of the defendant. We have carefully examined the record, and find no sufficient reason for disturbing the verdict.

[2] Technically, under the pleadings, plaintiff may not have been entitled to judgment for the \$20; but this is not the basis of his appeal. Apparently he has been rewarded according to his own agreement. His honor below evidently took this view of the matter, and we think the plaintiff should be content with the result.

No error.

(181 N. C. 535)

STATE v. ROUNTREE. (No. 273.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Criminal law \S 752½—On motion to dismiss testimony to be considered in light most favorable to state.

On motion to dismiss prosecution, testimony is to be considered in its most favorable light to the state.

2. Homicide \S 268 — Guilt of manslaughter held for jury.

In a prosecution for manslaughter, held, that the court properly submitted the case to the jury.

3. Criminal law \S 752½—Motion to dismiss directed to sufficiency of evidence, and not credibility of witness.

A motion to dismiss action or for judgment as of nonsuit under the Mason Act is directed to the sufficiency of the evidence to state or warrant a verdict, and not to its weight or to the credibility of the witnesses.

4. Homicide \S 74, 282—Recklessness constituting killing manslaughter and evidence sufficient to carry case to jury stated.

The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with a proper regard for human life, and the negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to carry the case to the jury in a criminal prosecution where it reasonably appears that death or great bodily harm was likely to occur.

5. Homicide \S 62—One engaged in unlawful act guilty of manslaughter.

Where one is engaged in an unlawful and dangerous act which is itself in violation of a statute intended and designed to prevent injury to the person, and death results, the actor would be guilty of manslaughter at least.

6. Highways \S 177 — Municipal corporations \S 707—Statute held not to fix lawful rate of speed for automobile.

C. S. \S 2618, in fixing the maximum rate of speed of motor vehicles within a city or on the public highway, does not purport to establish a rate of speed which will be lawful under all circumstances, and such speed must not be greater than is "reasonable and proper," considering the time and place, and "having regard to the width, traffic, and use of the highway," nor should it be such "as to endanger property or the life or limb of any person," as proper speed under given conditions may be excessive speed under others, and proper speed in the daytime might be grossly excessive at night.

7. Homicide \S 62—Automobilist violating statute held guilty of manslaughter.

An automobilist operating his machine in disregard of C. S. \S 2618, 2618, is engaged in an unlawful act, and is guilty of manslaughter where death results to a pedestrian.

Appeal from Superior Court, Cumberland County; Horton, Judge.

David Rountree was convicted of involuntary manslaughter, and appeals. No error.

Criminal prosecution, tried upon an indictment charging the defendant with manslaughter.

There was evidence on behalf of the state tending to show that on Sunday, April 25, 1920, about 6 p. m., James A. King was struck by an automobile and injured to such an extent that he died within three or four hours thereafter. At the time of the injury the deceased was on the north side of Hillsboro street extended, near a sharp turn or curve in the road, about one mile north of the corporate limits of the city of Fayetteville. It is mentioned in the record as the Hillsboro street road; and along this thoroughfare the defendant was driving his Ford car when he struck the deceased. The only

eyewitnesses to the occurrence were the defendant, his wife, and two colored women who were riding in the machine when the injury occurred. None of these parties, however, gave any evidence in the case.

H. G. Bullock testified that he saw the deceased a few minutes after the injury; that Mr. King was lying on the north side of the street, just beyond the curbing in the road; that he was flat on his back and appeared to be unconscious, and that his left leg was broken; that David Rountree, his wife, and some colored women were there when he arrived; that the defendant was holding Mr. King's head up, and asked one of the colored women for something to put under his head, and she went into a house and got a pillow; that the defendant said he was driving the car that hit the deceased. Continuing, the witness stated:

"The car was 6, 8, or 10 feet ahead of where the injured man was lying. The two left-hand wheels were in the road and the two right-hand wheels were just across the waterway or berm ditch outside of the road. The used part of the road was a little to the south side near the inside bend. Mr. King's body was on the opposite side. The road at that point is straight, but soon turns at almost a right angle and was built for a width of 31 feet. It was a new clay road and had not been used a great while. Where the car was, it was moderately hard. I did not notice the track of the car particularly. It was headed westward. The view was unobstructed. I asked some one to phone for a doctor, but as Mr. Patterson drove up I sent Mr. King to the hospital in his automobile. I do not remember that the defendant said anything about how the deceased was traveling when the car struck him. The defendant was crying before we left."

Lacy Patterson testified:

"When we got there Mr. King was lying back of a Ford car about 4 or 5 feet, with his head on a pillow. His feet were down in a gutter, or waterway, and his head was pointed southward. I observed the track of the car. It left the center of the road that would be traveled by a car or buggy 35 or 40 yards off and came straight until it stopped. It showed there were several kinds of tires on the car, and I could trace it by that. When I saw the car the left-hand side was 12 or 15 feet from the beaten track or ruts of the road ordinarily taken by a car. Mr. King's body was right over in the gutter and his feet were down in it. Where his feet were I would say is about 15 or 18 feet from the beaten track. The width of the road at that point was about 20 feet. Over there on the right side of the road where the wheels were standing there was an onion patch; it was cultivated. After carrying Uncle Jim to the hospital I came back and put down some pegs, from which the measurements were taken when they made a map of it. The deceased made no statement as to how the occurrence happened. About two inches of the bone could be seen protruding through his pants where his leg was broken."

(106 S.E.)

Leslie Smith testified that he was a civil engineer, and that he made a survey and map of the place where the deceased was injured and measured the distances on the road as pointed out by Lacy Patterson. The de-

fect. The direction of this road from the Linden road is almost due west, with an open view all the way.

The defendant offered no evidence, but moved to dismiss the action, or for judgment as of nonsuit under the Mason Act (chapter 73, Public Laws 1913). Motion overruled, and defendant excepted.

The jury returned a verdict adverse to the defendant, finding him guilty of involuntary manslaughter. From the judgment pronounced thereon, the defendant appealed.

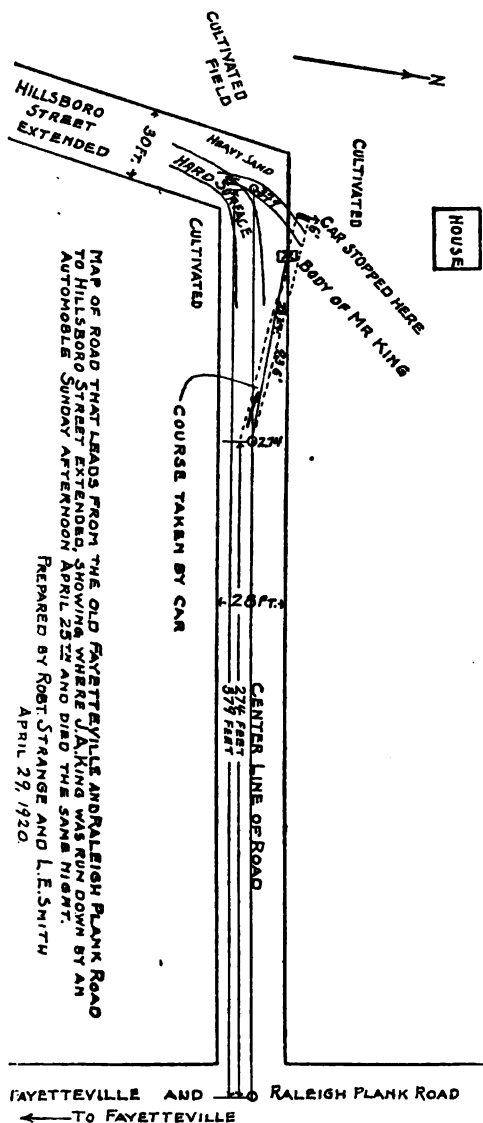
H. L. Brothers and Bullard & Stringfield, all of Fayetteville, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

STACY, J. [1-3] We have not stated all the evidence, because the foregoing would seem to be sufficient to dispose of the defendant's appeal. Considering the testimony in its most favorable light to the state, the accepted position on a motion of this kind, we think his honor properly submitted the case to the jury. *State v. Oakley*, 176 N. C. 755, 97 S. E. 616; *State v. Carlson*, 171 N. C. 818, 89 S. E. 30. The court's inquiry upon such a motion is directed to the sufficiency of the evidence to support or warrant a verdict (*State v. Hart*, 116 N. C. 976, 20 S. E. 1014), and not to its weight or to the credibility of the witnesses (*State v. Utley*, 128 N. C. 997, 35 S. E. 428).

[4] The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with a proper regard for human life. *State v. Gash*, 177 N. C. 595, 99 S. E. 337; *State v. McIver*, 175 N. C. 761, 94 S. E. 682; *State v. Tankersley*, 172 N. C. 955, 90 S. E. 781, L. R. A. 1917C, 533. The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to carry the case to the jury in a criminal prosecution where it reasonably appears that death or great bodily harm was likely to occur. *State v. Gray*, 180 N. C. 697, 104 S. E. 647. A want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury, will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences, or a heedless indifference to the safety and rights of others. *State v. Goetz*, 83 Conn. 437, 76 Atl. 1000, 30 L. R. A. (N. S.) 458.

[5] Again, it is generally held that, where one is engaged in an unlawful and dangerous act, which is itself in violation of a statute, intended and designed to prevent injury to the person, and death ensues, the actor would be guilty of manslaughter at least. *State v. McIver*, supra. C. S. 2618, provides:



endant's car left the center of the road at a point 274 feet west of the Linden road. From this point to where Mr. King's body was found it is 78 feet, and 93.5 feet to where the car stopped, which was 15½ feet from the point where the body was found. The width of the road where the car left the center of the track was 28 feet. The road was hard clay surface, but 10 feet from the center of the road the soil is sand. The tracks were visible four days afterwards and it had rained in the meantime. From the south side of the road to where Mr. Patterson said the body was found was about 31

"No person shall operate a motor vehicle upon the public highways of this state recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person."

Then follows an enumeration of certain rates of speed at given places which shall be deemed as violations of the section.

[6] But, in fixing the maximum rate within a city or upon the public highways, the statute does not purport to establish a rate of speed which will be lawful under all circumstances. It must not be greater than is "reasonable and proper," considering the time and place, and "having regard to the width, traffic, and use of the highways," nor should it be such "as to endanger property or the life or limb of any person." Proper speed, under given conditions, may be excessive speed under others; and proper speed in the daytime might be grossly excessive at night. *State v. O'Brien*, 32 N. J. Law, 169; *Commonwealth v. Pierce*, 138 Mass. 165, 52 Am. Rep. 264.

Section 2616 of the Consolidated Statutes also provides, in part, as follows:

"Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, * * * every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signaling. Upon approaching an intersecting highway, a bridge, dam, sharp curve, or deep descent, * * * a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed ten miles an hour, having regard to the traffic then on such highway and the safety of the public."

[7] If the defendant was operating his machine in disregard of these regulations, and thus occasioned the death of deceased, he was engaged in an unlawful act. "Involuntary manslaughter," says Wharton, Am. Crim. Law (11th Ed.) § 426, p. 622, "is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony." It does not appear from the evidence why the defendant left the central part of the road and ran out of the beaten path, or traveled portion of the highway, nor does it appear why he did not turn aside so as to avoid the collision. Under these circumstances, the jury might well have found that the injury occurred in consequence of the recklessness of the driver, amounting to criminal negligence. *State v. Blewen*, 169 Iowa, 256, 151 N. W. 102. See, also, *State v. Stitt*, 146 N. C. 643, 61 S. E. 566, 17 L. R. A. (N. S.) 308.

The deceased was walking on the outer edge of the road, far from the traveled part of the highway, where he had a right to be. There were no other machines near.

The view was unobstructed, and it is difficult to understand how the defendant could have struck the deceased with his car, under all the circumstances, without being guilty of culpable negligence. At any rate, the evidence was sufficient to be submitted to the jury, and they have so found.

No error.

(181 N. C. 205)

ACME MFG. CO. v. McPHAIL. (No. 298.)

(Supreme Court of North Carolina. April 13, 1921.)

1. Evidence ~~§~~441(1) — Preliminary negotiations merged in written contract.

Negotiations and conversation preparatory to the execution of a written contract are merged in the writing, and evidence will not be received of a contemporaneous oral agreement which contradicts the terms of the writing.

2. Evidence ~~§~~442(1) — Contract may be partly written and partly oral.

Except when forbidden by the statute of frauds, a contract may be partly in writing and partly oral, and in such cases the oral agreement may be shown, but in case of conflict the written agreement governs.

3. Evidence ~~§~~445(2) — Parol evidence rule does not prevent modification of written contract by subsequent parol agreement.

The parol evidence rule does not prevent the modification of a written contract by subsequent parol agreement; consequently evidence of a parol agreement by a fertilizer manufacturer to pay freight, made after execution of the written contract, but before the defendant ordered fertilizer under the contract, is competent, though the written contract provided that the purchaser should pay part of the freight.

4. Evidence ~~§~~444(6) — Parol evidence that seller was to credit notes with amount of freight permissible.

Where the purchaser of fertilizer claimed that the written contract which provided that he should pay part of the freight was modified, but it appeared that the purchaser executed notes including such portion of the freight which was prepaid by the seller, evidence that the notes were to be returned unless credited with the amount of freight is competent despite the parol evidence rule.

5. Principal and agent ~~§~~166(1) — To bind a principal by ratification or assent it must appear that principal had knowledge.

To bind the principal by ratification, assent, or acquiescence in prior acts of his agent in excess of authority actually given, a knowledge of the material facts must be brought home to the principal, and he must have acted in the light of such knowledge, and the same rule applies where the contract of the agent has been performed.

6. Principal and agent \S 169(1)—Facts are liberally construed in favor of ratification where agency is shown to exist.

Where an agency is shown to exist, the facts will be liberally construed in favor of ratification by the principal of the acts of his agent, and ratification may be implied when the conduct of the principal constitutes an assent.

7. Principal and agent \S 174—Whether principal ratified agent's agreement that he should pay all the freight for the jury.

Where a written contract required the buyer of fertilizer to pay part of the freight, the question whether a subsequent parol agreement by the agent of the seller that the seller should pay all the freight was ratified *held*, under the evidence, for the jury.

Appeal from Superior Court, New Hanover County; Gulon, Judge.

Action by the Acme Manufacturing Company against Jonah McPhail. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

See, also, 179 N. C. 383, 102 S. E. 611.

This is an action to recover \$145.47 for the wrongful conversion of certain notes and accounts, and growing out of a contract for the sale of fertilizers entered into between the plaintiff, a manufacturer of fertilizers, and the defendant, on February 2, 1914.

By the terms of the contract the defendant did not agree to buy, but the plaintiff agreed to ship to the defendant, certain fertilizers in such quantities as might be thereafter agreed upon at prices and on terms named in the contract, "shipments to be made in not less than carload lots, and we [fertilizer company] to be at no expense after the delivery of the goods f. o. b. Dunn, N. C."

The shipments to the defendant were to be carried by rail to Dunn, N. C., and then over a logging road to the defendant, and the real dispute in this action is whether the plaintiff or the defendant should pay the freight on the logging road.

The defendant offered to show that at the time of making the contract and before it was actually signed the plaintiff agreed that it would pay the freight on the logging road if other reputable fertilizer companies did so, and that other companies did pay this freight. This evidence was excluded upon the ground that it contradicted the written contract; it being stipulated therein that the plaintiff was to be at no expense after delivery at Dunn. The defendant excepted.

The defendant offered evidence tending to show that before he ordered any fertilizers a salesman of the plaintiff agreed that the plaintiff would pay the freight on the logging road, and the jury has found that this agreement was made by the salesman. The plaintiff denied that the salesman had any authority to make this contract or that it had ratified it. His honor charged that there was no

evidence of knowledge of the contract on the part of the plaintiff, and that there was no evidence that the plaintiff had ratified the contract, and the defendant excepted. All the fertilizers bought by the defendant were shipped after the agreement with the agent of the plaintiff, and the defendant prepaid the freight on the logging road.

At the close of the season for the sale of fertilizers the account of the defendant with the plaintiff was closed by the execution of four notes aggregating \$2,574.48, all of which have been paid except \$145.47, the amount in controversy in this action, which substantially includes the freight on the logging road.

The defendant offered to prove that at the time of the execution of these notes he signed the notes and delivered them to the agent of the defendant upon the understanding that the notes would be returned to him, and that the plaintiff might sue on the whole account unless the plaintiff allowed him credit for the freight on the logging road. This evidence was excluded, and the defendant excepted.

The jury under the instruction of his honor returned the following verdict:

"(1) After the execution of the contract for the shipment of fertilizer to defendant, did Woodward, agent for the plaintiff, agree that the company would pay the freight on the fertilizer from Dunn over the log road? A. Yes.

"(2) Did plaintiff have knowledge of such agreement and ratify the same? A. No.

"(3) What amount, if any, is plaintiff entitled to recover of the defendant? A. \$145.47."

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant excepted and appealed.

Wright & Stevens, of Wilmington, for appellant.

Rountree & Davis, of Wilmington, for appellee.

ALLEN, J. [1, 2] Negotiations and conversations preparatory to the execution of a written contract are merged in the writing, and evidence will not be received of a contemporaneous agreement which contradicts its terms. To do so would be "contrary to the well-settled rule, as stated by the Chief Justice in *Walker v. Venters*, 148 N. C. 388, where he said: 'It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well-settled rule that a contemporaneous agreement shall not contradict that which is written. The written word abides and is not to be set aside upon the slippery memory of man'—citing *Basnight v. Jobbing Co.*, 148 N. C. 350." *Cherokee County v. Meroney*, 173 N. C. 655, 92 S. E. 617.

It follows, therefore, that his honor cor-

tly excluded the evidence offered by the defendant tending to prove an agreement on the part of the plaintiff to pay the freight on the logging road, made at the time, because in direct contradiction of the contract, which imposed this duty on the defendant.

[3] The principle excluding parol evidence has no application to subsequent agreements which change or modify the original contract, and consequently it was competent to offer evidence that, after the making of the contract, the plaintiff agreed to pay the freight. *McKinney v. Matthews*, 166 N. C. 580, 82 S. E. 1036.

[4] Nor does the rule require the exclusion of the evidence of the defendant that he delivered the notes to the agent of the plaintiff upon the agreement that the notes were to be returned, if the plaintiff refused to credit them with the amount of the freight on the logging road, such evidence being received, not for the purpose of changing or modifying the contract represented by the notes, but to show that the contract was never in existence, because the condition upon which the delivery was made had not been performed, and the evidence was very material, as the freight was included in the notes, and without explanation the defendant was in the position of trying to avoid payment of the freight when he had deliberately included the amount in his notes. The authorities in support of this principle are numerous. See *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768; *Bowser v. Tarry*, 156 N. C. 38, 72 S. E. 74; *Garrison v. Machine Co.*, 159 N. C. 285, 74 S. E. 821, and cases cited.

We are also of opinion that it was error to instruct the jury, in the present state of the record, that there was no evidence of ratification by the plaintiff of the agreement by its agent to pay the freight on the logging road.

[5-7] It is true that "in order to bind a principal by ratification, assent, or acquiescence in prior acts of his agent in excess of authority actually given, a knowledge of the material facts must be brought home to him. He must have been in possession of all of the facts and must have acted in the light of such knowledge." 21 R. C. L. 928. And the same rule, requiring knowledge, ordinarily prevails when the contract of the agent has been performed, unless the performance shows knowledge, but, "where an agency has been shown to exist, the facts will be liberally construed in favor of the ratification by the principal of the acts of the agent, and very slight circumstances and small matters will sometimes suffice to raise the presumption of ratification, particularly where the act is for the benefit of the principal" (2 C. J. 492), and ratification may be "implied when the con-

duct of the principal constitutes an assent to the acts in question" (21 R. C. L. 927).

Let us then see, not whether the contract of the agent has been ratified, but is there evidence of ratification fit to be considered by a jury.

The contract was executed February 2, 1914. The defendant did not order out any fertilizers until about the middle of March, and not until the agent of the plaintiff had agreed that the plaintiff would pay the freight on the logging road. The defendant then sent his orders to the plaintiff for fertilizer, which showed that they were to be shipped over the logging road.

The plaintiff accepted the orders and prepaid all of the freight, which was contrary to the provisions of the contract, and in accordance with the agreement made by the agent. All of the fertilizers were shipped under this arrangement and the freight paid by the plaintiff, and the plaintiff made no demand on the defendant to repay the logging road freight until some time in July or later.

It does not appear that the plaintiff was compelled to pay the freight in order that shipments might be made, nor is there any evidence of any custom for the manufacturers of fertilizers to prepay freight when the contract requires the purchaser to do so, and leave the question of the payment of freight for final adjustment between the parties, and, on the contrary, the defendant offered evidence tending to prove that consignee paid freight on shipments when the contract required them to do so, and that the manufacturer was not required to make payment in order that delivery might be made.

The letter of the plaintiff of August 6, 1914, also furnishes some evidence that the agent was not without authority because the plaintiff, instead of saying that the agent had no authority to make the agreement with the defendant, says that he was "without sufficient information," and it may also be inferred from it that the agent informed the plaintiff of his contract with the defendant because it is said therein, "He was later directed to notify you that this freight would not be paid."

The fact that the plaintiff paid the logging road freight is not conclusive and may be explained, but, in the absence of explanation, taken in connection with the other circumstances, it furnishes evidence for the consideration of the jury that the plaintiff consented to the modification of the contract in accordance with the agreement with the agent, and this should have been submitted to the jury.

For the errors pointed out, there must be a new trial.

New trial.

(181 N. C. 214)

TYREE v. TUDOR et al. (No. 356.)

(Supreme Court of North Carolina. April 13, 1921.)

1. Parent and child §13(1)—Father owner of automobile not liable for son's negligence.

The mere fact that the owner of an automobile was the father of the driver whose negligence caused an accident does not make such owner liable in damages for his son's acts.

2. Master and servant §301(1)—Son driving automobile held father's servant.

Where a 16 year old boy drove his father's automobile with the latter's permission to convey a young lady to and from a dance, in so doing he was operating the car as the servant of his father, who was responsible for injuries inflicted by the son's negligence in driving.

3. Master and servant §332(1)—Parent's responsibility for son's negligent driving held for jury.

Where there was evidence that the negligence of defendant's son driving his automobile with permission was the proximate cause of the death of plaintiff's intestate, the case should have been submitted to the jury.

Appeal from Superior Court, Forsyth County; Fruley, Judge.

Action by L. P. Tyree, administrator, against George O. Tudor and others. From judgment of nonsuit, plaintiff appeals. Reversed.

The defendant Geo. O. Tudor is the father of Bynum Tudor, who at the time the plaintiff's intestate was killed in the automobile wreck was something over 16 years of age, "living at the home of his father and under his care, custody, and control." Geo. O. Tudor was the owner of two automobiles which he kept on his premises for business purposes and for the comfort and pleasure of his family—one a large Hudson touring car, and the other a Buick Six roadster. Bynum Tudor was the chauffeur for the family, drove both of the cars, sometimes driving out with his mother in the large car, and at other times with his father in the small car, and at other times alone, sometimes driving alone in the large car, and at other times in the Buick Six roadster.

On the night of June 19, 1918, there was a dance for the young people at the Country Club, which was situated on a concrete road about three miles west of Winston. Bynum Tudor invited Ruth Tyree, the plaintiff's intestate, a young girl nearly 16, to go in the car with him, and it is admitted in the pleadings that he procured the consent of his father to use the Buick Six roadster for the purpose of taking her to the dance. There is evidence that he asked permission of his father to use the large car, but his father refused him to take the small car. After the

two young people arrived at the dance it is in evidence that he did not dance, but while the others were dancing he was driving his car on the concrete road extending from Winston to the Country Club at a speed of 50 to 60 miles an hour, sometimes racing with other automobiles and sometimes with motorcycles.

The dance broke up about 1 o'clock a. m., and Bynum Tudor was among the last to leave the club. In this car besides himself as chauffeur, was his older brother, George, and Ruth Tyree. The evidence is that he drove at a speed of 50 to 60 miles an hour, with the sparks coming out of the Buick's manifold some 7 or 8 inches long, passing car after car on this crowded thoroughfare on his way to the city. In passing Martin Goodman's car at this speed, he turned in too short and side-swiped the Goodman car. The impact of the light Buick Six roadster with the heavier car of Goodman, threw the Buick roadster out of the road, whirling it over and over through the barb wire fence into a field alongside the road, cutting down three posts, one of them 6 inches square, throwing the car 36 feet, leaving it upside down with its wheels in the air and its front pointed in the opposite direction to that it was going. Bynum and his elder brother, who was in the car with them, were thrown out in a senseless condition and the body of the young lady was found hanging on the strands of the barb wire fence in a condition so distressing and mangled that one of the men who attempted to move it fainted. The practically lifeless body was rushed to the hospital, where she died almost immediately. Its condition was such that the authorities would not permit her parents to view it.

The road was 50 feet wide, 20 in the center being concrete and 15 feet on each side being dirt road. Goodman testified that he was driving on the right-hand side of the concrete in 2 feet of the edge, and that Tudor came up from behind without blowing any horn and struck his car, and at the time going probably 60 miles an hour. The distance to which Tudor's car was thrown is also some evidence of the great speed he was going. There was evidence that Tudor was in the habit of driving his father around town in his car.

At the close of the plaintiff's evidence, the court rendered a judgment of nonsuit, and the plaintiff appealed.

Swink, Korner & Hutchins and Jones & Clement, all of Winston-Salem, for appellant.

Manly, Hendren & Womble, Parrish & Deal, and Holton & Holton, all of Winston-Salem, for appellees.

CLARK, C. J. The plaintiff bases his cause of action upon the relation existing

between Geo. C. Tudor and his minor son as master and servant in two aspects:

(1) That on this trip Bynum Tudor was acting as chauffeur under or with the consent and approval of Geo. C. Tudor.

(2) That, where the parent maintains an automobile for social purposes by his family, he should be held liable for an injury sustained through its negligent operation while being used by a member of the owner's family, upon the theory that the car under such circumstances is being used for the purpose for which it was kept, and that the person—a member of the family—is operating it as the owner's agent. This includes cases where, the parent keeping the automobile for the comfort and pleasure of his family, a member of the family who is authorized, expressly or impliedly, to use it for such purpose, by his negligent operation of it causes an injury to another. This renders the owner liable.

[1] This court has often held that the mere fact that the defendant, the owner of the car, was the father of Bynum Tudor does not make him liable in damages for his acts. *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096; *Bilyeu v. Beck*, 178 N. C. 481, 100 S. E. 891. But in *Linville v. Nissen* the father not only did not authorize, but expressly forbade, his son to use the machine, and in *Bilyeu v. Beck* the daughter acting as chauffeur was more than 21 years of age, and the evidence tended to show that she was acting solely for herself, and not in any manner for her father or by his permission. In *Wilson v. Polk*, 175 N. C. 490, 95 S. E. 849, the evidence was that the owner was in the car at the time of the injury and was going for her own purposes to her farm.

On the other hand in *Clark v. Sweaney*, 175 N. C. 280, 95 S. E. 568, reaffirmed on rehearing 176 N. C. 529, 97 S. E. 474, the minor son was driving the automobile with the implied consent of his father, who was therefore held liable for his negligence. This consent was implied by the fact that the automobile was purchased for the use of the family and the minor son was permitted to operate it as a member of the family and had his mother with him in the automobile and the father was held responsible. In the present case permission was expressly given to the son to use the car for a social purpose and his invitation to the young lady to go with him was extended by the permission of his father to him to use the car for that purpose. He also carried in the car his older brother, and was in the habit of driving his father in this car.

In *Brittingham v. Stadlem*, 151 N. C. 300, 66 S. E. 128, it was held that, while the mere relationship of parent and child does not make the former liable for damages for the tort or negligent act of the other, the

parent is liable when he authorized or permitted the child to do the act, or the child was acting as his servant or his agent. In that case the defendants employed their 12 year old son as a clerk in a pawnshop, where, among other things secondhand pistols were dealt in, and while the boy was carelessly handling a pistol on which a loan was asked, he unintentionally shot and injured another customer in the store, and it was held sufficient to submit the case to the jury upon the question of the parents' actionable negligence.

In *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134, the court held that it is negligence per se for one under the prohibited age (16) to run an automobile; still the father would not be liable unless the negligence of the minor son was the proximate cause of the injury; and, while ordinarily a father is not held responsible for the injury caused by the negligence of his minor son done without his knowledge and consent, such consent may be inferred as in that case. In that case *Brown, J.*, says as follows:

"A somewhat similar case has been decided in South Carolina, where it is held that a person who provided an automobile for the pleasure of his family, which his son was authorized by him to operate, is held liable for his son's negligence when driving the car for the pleasure of himself and his friends. *Davis v. Littlefield*, 97 S. C. 171."

On the second appeal, in *Taylor v. Stewart*, 175 N. C. 199, 95 S. E. 167, the verdict in favor of the father was sustained, there appearing evidence:

"That death of plaintiff's intestate was an unavoidable accident, which a prudent chauffeur, authorized by law to run a machine, could not by exercising reasonable care have avoided."

In the case at bar it is admitted in the answer that Bynum Tudor was acting as an escort for the plaintiff's intestate, taking her to and bringing her home from the dance, and that as a result of a collision the plaintiff's intestate received injuries from which she died, and it is also in evidence that the defendant Geo. C. Tudor the day after the occurrence stated that his son Bynum had asked his permission to take his car to carry Ruth to the dance at the Country Club and wanted his large car, but the father had another engagement that night and could not let his son have that car, but he did let them have his small car to take Ruth to the Country Club to the dance. There was ample evidence to go to the jury; if believed, that the negligence of Bynum was the proximate, and indeed the sole, cause of the injury.

[2, 3] Upon the evidence the plaintiff was driving the car by the permission of the father, knowing that it was to be used for the conveyance of the young lady to and from

the dance, a social purpose. He was therefore operating the car as the servant of his father, and for the negligent injuries inflicted by him his father was responsible; it being within the scope and purposes for which the car was bought and used. There being evidence that the negligence of the son was the proximate cause of the death, the case should have been submitted to the jury.

In another recent case, *Reich v. Cone*, 180 N. C. 287, 104 S. E. 530, the owner of an automobile who had loaned his machine to his servant to use solely for his own purposes was held not liable in damages for the servant's negligence because it appeared that the servant was competent to drive the car and it was not being used by him in the employer's service. In the present case the car was being used for the social purposes of the family, and with the knowledge and consent of the father for that purpose, and there is no evidence that the minor son was competent to drive the car. Indeed, the evidence of his conduct that night, and in this very occurrence, tends to prove that he did not have sufficient discretion for that purpose, and his father is liable on that ground also if the jury should so find the fact. It was his duty not to intrust the safety of the young lady to his son unless he knew that he was careful and prudent in the operation of the machine. To hold otherwise would be dangerous to the safety of life and limb.

We will not lengthen this discussion by citations of numerous authorities from other states in which the decisions cannot all be reconciled or cases where the facts may more or less differ from the one at bar.

Upon our own authorities, and upon the reason of the thing, we think this case should have been submitted to the jury, and the judgment of nonsuit is reversed.

(181 N. C. 530)

STATE v. MILLS. (No. 50.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Highways \Leftrightarrow 186 — Municipal corporations \Leftrightarrow 707—One may be guilty of reckless or careless driving within the statute without exceeding speed limits.

The proviso of C. S. § 2618, was intended to define three acts as per se constituting reckless and careless driving where certain speed limits on highways and streets are exceeded and each of these acts is a separate and distinct crime, but it was not intended to restrict reckless or careless driving to the acts enumerated, so that one may violate the law by driving carelessly or recklessly without exceeding the speed limits.

2. Criminal law \Leftrightarrow 260(13)—Superior court may permit amendment making affidavit more certain upon appeal from recorder's court.

Where the original affidavit in recorder's court charged the defendant with reckless and careless driving and with driving faster than allowed by law, and also with the commission of an assault upon a person struck by the automobile, and the defendant appealed from his sentence upon conviction thereunder, the statute gives the superior court ample power to permit an amendment making the affidavit more certain and particular as to the special accusation (C. S. 1919, § 1500, rule 12), the matter being within the court's discretionary power (Rev. Code, c. 62, § 22; chapter 8, and Code, § 906).

3. Criminal law \Leftrightarrow 260(13)—Original warrant in recorder's court, charging violation of road laws, may be amended in superior court.

Where the original warrant in recorder's court charged defendant in a general way with all that is charged in the amendment allowed by the judge of the superior court, upon appeal, in the form of a bill of indictment, each count specifying a different offense, but all embracing an assault, reckless driving, and driving at an unlawful speed, the original warrant should be construed liberally, and, the meaning of the law being there the amendment making it more clear, is proper, the trial being anew (C. S. § 4647).

4. Indictment and information \Leftrightarrow 130—Counts for violation of speed law on highway outside of and in town may be joined.

The right to join three separate counts, alleging three different crimes at three different places, namely exceeding 25 miles an hour on public highway outside of a city, 18 miles an hour in the residential section, and 10 miles an hour in the business section of a city, is given by C. S. § 4622; the offenses being of the same general class.

5. Criminal law \Leftrightarrow 878(1), 1216(2)—Separate verdicts proper on conviction for exceeding speed law on three counts, and each sentence may begin at expiration of preceding one.

Where three separate counts accused defendant of exceeding the speed allowed by law on a public highway and on a street in residence section and a street in a business section, each count is in fact and theory a separate indictment, and it was proper for the jury to give a separate verdict on each count, and each sentence could be made to begin at the expiration of a preceding one.

6. Highways \Leftrightarrow 186 — Municipal corporations \Leftrightarrow 707—Conviction of driving on country road and in residence and business district of town held to be of three offenses, and not one.

Accused was convicted of three and not one offense, where he was convicted on a warrant under C. S. § 2618, charging violation of the speed law in driving on a country road and in the residence and business districts of a town, since the three acts constitute three separate offenses.

7. Criminal law §90(5)—Recorder's court of Nash county has concurrent jurisdiction with justices of the peace in the matter of violation of speed law on roads and streets.

The recorder's court of Nash county, N. C., has concurrent jurisdiction with justices of the peace of offenses within the jurisdiction of the latter, and also jurisdiction of other offenses which are made petty misdemeanors (Pub. Loc. Laws 1911, c. 176), and the recorder's court had jurisdiction of the offenses of exceeding the speed limit on the public highways and in a town, and also of the same offenses as alleged by the amended warrant on appeal to the superior court, and such jurisdiction is sustained, not only under the local statute, but also under the general statute concerning the recorder's courts.

Appeal from Superior Court, Nash County; Cranmer, Judge.

G. V. Mills was convicted in the recorder's court of driving an automobile in a manner in violation of law and committing an assault and battery while doing so, and he appealed to the superior court, and from a conviction therein he appeals. No error.

Defendant was charged before the recorder's court of Nash county with "unlawfully, willfully, and feloniously driving an automobile recklessly, carelessly, and faster than allowed by law, and committing an assault and battery while so doing upon J. R. Wheelless and others, with intent to kill, injure and maim, and damage said J. R. Wheelless, contrary to the form of the statute," etc. He was tried upon the charge before the recorder's court, and convicted and sentenced to six months' imprisonment, and assigned to work on the public roads, and he appealed. The law alleged to have been violated is section 2618 of the Consolidated Statutes. The statute creates several different offenses as to driving motor vehicles on the public highways of the state, that is, driving recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person. The proviso is that operating a motor vehicle at a rate of speed exceeding 25 miles per hour on any public highway outside the limits of any incorporated city or town, or at a rate exceeding 18 miles per hour in the residential portion of any city, or at a rate exceeding 10 miles per hour in the business section, shall be a violation of the statute.

W. M. Person, of Louisburg, for appellant. James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] The proviso was intended to define three acts which should per se constitute reckless or careless driving, and the

commission of each of these acts is a separate and distinct crime. There may be other acts of reckless or careless driving within the meaning of all that goes before the proviso, as it was not the purpose of the Legislature to restrict reckless or careless driving to those acts enumerated in the first proviso of section 2618. A person may drive carelessly, or even recklessly, without exceeding the prescribed speed limits, and this case furnishes a clear illustration of it.

[2] Now as to the power of amendment. It will be observed that in the original affidavit upon which the warrant was issued by the recorder, defendant was charged with reckless and careless driving, and with driving faster than is allowed by law, and also with the commission of an assault. The defendant appealed from the sentence of six months in prison, and in the superior court the presiding judge was requested to allow an amendment of the affidavit, and of the warrant which refers to it, so that the charge might be made with greater certainty and particularity, and the defendant was thereby informed of the special accusation made against him. We do not see why he should complain of this, as it favored him, because it enabled him to make better preparation for his defense. But whether so or not, the statute gives the judge ample power to permit such amendments to be made. Its terms are very broad and inclusive, as will appear on its face. This is the law, it being in Consolidated Statutes of 1919, § 1500, rule 12 (Revisal of 1905, § 1467, rule 11), and reads as follows:

"No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment."

In the note to section 1500 (rule 12) of the Consolidated Statutes will be found the cases in which the exercise of the power in a very liberal manner has been upheld. It was contended that under this section the court has no power to strike out the offense charged in the lower court, and insert an entirely new and different one. *State v. Taylor*, 118 N. C. 1262, 24 S. E. 526; *State v. Vaughan*, 91 N. C. 532; *State v. Crook*, 91 N. C. 536. The reason for the change in the statute extending the power of amendment so as to embrace both civil and criminal cases, matters of substance as well as matters of form, and the power to amend before or after judgment is perfectly obvious. It was because a justice of the peace was supposed to

lack technical learning and skill in framing process and pleadings, whereas the lawyer who practiced in the superior courts, and the solicitor, were supposed to have both, and also the judge, and no harm could be done to the defendant, or to the opposite party, by making the process or pleading conform, in some degree, to the rules of law. It produced, at least, greater certainty in legal procedure. No party could be prejudiced by it unless there was a departure from the original charge in the warrant. A clear analysis of this section (which was section 908 of the Code) is made by Justice Ashe in *State v. Vaughan*, supra, showing that the exercise of the power is discretionary, and that the power itself, by gradual amendment of the statute, is very broad, and finally was extended to matters of substance, whereas formerly it related only to matters of form and was confined to civil actions. Rev. Code, c. 62, § 22, chapter 3, and the Code, § 908.

[3, 4] Applying these well-settled principles to this case, we find that the original warrant, while somewhat informal in its allegations, embraced, in a general way, all that is charged in the amendment allowed by the judge, in the form of a bill of indictment, each count specifying a distinct and different offense, but all embracing an assault, reckless driving, and driving at an excessive speed or a speed prohibited by the law. We should construe the original warrant with some liberality rather than with technical rigidity and, if the meaning of the law is there, it may be amended to express it more clearly in the appellate court, where the trial is anew. Consolidated Statutes, § 4847. The charges here are for reckless driving and overspeeding in the three several respects mentioned in the statute. Defendant was acquitted of the assault, and properly convicted of the three acts of driving at an unlawful rate of speed. The latter were committed on three different occasions and at three different places on the public highway and on the streets of Spring Hope, defendant driving more than 18 miles in its residential and more than 10 miles in its business section. They were therefore separate and distinct crimes.

On the question of the power to amend the warrant and the duty of the court to pursue a liberal policy with respect thereto, the following cases are pertinent: *State v. Cauble*, 70 N. C. 62; *State v. Smith*, 103 N. C. 410, 9 S. E. 200; *State v. Baker*, 106 N. C. 758, 11 S. E. 360; *State v. Yellowday*, 152 N. C. 793, 67 S. E. 480; *State v. Currie*, 161 N. C. 276, 76 S. E. 694; *State v. Poythress*, 174 N. C. 809, 93 S. E. 919; *State v. Price*, 175 N. C. 804, 95 S. E. 478; *State v. Gillikin*, 114 N. C. 832, 19 S. E. 152; *State v. Telfair*, 130 N. C. 645, 40 S. E. 976; *Stone v. Railroad*, 144 N. C. 220, 56 S. E. 932. The later cases: *State v. Hyman*, 164 N. C. 411, 79 S. E. 284;

State v. Publishing Co., 179 N. C. 720, 102 S. E. 318. The warrant in this case is quite as amendable, under the provisions of Consolidated Statutes, § 1500, rule 12, as were the warrants in any of the cases just cited. The right to join the counts in one warrant is specially given, and the offenses are all of the same general class. Consolidated Statutes, § 4622.

[5] Each count, is in fact and theory, a separate indictment, and a general verdict of guilty applies to each and every count. *State v. Toole*, 106 N. C. 736, 11 S. E. 168. But here the jury has given, not a general verdict, but a separate verdict on each count. The punishment was properly imposed, and each sentence could be made to begin at the expiration of a preceding one. *State v. Hamby*, 126 N. C. 1066, 35 S. E. 614; *State v. Cathey*, 170 N. C. 794, 87 S. E. 532; *In re Black*, 162 N. C. 458, 78 S. E. 273.

[6] The defendant contends, though, that only one offense was committed, but we cannot accede to this proposition, as it is untenable, if the evidence is to be accepted as true. Each of the three acts denounced by the statutes, driving at a rate of speed exceeding 25 miles, 18 miles and 10 miles in the three several places mentioned constitutes a separate case of careless or reckless driving, the latter being but an intensive expression of the former, meaning rashly negligent, or utterly careless, as if heedless, or as if indifferent to or regardless of consequences. As we have said, a person may drive carelessly, or even recklessly or heedlessly without necessarily driving with excessive speed, though if he does overpass the speed limit, he violates the statutes by its express terms. Each of these offenses relating to speed have different elements, and it would be physically impossible to commit all of them at one and the same time or at one and the same place, because they refer to different localities, which are separated from each other. Defendant could not be in two places at one and the same time, and certainly not in three. He might drive at an excessive speed, over 25 miles per hour, on a public highway in the country for only a half mile, and at all other times he may keep his motorcar within the speed limit, and yet he would violate the law, and the same would equally apply to a street in the residential or business section of a town, using only a part of the street for the unlawful purpose, and his act would likewise be a violation of the statute. So that there were three violations in this instance. The motion to quash was properly overruled, as the statute cited allows a joinder of the counts upon which he was convicted. Consolidated Statutes, § 4622 (Laws of 1917, c. 168).

[7] As to the jurisdiction: The recorder's court in Nash county has concurrent jurisdiction with justices of the peace of offenses

within the jurisdiction of such justices, and also jurisdiction of other offenses which are made petty misdemeanors. Pub. Loc. Laws 1911, c. 176. The recorder's court had jurisdiction then of the offenses charged in the warrant, and also of those alleged in the superior court, by way of amendment. If there was no local statute, the general statute concerning recorder's courts would sustain the jurisdiction.

Reviewing the entire case, and record, we find that no error was committed by the judge at the trial.

No error.

(181 N. C. 180)

ROE v. JOURNIGAN. (No. 249.)

(Supreme Court of North Carolina. April 6, 1921.)

1. Deeds \S 66—Evidence of a tender and refusal of a deed $3\frac{1}{2}$ years after recording held not sufficient to rebut presumption of delivery.

Evidence that a deed was tendered and refused $3\frac{1}{2}$ years after it was recorded held not sufficient to go to the jury to rebut the presumption of delivery arising from its registration, especially when a second deed recited it was intended to cancel the first.

2. Evidence \S 273(3) — Testimony held inadmissible as declaration in interest of vendor.

In an action involving the validity of a deed granting a life estate to defendant's grantor, evidence of vendor's declaration that such grantor had refused to accept the deed because it did not convey a fee-simple estate, not shown to have been made prior to the registration to such deed, was inadmissible, being also a declaration in the interest of such vendor, who had subsequently made another deed granting the fee.

3. Life estates \S 23 — Full warranty deed by life tenant conveys only life estate.

Where defendant received a warranty deed and his grantor had only a life estate, such deed conveyed such life estate.

4. Deeds \S 177 — Deed conveying to person not in being held not revocable under law at time made.

Acts 1893, c. 498 (C. S. \S 996), providing that a deed conveying an interest to a person not then in being is revocable, is without application to a deed made prior to such act; the rights to the parties thereunder being fixed by prior statute, under which it is not revocable.

5. Deeds \S 66 — Evidence rebutting presumption of delivery held insufficient to go to jury.

Where owner of land made a deed to his son, defendant's grantor, giving a life estate, and the deed was recorded, and valid if accepted, and subsequently the father gave the son a warranty deed, testimony, offered to rebut the presumption of delivery arising from the registration of the former deed, held insufficient to go to the jury.

6. Infants \S 116—Counsel fees for service for infant must be arranged by agreement between counsel and guardian.

In an action by an infant for the recovery of a right to land, the court may not fix compensation for counsel; the matter of attorney's fees being for adjustment between counsel and the infant's guardian.

Appeal from Superior Court, Franklin County; Kerr, Judge.

Action by Bennie Roe by his next friend against James O. Journigan. Directed verdict for the plaintiff, and the defendant appeals. No error.

This case has been before us twice heretofore. *Roe v. Journigan*, 175 N. C. 261, 95 N. E. 495, and *a. c.*, 179 N. C. 687, 102 S. E. 498.

The facts are fully stated in the first appeal. 175 N. C. 262, 95 S. E. 495. William Roe executed a deed August 26, 1881, to plaintiffs' father, W. S. Roe, by which he conveyed to him a life estate, with remainder to his then wife for life if she survived him, and then to his children. This deed was recorded May 27, 1882. On January 2, 1886, he made a second deed to his said son W. S. Roe, in fee simple, for the same tract of 50 acres which was recorded. Thereafter W. S. Roe married a second time, and died July, 1915, leaving the plaintiffs, his children by his second wife, surviving him. The controversy is as to the validity of the deed of 1881.

W. S. Roe and his second wife conveyed the land to the defendant, and the deed was duly recorded. This action by the grandchildren of William Roe, who are the children of W. S. Roe by his second wife, against Journigan, the grantee of the deed by W. S. Roe, raises the question whether the deed for life estate to W. S. Roe was ever delivered. On this trial the court excluded testimony offered, and directed a verdict for the plaintiffs, and the defendant appealed.

B. T. Holden and W. H. Yarborough, Jr., both of Louisburg, for appellant.

W. H. & Thos. W. Ruffin and W. M. Person, all of Louisburg, for appellee.

CLARK, C. J. The real controversy in the trial is as to whether the excluded evidence was competent as tending to rebut the presumption of the delivery of the deed of 1881, which was raised by its registration. When the case was first here (175 N. C. 261, 95 S. E. 495), the court held that evidence of the declaration by W. S. Roe that he would not accept the deed of 1881, conveying a life estate, was incompetent, because he was not a party to the action, nor was he one under whom the plaintiff claims, as he derives his title from the deed of William Roe, and not from W. S. Roe, and, if admissible at all, it

could only be so as a declaration against interest, which it was not, but was a self-serving declaration on the part of W. S. Roe, and therefore incompetent.

On the second appeal (179 N. C. 686, 102 S. E. 498) the judge admitted the testimony of W. S. Roe to the same purport, upon the ground that it appeared that W. S. Roe was not the sole heir of his father, and had moved from the land in controversy, and therefore it was not a self-serving declaration, but the court again held there was error, because this did not show that the declaration was against the interest of the declarant.

[1] On the trial from which this appeal is taken the defendant offered to prove by Robert Harris that between 1881 and prior to 1886—that is, after the execution of the first deed and before the execution of the second—the witness was at William Roe's house, W. S. Roe being present; that William Roe had the deed of 1881 in his possession, and offered it to W. S. Roe, who refused to take it, saying he did not want any land, unless he could have it absolutely to do as he pleased with, and that he would not take a life estate.

On both the former trials we held that what W. S. Roe said to another witness was not competent, because not a declaration against interest, but here the defendant offered to show what William Roe and W. S. Roe did in respect to the delivery of the deed and the words accompanying such act, not as declarations against interest, but as part of the *res gestae*, showing that in fact there was no delivery, and the defendant contends that this evidence was therefore competent. But the witness also stated that this occurrence took place about 12 months before Journigan bought the land in December, 1886 (which would have been about December, 1885), and therefore 3½ years after the first deed had been recorded, and we do not think the evidence of a tender and the refusal by W. S. Roe of the deed at that date was sufficient evidence to go to the jury to rebut the presumption of delivery arising from the registration of the deed, May 27, 1882, especially when the second deed to W. S. Roe recites that it was intended as a cancellation of said first deed.

[2] The defendant also excepts because of the rejection of the testimony of Edward L. Harris, which was offered to prove that "some time between August, 1881 and January, 1886," William Roe stated to the witness that the tract of land belonged to himself, William Roe, and that W. S. Roe had refused to accept the deed because it did not convey a fee-simple estate. It does not appear therefore that this declaration by William Roe was made prior to the registration of the first deed, and, further, it was a declaration in the interest of William Roe.

[3, 4] It appears that the defendant, Jour-

nigan, obtained a deed with full warranty from W. S. Roe in December, 1886, and has been in possession 32 or 33 years, claiming it his own in good faith, and at the time of this conveyance W. S. Roe had no children. The defendant also pleads the statute of limitations, but this deed was certainly a conveyance of the life estate of W. S. Roe, who survived until 1915, and this action was begun in November, 1915. At that time the plaintiff was, and still is, an infant. The brother was then 25 years of age, and is not a party to this action, except as a next friend to the infant plaintiff, who alone recovers. It seems to be a hardship upon the defendant, especially as under Act 1893, c. 498, now C. S. 996, a deed such as this, conveying an interest to a person not then in being, is revocable. It is true that according to the evidence the plaintiff has been born since the act of 1893, but the rights conferred under that deed were fixed by the statute in force at the date of its registration in 1882. *Roe v. Journigan*, 175 N. C. 263, 95 S. E. 495.

[5] What the defendant may be entitled to recover for betterments placed upon the land under bona fide belief of the ownership of the legal title (C. S. 701), and by reason of the warranty of the father, to the extent of property, if any, descended upon the plaintiff from the estate of his father (C. S. 1741), are matters not now before us. We can only declare that the testimony offered to rebut the presumption of delivery arising upon the registration of the deed in 1882 was not sufficient to go to the jury.

[6] The allowance of \$500 to counsel for the infant is irregular, and must be stricken out. The compensation should be fixed by proper proceedings before the clerk (*Speight v. Railroad*, 161 N. C. 87, 76 S. E. 684), and the making the allowance a lien upon the land and directing a sale, if not paid, is not authorized, so far as we know, by any precedent. The counsel who so faithfully and ably represented the infant plaintiff in this case are entitled to compensation, but it must be adjusted with the guardian. It may be that the infant already has other property and a guardian, or, if not, one must necessarily be appointed to take charge of the property recovered in this case, and in either event the guardian will adjust the fee with the counsel, which will be passed upon by the clerk in approving the accounts.

In *Midgett v. Vann*, 158 N. C. 130, 73 S. E. 802, the court says that:

Counsel fees in favor of the successful party "were abolished by statute in 1871. In many states attorney's fees are allowed to the successful litigant, but it is not so in this state and in some others, nor in the federal courts. *Railroad v. Elliot*, 184 U. S. 530; *Hyman v. Devereux*, 65 N. C. 589; *Stringfield v. Hursh*, 94 Tenn. 425. The opinion in this latter case is an elaborate discussion on this subject, and gives the states where attorney's fees are re-

coverable and those where they are not, placing North Carolina in the last-named class. See, also, *Dolman v. Trust Co.*, 139 N. C. 212."

In regard to allowance of fees to counsel against their own client, it was said in *Mordcau v. Devereux*, 74 N. C. 673:

"The question is decided. *Patterson v. Miller*, 72 N. C. 516. This court has never interfered between attorney and client in making allowances for professional services, and we are not inclined at this late day to assume the power to do so. We make allowance to a clerk for stating an account, or to a commissioner for making sales, on the ground that the work is done by order of the court. But we have never supposed that we could be called on to settle fees between client and attorney, although there be a fund in the keeping of the court."

In this present case there is no fund in the keeping of the court even, and this matter should be adjusted as above indicated, when the infant can be represented by his guardian subject to the approval of the proper tribunal in passing upon his accounts.

No error.

(115 S. C. 486)

WALKER v. LEE et al. (No. 10579.)

(Supreme Court of South Carolina. March 10, 1921.)

1. Negligence ⇨80—Contributory negligence precludes recovery.

Generally contributory negligence prevents a recovery.

2. Highways ⇨172(1)—Traveler not required to keep to right of center unless other traveler is approaching from opposite direction.

Cr. Code 1912, § 617, and Civ. Code 1912, § 2157, requiring travelers on roads to keep to the right of the center, do not require a traveler to stay to the right of the center at all times, but merely requires him to travel to the right of the center when a traveler is approaching from the opposite direction.

3. Highways ⇨175(1) — Driver of automobile to right of center not excused from exercising ordinary care to avoid injury.

The mere fact that automobile driver was driving to the right of the center of the road did not relieve him from exercising due and ordinary care to prevent a collision.

4. Highways ⇨175(1) — Automobile driver required to drive to left of center if necessary to avoid collision.

Automobile driver who was driving to the right of the center of the road, on approach of automobile from opposite direction, was required to drive to opposite side of road if in so doing he could have avoided collision notwithstanding Cr. Code 1912, § 617, and Civ. Code 1912, § 2157 requiring traveler on road to keep to right of center.

5. Negligence ⇨6—When violation of statute or ordinance is negligence per se, technical violation required to avoid injury to person or property.

While the violation of a statute or ordinance is negligence per se, a person is bound to technically violate either, if by so doing he can avoid inflicting injury to person or property.

Fraser, J., dissenting.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Albert Walker against Robert E. Lee and another. Judgment for plaintiff and defendants appeal. New trial granted.

Melton & Belser, of Columbia, for appellants.

D. W. Robinson, of Columbia, for respondent.

WATTS, J. This is an appeal from a judgment entered in this case for a verdict for \$400 actual damages. The action was for damages in tort for injuries caused by the alleged negligence of defendants in driving their automobile. The defense was a general denial and alleged contributory negligence on the part of the plaintiff. The cause was tried by Judge Whaley and a jury in the county court for Richland county in March, 1920. The exceptions, seven in number, complain of error in his honor's charge to the jury and in failing and refusing to charge certain requests submitted by defendants, and that the verdict was contrary to law and evidence.

The principal point raised by all of the exceptions, and the question that underlies all of the exceptions, is whether, under section 617 of the Criminal Code of 1912, the plaintiff is to be held free from contributory negligence when by the exercise of due care he should have gone around behind defendant's automobile.

[1] Under the general principle of law, contributory negligence prevents a recovery, and his honor so declared, but his honor made an exception in this case, and held that under section 617, Criminal Code, and section 2157, Civil Code, 1912, the plaintiff, even if in the exercise of due care he should have gone around behind defendant's automobile and to the left of the center of the road, in so doing was under no obligation to do so by reason of the statutes, and was not guilty of contributory negligence. His honor was clear-cut and concise on this point and made it clear to the jury.

[2-5] We think his honor was in error. A proper construction of the statutes does not require that one should at all times stay in the right of the center of the road, but it means that a party must take the right

when he is meeting one, so as to give the party coming from the opposite direction his right of way unobstructed. A party has a right to travel on either side of the road, provided no one is coming from the opposite direction, and provided he is not obstructing the passage of any other person. A traveler can cross from one side to the other, provided no one is there, provided he obstructs no one's passage, and provided he injures no one by so doing, in person or property. When one violates a statute or ordinance, he is guilty of negligence per se, but he is bound to technically violate either if by so doing he can avoid inflicting injury to person or property. The question should have been submitted to the jury whether Walker could by the exercise of reasonable care have avoided the collision. In this case the mere fact that he was where he had a right to be under the law does not relieve him from exercising due and ordinary care, such as an ordinarily prudent person is required to do, to prevent a collision and avoid injury to person and property. Even though a person is driving where he has a right to, he must act under the emergencies of any case and exercise due care and circumspection, so as to prevent collisions and injuries, provided he does not obstruct the rights of the others traveling in a different direction.

The exceptions are sustained, and a new trial granted.

New trial.

GARY, C. J., and COTHRAN, J., concur.

FRASER, J. (dissenting). I cannot concur in the majority opinion in this case. Both the plaintiff and the defendant were using on a public highway dangerous machines. They were not only dangerous to foot passengers who must cross the highway, but to other persons who use these dangerous machines along the highways. The state and city governments have found it necessary to enact stringent rules for the use of the highways by these machines. There is no such thing as absolute safety, but, in order to secure a reasonable degree of safety to the traveling public, it is necessary that the rules be clear and their observance strictly enforced. The rule has, so far as this case is concerned, been made clear, and the courts should strictly enforce it. The defendant was not only where he had no right to be, but where he was forbidden to be. The plaintiff was not only where he had the right to be, but where the law commanded

him to be. If under this condition the defendant has the right to the defense of contributory negligence, all the protection afforded by the law is lost. Every lawbreaker will be permitted to take the forbidden side of the highway and force the man who is trying to observe the law to become himself a lawbreaker, or take the consequence at his peril. I do not mean to say that a man on the right of the highway has the right to willfully ride down and intentionally injure the wrongdoer, but I do not think that the lawbreaker is entitled to the protection of the doctrine of contributory negligence. I think that the only duty a law observer owes to a lawbreaker is "not to intentionally injure him." The disposition of many drivers of dangerous machines is to proclaim to the rest of the world:

"You see me coming, or, by reasonable diligence, can see me coming. Get out of my way at your peril."

I do not think the courts should sustain the claim, and yet that is, in my judgment, just what the court is doing when it allows the defense of contributory negligence.

It may be that, the object of the law being to prevent accidents from collisions, one may go to the left, on some unfrequented road, where there is no apparent danger of collision, but even then he assumes the risk of an error of judgment. This may be strict and harsh, and at times inconvenient, but the strictness, harshness, and inconvenience does not compare with trail of the lawbreaker, marked as it is by broken laws, broken heads, broken bones, and the graves of the dead. There may be such a thing as discretionary obedience to law (I doubt it), but in my judgment it does not apply to the observance of traffic laws when dangerous machines are used.

The charge of Judge Whaley was, in my judgment, more favorable to the appellant than they had the right to ask. He charged the jury that the plaintiff was liable for contributory negligence unless, in order to avoid the accident, he would have been required to cross the center of the street, which was forbidden by law. I am very clear in my own mind that the law does not require a man to violate the law in order to avoid the unlawful acts of another. Judge Whaley charged the jury that the plaintiff was not required to violate the law in order to avoid the admittedly unlawful conduct of the defendant. I think he was clearly right, as far as he went, and, if he erred, it was in favor of the appellant.

For these reasons, I dissent.

(129 Va. 638)

**BOARD OF SUP'RS OF LOUISA COUNTY
v. BIBB, Commonwealth's Atty.**(Supreme Court of Appeals of Virginia.
April 1, 1921.)**Counties** ⇨ 174—**States** ⇨ 116, 119—**Statutes** authorizing county bond issue to improve state highways, and providing for reimbursement of county by state, held constitutional.

Acts 1920, c. 213, authorizing bond issue by county for improvement of state highways, and Acts 1920, c. 184, authorizing the county to improve a section of the state highway system, and providing for reimbursement of county by state for amount expended therefor, held not violative of Const. § 184, as it existed at time of their enactment, prohibiting the state from contracting debts for other than specified purposes, or of section 185, prohibiting state from assuming indebtedness of any county, or of section 187, requiring every law creating a debt to provide for a sinking fund for its payment.

Error to Circuit Court, Louisa County.

Proceeding by W. C. Bibb, Commonwealth's Attorney, against the Board of Supervisors of Louisa County. Judgment for plaintiff, and defendant brings error. Reversed.

W. C. Bibb, of Louisa, in pro per.

PER CURIAM. The order of the court below under review in this case contains the following decision, namely:

" * * * That the act of the General Assembly of Virginia under which the board of supervisors of Louisa county, Va., propose to issue the \$200,000 of bonds, entitled 'An act to authorize the county of Louisa to borrow money and issue bonds for a sum not exceeding two hundred thousand dollars (\$200,000.00),' which act was approved March 16, 1920, and is chapter 213 of said Acts of 1920 (pages 308, 309), is unconstitutional, and that the board of supervisors of Louisa county, Virginia, have no right to issue any bonds under said act, nor to make any levy upon the property in the county of Louisa under the provisions of said act, and that their order of March 12, 1921, is illegal, because of the unconstitutionality of the said act, and the said order is hereby annulled by this court."

It appears from the record that the questions raised in the court below with respect to the validity of the statute aforesaid were based on the position that, as such statute was enacted for the purpose of enabling the county of Louisa to obtain the benefit of the statute contained in Acts 1920, p. 268, entitled "An act to anticipate by counties, or otherwise, the construction of the state highway system," they are both in conflict with

section 184 of the Constitution of Virginia as it stood at the time such statutes were enacted, and with sections 185 and 187 of such Constitution as they stood and now stand. The court is of opinion that the position mentioned is not well taken, that neither of the statutes in question are in conflict with the sections of the Constitution of the state aforesaid, but that both of such statutes are constitutional and valid.

The order of the court below under review will therefore be reversed and annulled, and this court will enter such order as that court should have entered, namely, to the effect that the board of supervisors of Louisa county have the right to issue bonds under the aforesaid act approved March 16, 1920 (being chapter 213 of the Acts of 1920, pp. 308, 309), and that the order of such board, aforesaid, of March 12, 1921, is in that and in all other particulars drawn in question upon this appeal legal and valid in all respects.

Reversed.

(129 Va. 695)

NEW YORK, P. & N. R. CO. v. CHANDLER.

(Supreme Court of Appeals of Virginia. Jan. 20, 1921. Rehearing Denied April 6, 1921.)

1. Appeal and error ⇨ 525(1), 538—Instructions are not part of record unless made so by bill of exceptions or certificate.

Instructions are no part of the record in an action at law unless made so by bill of exceptions or certificate in accordance with the statutory requirements on that subject (Acts 1916, c. 416, now Code 1919, § 6252; Acts 1916, c. 406, now Code 1919, § 6253), and instructions could not be certified after 60 days under Code 1919, § 6341, which merely authorizes selections from the record as already completed.

2. Carriers ⇨ 177(3)—Loss suffered by reason of delay held within Carmack Amendment, rendering initial carrier liable.

Loss for consequential damage which shipper suffered of the whole of the value of potatoes by reason of his loss of the sale of them which he had made at a stipulated price, caused by negligent delay in the transportation, followed by the subsequent conversion of the goods by the wrongful sale of them by the terminal carrier, was within the operation of the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) which makes the initial carrier liable for any loss, damage, or injury to such property, etc.

3. Carriers ⇨ 98—Liable for damages resulting from delay.

If damage results from failure, without good cause, to deliver goods at their destination within a reasonable time, the carrier is liable for such damage, since the law implies a contract that goods shall be delivered within a reasonable time in absence of special agreement.

4. Carriers \S 123 — Delay held proximate cause of loss from subsequent wrongful sale by carrier preventing sale by shipper.

Where a delay in the transportation has caused the loss of a sale at a stipulated price, such delay is the proximate cause of the loss to the shipper of the full value of the goods, where the subsequent action of the carrier in the wrongful sale of the goods has prevented the plaintiff from himself selling the goods on the market or taking any other steps to minimize the damage which he has suffered.

5. Carriers \S 178—Carmack Amendment does not make initial carrier liable for injury by succeeding carrier as warehouseman.

The Carmack Amendment (U. S. Comp. St. \S 8604a, 8604aa) does not make the initial carrier liable for a loss of or injury to goods proximately caused by the conduct of a succeeding carrier while occupying the relationship of warehouseman.

6. Carriers \S 139—Refusal to receive goods by third person to whom goods were to be delivered on shipper's order held not to render carrier liable only as warehouseman thereafter.

Where shipper consigned goods to himself to be delivered to a third person on the shipper's order, refusal of such third person to receive the goods when he had no written order from the shipper authorizing delivery to him did not terminate carrier's liability as a carrier, or render it only liable as a warehouseman thereafter, since on such refusal the shipper became the unconditional consignee, and as such was entitled to notice of arrival of the goods and a reasonable time thereafter within which to make other disposition thereof so as to have them taken from the carrier's hands.

7. Carriers \S 185(3)—Finding that consignee had not a reasonable time to dispose of goods sustained.

In an action to recover the value of potatoes shipped by plaintiff and wrongfully sold by terminal carrier, which defendant claimed was holding them as a warehouseman, evidence held sufficient to sustain finding that four days given plaintiff within which to make disposition of the goods at point of destination was not a reasonable time, and defendant was not absolved from liability as carrier.

8. Carriers \S 104—Finding of unreasonable delay in transportation sustained.

Evidence held sufficient to support a finding that there was unreasonable delay in the transportation of potatoes, and that such delay caused the loss of a sale thereof by the shipper.

9. Carriers \S 104—Burden on carrier to explain unusual delay shown by evidence.

When evidence of unusual delay is adduced, a prima facie case of negligence is made out, and the burden then devolves on the carrier to explain the delay, and to show it arose from some other cause than the defendant's negligence, or that of its agents or servants.

10. Carriers \S 158(3)—Damages for delay in shipment held properly estimated by jury in case where bill of lading provided how loss should be computed.

Where shipper lost sale of goods under contract through carrier's negligent delay as to a shipment wrongfully sold by the carrier, the jury properly estimated the damages on the basis of the price the shipper was to receive under the contract of sale, instead of following the general rule that the measure of damages for loss of entire value of goods occasioned by delay in transportation is the market value of the goods at destination when delivery should have been made, plus other proximate damage, where the contract price was less than the market price, though bill of lading provided that loss should be computed on basis of value of property at place and time of shipment.

On Petition for Rehearing.

11. Carriers \S 157—Provision in bill of lading as to liability after notice of arrival of goods held not to change rule under Carmack Amendment.

A provision in a bill of lading, "Property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouseman, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only," held not to change the established rule that, where the goods are not accepted, the liability of the carrier as carrier under the Carmack Amendment does not cease until the expiration of a reasonable time for the removal of the goods after the giving of the notice to the party entitled to receive them, especially where the Carmack Amendment, as amended by the first Cummins Amendment (U. S. Comp. St. \S 8592, 8604a), was in effect.

Error to Circuit Court, Northampton County.

Action by J. W. Chandler against the New York, Philadelphia & Norfolk Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action is upon the special contract of carriage set out in the notice of motion by which the suit was commenced. The plaintiff in error was the defendant and the defendant in error the plaintiff in the court below. The latter will be hereinafter referred to as the plaintiff and the former as the railroad company.

The contract of carriage alleged in the notice of motion was of one carload of Irish potatoes, containing 219 barrels, delivered by the plaintiff to the railroad company, as the initial carrier, at Cape Charles, Va., on July 16, 1917, to be carried to Atlanta, Ga., to the plaintiff himself as consignee to be there delivered on written order to G. A. De Wald & Co.

The notice of motion values the potatoes

at \$4.10 per barrel f. o. b. Cape Charles, Va., aggregating \$897.90, that being the price at which they had been sold by the plaintiff to G. A. De Wald & Co., and alleges that the railroad company and its agents "negligently failed to transport said carload of Irish potatoes with reasonable dispatch, and by reason of said negligence said carload of potatoes was refused by said G. A. De Wald & Co. upon arrival at Atlanta, Ga."; that "upon refusal of said carload of potatoes by said G. A. De Wald & Co., at Atlanta, Ga., [the railroad company and its agents] negligently and wrongfully sold said carload of potatoes without notifying [the plaintiff and his agents] and without any authority from [the plaintiff or his agents]"; that, "by reason of [the railroad company's] said negligence [the plaintiff] has received nothing for said carload of potatoes," and accordingly judgment is sought against the railroad company for the said sum of \$897.90, with interest thereon from July 16, 1917, until paid, being the amount of loss to the plaintiff occasioned by the railroad company's breach of contract of carriage aforesaid.

There was a trial by jury, which resulted in a verdict and judgment for the plaintiff for the said \$897.90, with interest thereon from July 16, 1917, until paid.

All of the evidence introduced both by the plaintiff and defendant is duly certified and appears in the record before us.

It also appears from the record that on the trial of the case instructions were given to the jury to which no exceptions were taken by the railroad company or the plaintiff at the time they were given, as the trial court certifies, and such court further certifies that not only were no such exceptions taken, but, "on the contrary, counsel for plaintiff and defendant expressly stated to the court at the time they presented them to the court that they had agreed on the instructions."

On the return of the verdict aforesaid the railroad company moved the trial court to set it aside as contrary to the law and the evidence and for misdirection by the court of the jury. The record states that these motions were overruled by the trial court, and that the court overruled "the motion which was made on the ground of error of the court in granting the instructions," because no exceptions were taken thereto at the time they were granted, and because they were presented to the court as agreed instructions as aforesaid.

The judgment under review was entered on the 22d of November, 1919.

On the 24th day of November, 1920, more than one year thereafter, the following order was entered in vacation by the honorable judge of the trial court, namely:

"J. W. Chandler v. New York, Philadelphia & Norfolk Railroad Company.

"It appearing to the court from an examination of the petition and record filed in the Su-

preme Court of the state of Virginia in the above case that the instructions given at the trial of said case in the circuit court were not made a part of the record by the clerk, and instructions having been expressly agreed to by counsel for plaintiff and counsel for defendant in the circuit court, and it further appearing that counsel for the New York, Philadelphia & Norfolk Railroad Company has had due notice that an application would be made, under section 6341 of the Code of Virginia, to have said instructions made a part of the record, upon motion of J. Brooks Mapp, attorney for J. W. Chandler, it is hereby ordered that said instructions shall be, and the same are hereby, made a part of the record."

A certified copy of this order is presented to us, accompanied with what are certified by the clerk of the trial court to be two instructions offered by the plaintiff and one instruction offered by the defendant in the instant case. Their contents are not here given, as in the opinion of the court, as will more fully below, they cannot be considered as a part of the record before the appellate court.

It should be stated that different counsel appeared for the railroad company in the trial court from counsel for the railroad company on the appeal before us.

Of the evidence in the case the following only need be said:

There was a bill of lading covering the shipment of the potatoes which conformed to the allegations aforesaid with respect to it in the notice of motion. It was not what is commonly known as an "order notify" bill of lading, but a species of what is commonly known as a "shipper's order" bill of lading. The consignee was the plaintiff himself, with notation in the bill of lading, "Deliver on written order to G. A. De Wald & Co." One of the railroad company's witnesses refers to this as an unusual consignment in the following language:

"* * * This car was consigned to J. W. Chandler, to deliver on written order, and very few—in fact that is about the only case that I remember of a carload of potatoes being shipped that way, to deliver on written order."

The plaintiff in his testimony, in explaining what the notation aforesaid means, makes this statement in his testimony:

"The meaning of that is Mr. G. A. De Wald would have to pay for the car of potatoes to get possession of it. Instead of making it an order bill of lading shipment, where the bill of lading is to be produced to the railroad to secure the shipment, we simply attach our order to our draft, and when they pay the draft they obtain the order, and the order is delivered to the railroad company for the goods.

"Q. That also explains, does it not, why the shipment was consigned to you instead of G. A. De Wald & Co., so you could get your money before the delivery of the shipment? A. Yes, sir."

The defendant railroad company's line does not extend to Atlanta. Its line connects with that of the Seaboard Air Line Railway Company, which does extend to Atlanta, and the shipment in question was thus transported, the last-named company being the terminal carrier.

There is no conflict in the evidence as to the following facts:

The bill of lading contained the following notation on its face:

"Abnormal conditions prevail on the lines of the carriers which will handle this shipment and it is subject to delay."

But during the period when the shipment in question was made four days was the usual running time of shipments of the same character from Cape Charles to Atlanta. The plaintiff himself shipped another car of potatoes from Cape Charles to Atlanta on the day after the car was shipped which is involved in this action, to wit, on July 17, 1917, and that car arrived in Atlanta on the 21st. The car of potatoes involved in the instant case arrived on the yard of the terminal carrier, approximately five miles west of Atlanta, which is used as a part of the system of that carrier at Atlanta, as a "delivery yard for Atlanta," at 5:30 a. m. July 22, 1917. It was not placed at "foot of Spring street where all deliveries are made" until "the night of the 23d or the morning of the 24th prior to 7:30 a. m." The terminal carrier thereupon, on July 24, 1917, at noon, notified G. A. De Wald & Co. that the shipment was ready for delivery to them. This notice was given over the telephone, and confirmed by postal card. De Wald & Co. in reply to the notice over the telephone refused to accept delivery of the shipment. There is some conflict in the testimony as to the reason given by De Wald & Co. for such refusal, but of this it is sufficient to say that there is ample evidence in the record to have warranted the jury in finding that the refusal was on account of the delay in the transportation over the usual and expected period of four days from July 18th, the date of the shipment from Cape Charles, such delay affecting De Wald & Co. in this, that the market price of potatoes in Atlanta materially declined after the expiration of such period.

On the refusal of De Wald & Co. to accept delivery of the potatoes, the terminal company on July 24th promptly wired the agent of the defendant railroad company at Cape Charles that the car of potatoes, giving its number, "consigned to J. W. Chandler had been refused, and asking" that J. W. Chandler "advise disposition." Meanwhile the plaintiff had been informed by his New York broker, through whom the sale of the potatoes had been made to De Wald & Co., of the refusal of the latter to accept them on account of said delay in transportation. Thereupon the

plaintiff took the matter up at once (by wire it is presumed) with De Wald & Co., through the broker, with the view of making an adjustment or reaching an understanding with Mr. De Wald by which the latter would accept delivery of the potatoes. This was on the 24th. Later on the same day the agent of the defendant railroad company at Cape Charles, Mr. Savage, having received the telegram aforesaid from the terminal carrier, called the plaintiff over the telephone and told him the contents of the telegram. Just here there is a conflict in the testimony for plaintiff and that for the railroad company as to what the plaintiff's reply to this notification was. The plaintiff's testimony on this subject is as follows:

"My recollection is that I told Mr. Savage that the car in question would be handled; that is, it would be taken care of. We can't always give disposition the very minute they ask disposition, because it is very detrimental to do anything of that kind. We do not know that it is refused until we are notified, and we have to make other arrangements. Q. Is it or not along about this time a very busy season with you, not only this year, but in 1917? A. Yes, sir."

Mr. Savage testifies that in reply to his said notification over the telephone of the contents of said telegram the plaintiff said that "the car [of potatoes] had been disposed of." Mr. Savage still later in the day on the 24th wired the terminal carrier in Atlanta that the plaintiff said that "the car [of potatoes] had been disposed of."

The terminal carrier on the 25th wired the agent at Cape Charles, Mr. Savage, that the car of potatoes (giving its number) "has not been disposed of. Should be handled immediately." After 4:55 that afternoon Mr. Savage saw the plaintiff in person at Cape Charles and informed him of the contents of this second telegram. Here again there is a conflict in the testimony as to what reply the plaintiff gave on the subject of the disposition to be made of the car of potatoes. Mr. Savage testifies that plaintiff told him in reply to the second telegram precisely what he (Savage) wired back to the terminal carrier, and that was this:

"Shipper claims consignee refusing shipment account of some one advising car forwarded July 18th, while it actually left here July 16th; declines to give disposition."

The plaintiff's testimony on this subject is as follows:

"Q. You have heard Mr. Savage's testimony as to what took place on the 25th; what is your recollection of what took place at Cape Charles?

"A. My information was that the transportation company had told Mr. De Wald that that car was not shipped until the 18th, and I told Mr. Savage, if the transportation company had made that statement, the car was shipped

on the 16th, and until I knew better I refused to give disposition of it.

"Q. Mr. Chandler, did you abandon the car, or give it up for the railroad company to handle?

"A. No.

"Q. Did you notify Mr. Savage or any one to that effect?

"A. No. * * *

"Q. I believe you testified that you were handling this car as rapidly as you could after you got notice of it?

"A. Yes, sir."

As the result of the negotiations set on foot as aforesaid by the plaintiff on the 24th with De Wald & Co. through the plaintiff's broker, the plaintiff subsequently (within what time precisely does not appear from the record) reached "a satisfactory understanding with Mr. De Wald," as the plaintiff testifies, by which De Wald & Co. agreed to take the potatoes and called for them, but they were not and could not be delivered to him because of the following fact, namely: The terminal carrier on July 28th turned over the car of potatoes to McCullough Bros., potato dealers in Atlanta, for sale, who promptly thereafter sold them on the market in Atlanta.

The plaintiff in his testimony states that he could not say whether, under the arrangement made with De Wald & Co. aforesaid, as a result of the negotiations set on foot by the plaintiff on July 24th, he would or would not have gotten the full amount of \$897.90.

The potatoes sold on the market as just stated for \$508.60, after deducting the commissions of McCullough Bros. of \$57.40 and \$8 for labor in assorting them. This amount was received by the terminal carrier, from which the latter deducted freight charges and demurrage, leaving \$312.18, net balance in hand. No part of this has ever been paid to the plaintiff or offered to be paid.

The uncontradicted testimony for the plaintiff is to the effect that but for the delay in transportation aforesaid he would have received said \$897.90 for the potatoes as of July 17, 1917.

The following letter of the claim agent of the said terminal carrier is in evidence:

"Seaboard Air Line Railway Company.

"Portsmouth, Va., August 28th, 1917.

"CL-25528.

"Mr. J. W. Chandler, Exmore, Va.—Dear Sir: I have before me your letter of August 18th to our Agent at Atlanta, Ga., regarding DI&W car 39485, loaded with potatoes, consigned to you to be delivered to G. A. De Wald, on written order, in which you claim that Mr. De Wald called for his car of potatoes, and same had been delivered to McCullough Bros., beg to advise that the car arrived at destination on July 22d, and Mr. De Wald was notified by phone; same was refused by him on July 24th, at noon, claiming delay in transit, and stating that shipment was routed Ga. Ry. We immediately handled with the agent of the

NYP&NRR., at Cape Charles, Va., and wrote you direct requesting disposition, before disposal orders could be obtained, then shipment began to deteriorate and I found it necessary to turn over to McCullough Bros. for handling, in order that the shipment might not become worthless, and same was sold for \$312.18 net, for which we will entertain claim."

The railroad company introduced evidence tracing shipment in question while on its line, showing delivery to the Belt Line, at Pinnars Point, for the said terminal carrier, on July 17th at noon, which evidence tended to show that there was no unreasonable delay in transportation up to that time. But it introduced no evidence whatever, and there is none in the record, explaining the subsequent unusual delay in the transportation. As aforesaid, the car of potatoes arrived on the yard of the terminal carrier within five miles of Atlanta at 5:30 a. m. of July 22d. The car had then been delayed in transit approximately two days longer than the usual period required therefor aforesaid, and approximately two days longer than the subsequent shipment which plaintiff made to the same place from Cape Charles on July 17th as aforesaid. There is no evidence introduced by the railroad company or in the record explaining this delay. It appears in evidence that July 22d was Sunday, but there is no evidence that such freight was not customarily moved on Sunday; and there is no evidence explaining why the shipment was not moved on to the delivery station in Atlanta during the day of Monday the 23d instead of being delayed there, as it was, until the movement of the car that night or "the morning of the 24th prior to 7:30 a. m." to the delivery station. And the further delay in not notifying De Wald & Co. of the arrival of the shipment until noon of the 24th is in no way explained. The unexplained delay in the transportation therefore was four days beyond the usual time required therefor at that time.

There is no evidence tending to show that the potatoes were damaged or in any way injured physically by the delay in transportation up to noon of the 24th of July. Nor, indeed, is there any evidence whatever that they were at all in a damaged or injured physical condition at the time they were sold by the terminal carrier, as aforesaid, immediately following the 28th of July. There is the statement contained in the aforesaid letter of the claim agent at Portsmouth, Va., of the terminal company of August 28th which says that "before disposal orders could be obtained then shipment began to deteriorate," etc. But this agent could have had no personal knowledge of such deterioration. Mr. McCullough, of the firm of McCullough Bros., who sold the potatoes as aforesaid, testified as a witness for the railroad company, and he does not say or indicate in any part of his testimony that the potatoes were

in a damaged or injured condition when sold. On the contrary, on being asked what was the reason for the general decline in the market price of potatoes "from and after July 22d or 23d," he said, "Well, just the extra supply of potatoes on the market and the general decrease all over the country; Georgia potatoes were coming freely in at that time," leaving as a reasonable inference to be drawn from his testimony that the reduced price he had just testified he obtained for the shipment of potatoes in question was due solely to the decline in the market price by the time he sold them. And no other witness testified that the potatoes were physically injured or damaged up to the time they were thus sold.

The testimony for defendant shows that the market price in Atlanta of such potatoes as those of the shipment in question was \$6 to \$0.25 per barrel up to and including July 20, 1917, \$5 to \$5.25 per barrel on July 21st and 23d, and \$5 to \$5.50 on July 24th; that there was a general decline in such market price after July 22d or 23d, but no figures are given in the evidence of such prices after July 24th, except that it appears from the gross price obtained by McCullough Bros. immediately following July 28th for the 219 barrels of plaintiff's potatoes as aforesaid were \$508.60 and \$57.40 and \$8-\$574, or \$2.62 per barrel.

Jas. G. Martin, of Norfolk, for plaintiff in error.

Mapp & Mapp, of Accomac, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions presented for our decision by the assignments of error will be disposed of in their order as stated below.

[1] 1. Are the instructions referred to in the statement preceding this opinion, which were not certified by the judge of the trial court within the period of 60 days fixed by statute (Acts 1916, p. 722, now Code 1919, § 6252), a part of the record before us in this case?

This question must be answered in the negative.

The instructions are no part of the record in an action at law unless made so by bill of exceptions or certificate in accordance with the statutory requirements on that subject. Acts 1916, p. 722, now Code 1919, § 6252, or Acts 1916, p. 708, now Code 1919, § 6253. Section 6341 of the Code of 1919, under which the instructions in question were certified, has reference only to what is already a part of the record, and merely authorizes selections from the record as already completed. It does not authorize any additions to the record. *Barksdale v. Parker*, 87 Va. 141, 12 S. E. 344.

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[2] 2. Is the loss and consequential damage which the plaintiff has suffered of the whole of the value of his goods by reason of his loss of the sale of them which he had made at a stipulated price caused by negligent delay in the transportation, followed by the subsequent conversion of the goods by the wrongful sale of them by the terminal carrier, within the operation of the "Carmack Amendment," which makes the initial carrier who receives goods for interstate transportation liable "for any loss, damage or injury to such property, caused by it or by any common carrier * * * to which such property may be delivered or over whose line or lines such property may pass"? U. S. Comp. St. § 8604a. (The question assumes for the present that the delay was negligent, and that the conversion was wrongful.)

This question must be answered in the affirmative.

Indeed, such question is expressly decided in this state by the case of *Norfolk Truckers' Ex. v. Norfolk Co.*, 116 Va. 466, 82 S. E. 92. There, as in the instant case, the action was for the loss suffered by the plaintiff of the whole of the value of his goods, by reason of his loss of sale of the goods, which he had made at a stipulated price, caused by the negligent delay in the transportation, followed by the subsequent wrongful sale of the goods by the terminal carrier. In the opinion of this court in that case, delivered by Judge Harrison, in reference to the Carmack Amendment and its application to such case, this is said:

"We are of opinion that the amendment, which makes the initial carrier responsible for 'loss or damage or injury to goods,' is broad enough to cover a case of damage to the shipper by reason of delay. It would be a narrow construction of the statute to confine its operation to the actual loss of goods, or to their physical injury. The wrong for which the statute undertook to give a remedy was that done the shipper, and if the shipper has suffered loss by reason of the negligent or unreasonable delay of the carrier in the performance of its contract; it is just the same as though the loss had resulted from a physical injury to the goods or from the actual loss or disappearance of specific articles."

[3] As said in 10 C. J. § 404, A, pp. 284, 285:

"* * * If damage results from failure, without good excuse, to deliver the goods at their destination within a reasonable time, the carrier is liable for such damage. * * * When a carrier undertakes to convey goods, the law implies a contract that they shall be delivered at destination within a reasonable time, in the absence of any special agreement as to the time of delivery. This duty, it is said, is as obligatory as the duty to deliver safely. And the principle applies although there is a written contract for the shipment which contains no stipulation as to the time within which

the goods are to be delivered. The law will nevertheless imply an understanding to carry within a reasonable time."

[4] Where, as in the *Norfolk Trucker's Ex. Case* and in the instant case, delay in the transportation has caused the loss of a sale at a stipulated price, such delay is the proximate cause of the loss to the plaintiff of the full value of the goods, where the subsequent action of the carrier in the wrongful sale of the goods has prevented the plaintiff from himself selling the goods on the market or taking any other steps to minimize the damage which he has suffered. It is true, with respect to the elements and measure of damages in actions involving the liability of carriers for delay in the delivery of goods, as said in 10 C. J. § 4446, pp. 307, 308, cited and relied on for the railroad company:

"Ordinarily" the measure of damages is "not the value of the goods. * * * Delay in delivery of the goods, even though it is such as to render the carrier liable, does not constitute conversion, and the person entitled to the goods cannot on that account refuse to receive them and sue for the full value. The measure of damages is not the full value, since the bailor still retains the ownership, but the loss proximately caused by the delay. The carrier's liability is to compensate for the damages growing out of the delay, and not for loss; and the remedy of the party entitled to the goods is to sue for the damages he has sustained by reason of the delay. The rule proceeds on the theory that a party injured by the breach of a contract by another should take all reasonable steps to minimize the damage he will suffer."

But this is where there is the delay referred to merely, and the plaintiff still retains the ownership and control of the property, so that it is within his power to take some steps, such as aforesaid, to minimize the damages. Manifestly such rule has no application to such a case as that before us.

It is urged in argument for the railroad company that in the instant case the consignee refused to accept delivery at noon on July 24th, and that the consignor on July 25th refused to give any instructions for the disposition of the goods, or, if the latter be not true, that certainly the consignor did not give any instructions for the disposition of the goods within a reasonable time after the 24th of July, when he was notified of the arrival of the goods in Atlanta and the refusal of De Wald & Co. to accept delivery of them, which conduct of De Wald & Co. and the plaintiff, as is urged for the railroad company, terminated the relationship of the railroad company to the plaintiff as that of a carrier and reduced such relationship to that of a warehouseman, and that the subsequent action of the terminal carrier in selling the goods was that of a warehouseman, for which, even if wrongful, the defendant railroad company is not liable under the Carmack Amendment (U. S.

Comp. St. §§ 8604a, 8604aa)—citing *N. & W. Ry. Co. v. Stuart Draft Co.*, 109 Va. 184, 63 S. E. 415; *Hogan Milling Co. v. Union Pac. R. Co.*, 91 Kan. 783, 139 Pac. 397; *Adams Express Co. v. Croninger*, 226 U. S. 491, 506, 507, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Adams v. Great Western R. Co.*, 181 Iowa, 1052, 165 N. W. 367, L. R. A. 1918B, 622.

[5] The law is unquestionably settled, as appears from these authorities, that the Carmack Amendment does not make the initial carrier liable for a loss of or injury to goods proximately caused by the conduct of the succeeding carrier while occupying the relationship of warehouseman; and if, in the instant case, prior to July 28th, when possession of the goods was delivered to another for the sale of them, the liability of the railroad company as carrier had ceased—I. e., its relationship to the plaintiff as carrier had ceased—and the relationship of the terminal carrier to the plaintiff had become that of a warehouseman, it is unquestionably true that said amendment is not applicable to the case in so far as the damages occasioned the plaintiff by the sale of the goods by the terminal carrier is concerned. In such case the chain between the original negligence as carrier, in delaying the transportation, and the total loss sustained by the plaintiff, would be broken, and the wrongful conduct of the terminal carrier in selling the goods would lose its character of being a mere incident to the original wrong and become itself the proximate cause of a part at least of the injury to the plaintiff, so that the plaintiff would not be entitled to recover in this action the whole of the damages claimed. But whether this is such a case depends, of course, upon whether the relationship of carrier aforesaid had terminated when the possession of the goods was delivered as aforesaid for sale, and that, therefore, is the crucial question in the case.

As said in *N. & W. Ry. Co. v. Stuart Draft Co.*, just referred to:

"It is not infrequently a question of some nicety to determine the precise * * * time at which the liability of a railroad company as carrier ceases and that of warehouseman begins."

This, however, which is quoted with approval in the opinion of this court in the case just mentioned, is said in 6 Cyc. 455:

"The carrier remains liable until the goods have reached their destination and the consignee has had reasonable opportunity (involving notice of arrival when such notice is essential to charge him with the duty of taking the goods) to receive the goods from the carrier, and that, after the expiration of such reasonable time, the liability of the carrier, if the goods remain in his possession, is that of warehouseman only. The carrier is liable only as warehouseman after the consignee has refused to receive the goods, or while the goods

are held by the carrier at the request and at the convenience of the consignee."

[8] And it must be borne in mind in the instant case that under the terms of the bill of lading the firm of De Wald & Co. was not the consignee. That firm, at the time they refused to accept delivery, at noon on July 24th, had no written order from the plaintiff authorizing the delivery to them, and hence it had no authority to refuse to accept the delivery. Therefore the so-called refusal of De Wald & Co. to accept delivery was nothing more than notice to the railroad company that they would not put themselves in a position to accept delivery by paying for the goods, and thus obtain the written order aforesaid. Theretofore De Wald & Co., as appeared from the bill of lading, was merely a conditional consignee. Thereupon the plaintiff became the unconditional consignee, and as such he was entitled to notice of the arrival of the goods, the refusal of De Wald & Co. to qualify as consignee, and a reasonable time thereafter within which to make other disposition of the goods so as to have them taken from the hands of the railroad company. A reasonable delay in delivery due to such a cause must often arise in the transportation business, and this, in reason, and in accordance with the substance of the holding of the authorities on the subject, must be regarded as within the mutual contemplation of the shipper and carrier at the time of the contract of carriage.

This brings us to the next question for our decision, and that is this:

3. Was the plaintiff given a reasonable time, between the notice to him, on the afternoon of July 24th, of the arrival of the goods at destination and the refusal of the conditional consignee to qualify as such, and the delivery by the terminal carrier of the goods to another, on July 28th, for sale, within which to make other disposition of the goods?

This is a question of fact dependent upon all of the facts and circumstances in evidence in the case. The controverted question of fact whether on receiving the notice in question the plaintiff expressly notified the railroad company "that the car in question would be handled," as the plaintiff testified he did, or "that the car had been disposed of," as Mr. Savage, a witness for the railroad company, testified, is an important one in this connection. The decision of this fact involved in this conflict of the testimony was peculiarly for the jury. The same is true of what occurred in the personal interview between the plaintiff and Mr. Savage on July 25th. The question of fact therein involved is whether the plaintiff by what he said to Mr. Savage on July 25th can be reasonably said to have justified the railroad company in receiving the impression that the plaintiff refused absolutely to give any

instructions for other disposition of the shipment, and abandoned it to the railroad company to handle it. Then there is the statement in the letter of August 28th of the claim agent at Portsmouth of the terminal carrier, saying:

"We immediately handled with the agent of the NYP&NRR at Cape Charles and wrote you direct, requesting disposition, before disposal orders could be obtained, then shipment began to deteriorate and I found it necessary to turn over to McCullough Bros. for handling, in order that the shipment might not become worthless * * *"

—which tended to show that the railroad company never received the impression that the plaintiff had refused to give instructions for disposition, but knew from what plaintiff told Mr. Savage on July 24th that he was at work endeavoring to make other disposition which was to be expected to be made as soon as reasonably possible, and that the terminal carrier decided to sell the goods, not because the plaintiff refused or failed to give other disposition instructions, but because of a different reason altogether, namely, because, as alleged in said letter, the "shipment began to deteriorate, and I found it necessary to turn over to McCullough Bros. for handling, in order that the shipment might not become worthless." This is a self-serving declaration long after the sale of the goods. It is not supported by a scintilla of evidence in the record. The witnesses who saw the potatoes in Atlanta make no mention of any deterioration in them, and the other testimony on the subject which was introduced in behalf of the railroad company gives as the sole reason for the low prices of potatoes in Atlanta after July 22d and 23d the general fall in prices, all as set out in the statement preceding this opinion. And there are other circumstances, which are set out in the statement just referred to, and hence, need not be repeated here, which tend to show that the railroad company did not give the plaintiff the reasonable time in question, and, indeed, did not itself act upon the supposition that it had done so.

Moreover, it should be said on this subject that so long as the railroad company continued to occupy the relationship of carrier to the plaintiff, any deterioration in the goods due to the delay in delivery was in truth proximately caused by the negligent delay of the carrier, and the carrier could not sell the goods because of such deterioration so as to escape liability for the result of such antecedent delay, and its sale of the goods because of such deterioration could only have been in recognition of such liability and in mitigation of the damages. And as appears from said letter, in the light of the testimony in the case, the sale was in fact made by the terminal carrier merely in apprehension of such deterioration and for the purpose of mitigating the damages.

[7] We are of opinion, therefore, that there was ample evidence before the jury to support their verdict in finding that the reasonable time in question was not given, and hence that the relationship of the railroad company to the plaintiff still remained that of carrier at the time the potatoes were delivered over for sale as aforesaid.

It follows from this conclusion that the delay in transportation aforesaid was the proximate cause of the loss and damage suffered by the plaintiff, and the railroad company is liable therefor if the facts were that such delay was due to the negligence of the railroad company or of said terminal carrier (which is a conclusion of law if it was an unreasonable delay), and that such delay was the occasion of the loss of the sale to De Wald & Co.

This brings us to the next question before us for our decision, namely:

[8] 4. Is there sufficient evidence in the record to support the verdict of the jury, which found, in effect, that there was unreasonable delay in the transportation of the goods, and that that delay was the occasion of the loss of the sale by the plaintiff to De Wald & Co., or is that finding contrary to the evidence?

In the case of *Norfolk Truckers' Ex. v. Norfolk Co.*, supra, 116 Va. 466, 82 S. E. 92, the transportation was from Herbert's, Va., to Johnstown, Pa. The shipment was delayed in transit eight days beyond the usual period required for such transportation. Such delay in the instant case was, it is true, only four days. But otherwise the evidence in the *Norfolk Truckers' Ex. Case* was much weaker than in that now before us to sustain the verdict of the jury for the plaintiff.

[9] As said of the transportation of inanimate goods in 10 C. J. § 420 (2), p. 301:

"* * * When evidence of unusual delay is adduced, a prima facie case of negligence is made out, and the burden then devolves on the carrier to explain the delay and to show that it arose from some cause other than the carrier's negligence or that of its agents or servants."

We deem it sufficient to say in conclusion upon the subject under consideration that the material evidence bearing thereon and the lack of evidence adduced by the railroad company in explanation of the unusual delay, at least while the shipment was in the hands of the terminal carrier, appears from the statement preceding this opinion; and we must hold, as we held in the *Norfolk Truckers' Ex. Case*, supra, 116 Va. at page 471, 82 S. E. 94, that—

"In view of the established facts and the reasonable inferences to be drawn from them, it cannot be said that the jury were without evidence to support their conclusion that there had been unreasonable delay in the carriage and delivery of the potatoes, and that such delay was the occasion of the [conditional] con-

signee's refusal to accept the shipment; nor can it be said that the verdict found was a plain deviation from right and justice."

There remains but one other question for our decision, and that is the following:

[10] 5. Is the verdict of the jury invalid because it estimated the damages on the basis of the price the plaintiff was to receive under the contract of sale to De Wald & Co., plus the other proximate damage, consisting in this case in loss of interest, instead of following the general rule that the measure of damages for loss of the entire value of goods occasioned by delay in the transportation of them is the market value of the goods at the place of destination at the time when the delivery of them should have been made, plus the other proximate damage, consisting in this case in loss of interest?

This question must be answered in the negative.

There is the following stipulation in the bill of lading in the instant case, namely:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid."

This value has been construed by the courts to mean the invoice price at which the goods are sold at the time and place of shipment, with freight added to the place of destination, if paid. *Kelly v. Southern Railway*, 84 S. C. 249, 66 S. E. 198, 137 Am. St. Rep. 842.

While such stipulation might not be valid under the Cummins Amendment of 1915 (Fed. Stat. Ann. 1916, Supp. pp. 124, 125 [U. S. Comp. St. §§ 8592, 8604a]) as against the shipper where there has been no such sale, or where such sale is defeated by the action of the carrier, and it appears in evidence that the stipulated value is less than the market value at destination at the time the goods should have there arrived, and the shipper seeks to recover such market value, no such case is presented by the record before us. And such stipulation, with the construction placed upon it aforesaid, is certainly valid under the circumstances of the instant case, for in such case, in the absence of any stipulation on the subject, the law would fix the same measure of damages.

As said in 10 C. J. § 611 (4) p. 399:

"Where goods are shipped in pursuance of a sale thereof at a stipulated price which is less than the market price at destination, damages for loss or injury must be estimated on the basis of the price to be received under the contract of sale. But, if the price contracted for is greater than the market value at destination, the estimate will have to be based on the market value, unless the carrier had been notified at the time of the shipment of the fact that the goods had been sold for a higher figure."

In the instant case the stipulated price at which the goods were sold to De Wald & Co.

at the time and place of shipment was much less than the market price at destination from July 18th to July 24th, inclusive; so that the market price at destination when the goods should have arrived was greater than the stipulated selling price, plus the freight, as appears in evidence.

The case will be
Affirmed.

On Petition for Rehearing.

[11] It is urged in the petition for rehearing that the court has not given legal effect to the clause in the bill of lading involved in the case which is as follows:

"Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) *after notice of its arrival has been duly sent or given* may be kept in car, depot, or place of delivery of the carrier, or warehouseman, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only." (Italics supplied.)

It is argued that this identical provision in a bill of lading was held valid and binding in the case of Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836, and that therefore it should be held by us as fixing the character of the liability of the terminal carrier in this case as that of a warehouseman after the expiration of 48 hours after both Chandler and De Wald were notified of the arrival of the goods at destination. And the discussion by the Interstate Commerce Commission, in the Matter of Bills of Lading, decided April 14, 1919, 52 Interst. Com. Com'n R., 671, at pages 696, 700, 701, and 712, is also relied upon. But neither the Supreme Court decision nor the discussion of the Interstate Commerce Commission referred to sustains the position that the clause in the bill of lading in question is applicable or binding in cases of interstate shipments, when the relationship of shipper and carrier has not been terminated by the expiration of a reasonable time for the removal of the goods after the giving of the notice to the party entitled to receive them.

In the Prescott Case it developed in evidence on the trial that the consignee accepted the goods, took away a portion of them, and left the residue merely for his convenience until he could call for them, and, as stated in the opinion of the court:

"At the close of the testimony the plaintiff withdrew his causes of action against the defendant as a common carrier * * * and the case went to the jury solely with respect to the liability of the defendant as warehouseman."

The loss in the case was occasioned by fire while the goods remained in the custody of

the railroad company in the admitted capacity of warehouseman. And, as clearly appears from the opinion of the court in the Prescott Case, and from what is said with respect to that case and other cases by the Interstate Commerce Commission in its report in the Matter of Bills of Lading, 52 Interst. Com. Com'n R. at pages 696 to 700, inclusive (referred to at page 712), the Prescott Case has not changed the established rule that when the goods are not accepted, the liability of the carrier, as carrier, under the Carmack Amendment, does not cease until the expiration of a reasonable time for the removal of the goods after the giving of the notice to the party entitled to receive them. And the Interstate Commerce Commission in its said report unquestionably recognizes that such rule was in force as late as April 14, 1919, unaffected by the clause in bills of lading which is drawn in question in the case before us, notwithstanding the Prescott Case, which is expressly referred to and discussed in such report.

Moreover, the Carmack Amendment, as amended by the first Cummins Amendment, which latter was approved March 4, 1915, and was in force when the cause of action in the instant case arose, expressly provides that the liability of the carrier, as carrier, imposed by the statute, should exist—

"notwithstanding any limitation of liability * * * in any * * * receipt or bill of lading, or in * * * any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void."

Therefore, even if the clause in the bill of lading in question were to be construed as attempting to fix the arbitrary limit of time therein mentioned as the time within which the relationship of shipper and carrier may be terminated by the notice prescribed therein, it would be void, under the provision of the statute just quoted, in all cases in which, under the facts of the particular case, such time is found not to be the reasonable time aforesaid.

There is but one other ground for a rehearing urged in the petition therefor, and that is to the effect that the distinction made in the original opinion between the bill of lading involved in the case and an ordinary order notify bill of lading is unsound. The distinction referred to is, as we think, a sound distinction as bearing upon the ascertainment of "the party entitled to receive" the goods as consignee. No reason is suggested why we should consider our conclusion unsound on that subject, and we see none.

The petition for rehearing will therefore be Refused.

(129 Va. 663)

SMITH v. WITHROW.

(Supreme Court of Appeals of Virginia. April 6, 1921.)

1. Appeal and error \S 525(1), 528(4) — Instruction or affidavits must be included in the record, to be available on appeal.

Matters, such as instructions or affidavits used on new trial, if sought to be availed of on appeal, must be made parts of the record by proper bills of exceptions.

2. Appeal and error \S 933(5) — Presumed that affidavits not in record on which new trial was ordered were sufficient.

In the absence of affidavits on which the trial court relied in setting aside the jury's verdict, this court must presume that the verdict was properly set aside, and where the plaintiff tendered no evidence on the second trial the final judgment of the court therein must be affirmed.

3. Appeal and error \S 706(3) — Matter depending on affidavits cannot be reviewed in their absence.

A complaint that a verdict on a first trial should not have been set aside, save as to the recovery for personal injuries to which the affidavits for new trial related, cannot be reviewed, in the absence of such affidavits.

Error to Circuit Court of City of Newport News.

Action by G. W. Smith against C. S. Withrow. Verdict for plaintiff, motion for new trial sustained, judgment on second trial for the defendant, and the plaintiff brings error. Affirmed.

T. J. Christian, of Newport News, for plaintiff in error.

Lett & Massie, of Newport News, for defendant in error.

SAUNDERS, J. The following facts are revealed by the record in this case:

The plaintiff in error, an old man named Smith, owns a small truck farm a few miles north of the city of Newport News. Returning to his farm from that city on the night of May 17, 1919, accompanied by his wife, and driving slowly on the right-hand side of the road, he was run into from the rear by an automobile belonging to Claude S. Withrow, the defendant in error. Hereinafter the parties will be referred to, respectively, as the plaintiff and the defendant.

The impact of the automobile knocked Smith out of his wagon, injured his horse, so that he died in a few days, and damaged the vehicle. After making some ineffectual efforts to effect a settlement with the owner of the car, Smith brought an action of trespass against the latter in the circuit court of the city of Newport News for personal injuries received and damage to his property, and secured a verdict for \$500.

The defendant moved to set the verdict aside on the ground that it was contrary to the law and the evidence, and on the further ground of after-discovered evidence. The court overruled the motion on the first ground, and deferred the disposition of the motion on the second ground until the following day. On that day the defendant tendered four affidavits in support of his motion last made. These affidavits were received and ordered to be filed. Thereupon, after argument, the court sustained the defendant's motion on the ground last above stated, set aside the verdict, and ordered a new trial. To this action of the court the plaintiff excepted.

The case was called for trial at the January term, 1920, of the circuit court, and, the plaintiff declining to introduce any evidence, it was considered by the court that the—

"plaintiff should take nothing by his writ, and that the defendant should go thereof without day."

The plaintiff applied for and secured a writ of error and supersedeas from one of the judges of this court.

[1] The evidence submitted on the first trial of the case was duly put in the record by a proper bill of exceptions; but the plaintiff failed to make the affidavits tendered by the defendant a part of the record. Plaintiff's bill of exception No. 2, erroneously referred to in the record as defendant's bill, merely excepts to the action of the court in setting aside the verdict, and prays that his bill of exceptions may be signed, sealed, etc. Of course, matter such as instructions, or affidavits, if sought to be availed of in this court, must be made parts of the record by proper bills of exception. There is no need to cite authority for this pronouncement, but a very recent case to this effect is *N. Y., P. & N. R. Co. v. Chandler*, 106 S. E. 684.

[2] In the absence of the affidavits upon which the trial court relied when it set aside the verdict of the jury, this court must presume that such action was correct, and the verdict properly set aside. That being so, and the plaintiff tendering no evidence on the second trial, the final judgment of the court recited supra was unescapable.

[3] The plaintiff complains that the verdict on the first trial should not have been set aside, save as to the recovery for the personal injuries to which the affidavits related; but determination of this contention would require an inspection of the affidavits. These affidavits, as stated supra, are not before this court. Hence, in respect of the above contention, this court must presume that the defendant's affidavits supported the action of the trial court, and that its judg-

ment setting aside the verdict generally was fully justified.

In the state of the record, and the situation cannot be rectified by any present action on the part of this or the trial court, nothing remains save to affirm the judgment complained of, which is accordingly done.

Affirmed.

(129 Va. 640)

GREAT ATLANTIC & PACIFIC TEA CO. v. COFER.

(Supreme Court of Appeals of Virginia. April 6, 1921.)

1. Landlord and tenant ⇨53(2) — Lessee's rights not affected by erroneous acknowledgment of receipt of subsequently returned check for rent.

A lessee's rights under lease as against innocent purchaser were not affected by the erroneous acknowledgment of receipt of lessee's subsequently returned check by employee of purchaser's agent who had been instructed not to accept check from lessee for rent.

2. Landlord and tenant ⇨53(2)—Lease for two-year term with option to renew held for a term of more than five years required to be recorded.

A lease for a term of two years and one month, giving lessee the option to four successive renewals of the lease each for a term of one year, held a "contract of a term of more than five years," within Code 1904, §§ 2463, 2465, making such a contract void as to purchasers for a valuable consideration without notice, unless recorded.

3. Landlord and tenant ⇨53(2)—Purchaser's acceptance of rent without knowledge of right to renew not ratification of renewal contract.

Acceptance by lessor's grantee of rent from lessee with knowledge that lease provided for a term of two years and one month, but without knowledge of lessee's option to renew, did not constitute a ratification of the provisions of lease as to a right to renew.

4. Landlord and tenant ⇨24(1)—Validity of lease not affected by invalid covenant for renewal.

A lease for a term of two years and one month with the privilege to lessee of four successive renewals each for a period of one year, though void as to innocent purchaser because unrecorded under Code 1904, §§ 2463, 2465, making land contract for term of five years void as against purchaser for value without notice, in that the privilege of renewal made it a contract for term of more than five years, was valid in so far as the original term of two years and one month was concerned, since a covenant for renewal may be void without impairing the original term.

5. Landlord and tenant ⇨291(16)—Whether purchaser had knowledge putting him on inquiry as to contents of lease held for jury.

In unlawful detainer action by lessor's grantee who claimed to have purchased without

knowledge of the provisions of lease giving lessee the privilege of renewal, question of whether grantee, when he purchased the property, had knowledge of such fact as would have put a reasonably prudent man on inquiry as to the contents of the lease, held for the jury.

6. Vendor and purchaser ⇨229(1)—Purchaser chargeable with fact which inquiry prompted by knowledge of facts would have necessarily revealed.

Purchaser to be charged with notice of a fact must have knowledge of facts and circumstances naturally calculated to excite suspicion in the mind of a person of ordinary care and prudence as to the existence of such fact, and which would naturally cause him to pause and make an inquiry which would necessarily have resulted in the discovery of the fact.

Sims, J., dissenting.

Error to Corporation Court of Norfolk.

Action by J. H. Cofer against the Great Atlantic & Pacific Tea Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Willcox, Cooke & Willcox, of Norfolk, for plaintiff in error.

E. R. F. Wells, of Norfolk, for defendant in error.

SAUNDERS, J. This is an action of unlawful detainer brought by J. H. Cofer (defendant in error) to recover possession of certain premises on Granby street, Norfolk, Va., alleged to be unlawfully detained by the Great Atlantic & Pacific Tea Company (plaintiff in error). The jury trying the case, after hearing the evidence and being instructed as to the law, returned a verdict in favor of the plaintiff, which the court refused to set aside. The case is brought before us by writ of error to the judgment of the trial court.

The plaintiff in error, the Great Atlantic & Pacific Tea Company (defendant below and hereinafter referred to as the Tea Company), makes three assignments of error:

First. The giving of the instruction requested by the plaintiff.

Second. The refusal of four instructions requested by the defendant.

Third. The refusal of the trial court to set aside the verdict.

The pertinent facts are as follows: One J. Frank East was the owner of certain real estate on Granby street, in Norfolk. On November 24, 1917, he entered into a written lease of a portion of this property with the Tea Company. This paper, in part, was as follows:

"The said lessor has leased, and by these presents does grant, demise and lease unto the said lessee" (the Tea Company) "all that," etc. (Here follows the description of the property leased.)

"To have and to hold the same for a term of

two years and one month, to begin December 1, 1917, and to end December 31, 1919, at," etc. * * *

"The lessee at its option shall be entitled to the privilege of four successive renewals of this lease, each such renewal to be for a period of one year, to be subject to all the terms and conditions of this lease. * * *

This lease was under seal but never recorded. The lessee entered and took possession of the premises under the terms and provisions of its lease. On March 28, 1919, East executed an agreement with one J. H. Cofer, subsequently the plaintiff in the aforesaid action of unlawful detainer, for the sale of his Granby street property, including that portion leased to the Tea Company. In this agreement of sale it was provided, among other things, that—

"The taxes on said property for the year 1919, and the rents from the same are to be apportioned between the parties as of the day of settlement above named" (May 1, 1919).

Cofer bought this property through one R. L. Forrest, agent of the vendor, East. The agreement of sale was consummated on May 1, 1919, on which date East and wife conveyed the property to Cofer. This conveyance contained a covenant that the grantors had done nothing to incumber the land. After completing his purchase, Cofer employed Hoggard & Co. to collect his rents. In June, 1919, Hoggard at the direction of Cofer informed the Tea Company that "its lease expired on December 31, 1919, and that it would be expected to vacate on that date." At the same time the company was advised that it could secure a further lease of the premises at \$75 a month. Receiving no reply to this letter, Hoggard wrote again, asking the company if it desired a new lease on the terms submitted. In reply to this inquiry the superintendent of the Tea Company called Hoggard's attention to the fact that it had "a lease containing a clause affording the privilege of four renewals for one year each," and that under such circumstances the company "would not consider favorably the proposition to increase the rental to \$75.00." This letter and the lease of the Tea Company were at once submitted to Cofer by Hoggard.

[1] In November, 1919, the company wrote to East, in care of Hoggard, that it had decided to renew its lease on the premises on Granby street for the term of one year from January 1, 1920, on the terms provided by its contract, and that it reserved its "rights with respect to the remaining three options." This letter was also submitted to Cofer. During the period of this correspondence, and for the month of December, 1919, the monthly rent due by the company was paid to and receipted for by Hoggard, the agent of Cofer. When the latter was advised that the company refused to vacate his property, and was

claiming the right to hold the same under its lease, he notified his agent, Hoggard, not to accept any rent after December 31, as he proposed "to take the matter up with his attorney and make a contest." Hoggard & Co. instructed their office force not to accept any checks from the Tea Company for rent after December 31, 1919. The Tea Company sent a check for January, 1920. By mistake of a clerk in the office of Hoggard & Co., this check was accepted and a receipt therefor forwarded. The error was discovered at once, and the Tea Company so advised by letter. The check was returned uncollected, with a request for the return of the receipt. This was not done. Under the circumstances, the rights of the parties were in no wise affected by the erroneous acknowledgment of receipt of the subsequently returned check.

The Tea Company refusing to surrender Cofer's property, the latter brought an action of unlawful detainer on January 12, 1920, to recover the same. Upon the trial of the issue the jury returned a verdict for the plaintiff, which the trial court declined to set aside.

The plaintiff in error complains of the following instruction given at the instance of the plaintiff:

"The court instructs the jury that under the law the lease offered in evidence should have been recorded, and is void as to J. A. Cofer, unless they believe from the evidence that at the time of his purchase he had knowledge of such facts which would put a reasonably prudent man on inquiry as to its terms."

The plaintiff in error objects to that portion of this instruction which tells the jury that the lease should have been recorded, contending that it is in conflict with *James v. Kibler*, 94 Va. 165, 26 S. E. 417, and *Marks v. Gorla Bros.*, 121 Va. 491, 504, 93 S. E. 675.

In view of this contention, a critical examination has been made of the cases cited, and of the contract of lease in issue. It will be noted that this contract, which has been cited supra makes in part an actual demise of the premises for a term of two years and one month, to end December 31, 1919, and in further part provides that the lessee, at its option, shall be entitled to the privilege of "four successive renewals of the lease." Each of such renewals was to be subject to all the terms and conditions of the lease. Hence this instrument achieves a double purpose: First, it affords a distinct and complete demise of the premises for a term of two years and a month; second, it relates to and provides for, at the option of the lessee, an extension of the term of the demise.

Sections 2465 and 2463 of the Code of 1904, read together, provide that every contract in writing for the conveyance, or sale of real estate, or of a term therein of more than five

years, shall be void both at law and in equity, as to purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record.

The right of the lessee in this case to hold his actual demise against the purchaser is not challenged; but the former essays to hold beyond the term of this demise. The contract provides the means by which the lessee at his option can extend the term of the demise so that the maximum aggregate of the term and the extensions will be six years and one month. In that respect, the contract is one for a term in real estate of more than five years. But a contract for such a term, as we have noted, *supra*, is required to be recorded to protect the lessee against purchasers for value without notice.

In *James v. Kibler*, *supra*, the question for decision was whether a written paper making a lease for five years, with an option for the lessee to continue for another five years, was a present lease for ten years. Obviously it was not, and the court so held. A contract for a lease, and an actual present demise, are essentially different. Judge Harrison notes this distinction in *James v. Kibler*, when he declares that—

"A mere covenant to renew a term, at the option of the lessee, is not an actual renting for a longer period than the term specified."

Hence the paper under consideration is not a lease for more than two years and one month, by virtue of the authority of *James v. Kibler*; but it constitutes a contract binding on the lessor, under which the lessee can hold the leased premises for an aggregate in excess of five years. The question may well be asked: If this is not a contract for a term of more than five years in real estate, what is it?

The case of *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280, is very similar in its facts to the case in judgment. The owner of the property in that case leased it to one Toupin for a term of five years, with the privilege of a further term of five years. This instrument was not recorded. Thereafter he sold the property to Peabody. A contest arose between the latter and Toupin over the possession of the premises. The question presented for decision was the effect of the provision furnishing the privilege of renewal. Under the Massachusetts law, a present term of seven years or less is good without recordation, but an instrument providing for a term in excess of seven years is required to be recorded. The court held as follows:

"It is enough for the purposes of this case to hold that as to any extension, or second term, or agreement for renewal, which will carry the possession of the lessee to more than seven years from the making of the instrument, every instrument which confers an estate for years is within the meaning of the statute. The in-

strument on which the plaintiff relies was of this nature, and so far as it purported to give him the right to a second term of five years, it was invalid as against a purchaser without actual notice."

[2] Analyzing the indenture in the instant case, it is perceived to be a contract by which the lessor has definitely parted with the control of his property for the full period to which the instrument relates. Hence we conclude that this paper is a single contract giving the lessee a demise and four options, and is not four several contracts of option as contended by the defendant. But a contract which provides an actual demise of real estate for two years, and one month, and the means by which the lessee's enjoyment and possession of the premises can be extended for four years more, is certainly a contract for a term of more than five years in real estate and, as against a subsequent purchaser for value and without notice, must be recorded. The case cited *ubi supra* supports this conclusion. The first assignment of error is not considered to be well taken.

The second assignment of error is the refusal of the court to give four instructions submitted by the defendant.

The first of these instructions is the converse of the instruction just considered; hence, if that was correct, its converse was not, and was properly rejected by the court.

Instruction No. 3 as tendered is as follows:

"The court instructs the jury that even if the plaintiff did not have notice of the defendant's lease, yet if they believe from the evidence that he ratified it after he did know of it, they must find for the defendant. Acceptance of rent after notice is a sufficient ratification. Notice to the agent of the plaintiff is notice to him."

[3, 4] This seems to be, abstractly speaking, a correct pronouncement of law; but upon the evidence in the instant case, it was correctly refused. There is no evidence whatever that the plaintiff ratified the lease as a whole after knowledge of its existence. Nor did his acceptance, after notice, of rent for the remainder of the term constitute a ratification. Plaintiff was aware at the date of his deed that the defendant had a lease expiring December 31, 1919. It was a part of his contract of purchase that he was to receive the rents under this demise from May 1, 1919, to the end of the year. This demise was good against the purchaser whether the contract for the term of six years and one month was sustained, or not. Hence, in accepting rent under the demise, the purchaser did not validate the six-year contract. As soon as Cofer was advised of the defendant's claim that it could hold the property beyond December 31, and proposed to do so, he advised his agents that he intended to resist this claim, and not to re-

celve any rent beyond December, 1919. He had already, of date June 14, 1919, advised the Tea Company that their lease would expire at midnight December 31, at which time they were expected to vacate the premises, unless a new lease was effected. Under these circumstances, the receipt of rent for the balance of the year, 1919, did not ratify defendant's lease as a whole, and establish its claim to a six-year term. The Massachusetts court, in the case of *Toupin v. Peabody*, supra, declined to decide whether an instrument making a present demise for a term of less than seven years, and providing for a further term which with the present demise would exceed seven years from the making of the instrument, would be wholly void as to a bona fide purchaser, without actual notice, or whether it might be good for the demise of less than seven years. This same question arises in the instant case, since the contract makes a present demise for a term of two years and a month, and provides for a further term; the aggregate being in excess of five years. The demise for two years should not be considered void. It is only when the lessee, using that demise and the provision for renewals in conjunction, asserts a right to a term of years in the premises in excess of five years, that his contract is required to be recorded to be effective against a purchaser for value. If not recorded, then with respect only to his claim for a term greater than five years should the contract be considered as avoided as to such a purchaser. This view of the contract strengthens our conclusion that acceptance of rent for the present term which the contract provided did not establish the defendant's right to the renewals, and relieve it from the necessity of recording the instrument under which it claimed. This was the conclusion of the trial court, as appears from its written opinion, and in that conclusion we find no error.

Instruction No. 5, of the rejected instructions, is in these words:

"The court instructs the jury that a tenant who enters, or holds possession of property under a void lease is a tenant at will until he pays and the owner accepts payment of rent. In this case, if they believe from the evidence that the plaintiff had no notice of the defendant's lease when he acquired title, but accepted rent from it for an aliquot part of a year, then the defendant became a tenant from year to year, and they must find for the defendant."

From the conclusion announced, supra, it follows that the lessee neither entered, nor held under a void lease. Both parties operated under a demise that was valid. They collided, so to say, over another claim of the defendant, to wit, his claim to a term in excess of five years. In that respect it is considered that the indenture of leasing is required to be recorded to be good against a purchaser without notice. A covenant for

renewal may be void, and therefore fall, without impairing the original term. *Gear on Landlord & Tenant*, par. 102; *Hart v. Hart*, 22 Barb. (N. Y.) 606.

Instruction No. 5 was properly refused.

The last of the rejected instructions is No. 4, which is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff had actual knowledge at the time he purchased the property that the defendant had a lease for a portion of it, then he is charged with constructive knowledge of all the terms and conditions of said lease, and they must find for the defendant."

This instruction will be considered in connection with the third assignment of error, to wit, the refusal of the court to set aside the verdict, and also with the concluding sentence of the instruction actually given, namely, that the defendant's lease was void as to Cofer, unless the jury believed "from the evidence that at the time of his purchase he (Cofer) had knowledge of such facts as would have put a reasonably prudent man on inquiry as to its terms." At this point we encounter the most troublesome feature of this case. Cofer did make certain inquiries, and ascertained that the defendant had an actual lease which expired on December 31, 1919. A very pertinent query is: Could Cofer conclude his investigations at this point, complete his purchase, and be safe, or was he required to prosecute further inquiries, and failing to prosecute them, is he to be charged with the knowledge that such further inquiries might have afforded? It may be well before proceeding further to collate from the record precisely what Cofer did and what he learned before completing his purchase.

Cofer purchased the property in controversy of East, through the latter's representative, Forrest, about April 1, 1919, giving \$40,000 therefor. He had the title examined by a Norfolk attorney, who "reported a clear title, no exceptions made whatever." Cofer states that he knew the Tea Company was a "tenant of the property at the time he made his purchase, but that he did not consult with it, or its representatives, that it was not necessary."

Extracts from Cofer's testimony:

"Q. What notice did you have that any of this property had been rented?

"A. When Mr. Forrest brought this property to me to purchase, representing Mr. East, the owner of the property, I very naturally asked Mr. Forrest what the rentals were, and also how long the places were rented for. Mr. Forrest is a reputable— * * *

"Witness: When Mr. Forrest brought the property to me, I became interested in it, and the first question was with reference to the revenue and the tenants. Mr. Forrest is a reputable real estate man. I have had a number of dealings with him, and I have never yet had occasion to question any statement he

made. I naturally assumed Mr. Forrest had given the information, and I took for granted that his statements were correct, and based on his statements of fact, I purchased the property.

"Q. What were his statements?

"A. To the effect that the revenue from the property was approximately \$200 a month, and that all the leases expired approximately at the same time as of December 31, this past year. He was very positive of that, and I would not have acquired the property had I not known it.

"Q. Now, Mr. Cofer, Mr. Willcox has asked some questions here, the object of which was to develop some custom here in Norfolk. I will ask you this: Is it customary in this city, when a reputable real estate agent who represents the owner of the property tells you that there is a short time tenancy on the property, for the purchaser to go to the tenant and ask to see his lease?

"A. It is not customary. It would be rather out of place, I think.

"Q. Did you accept Mr. Forrest's statements as true?

"A. Absolutely, because he had investigated the matter at my request, and reported back to me, and I accepted his statements as final.

"Q. For whom was Mr. Forrest acting at the time?

"A. Mr. J. F. East, the owner of the property. If Mr. Forrest had told me there was a long time lease on the property, I would have demanded to see the lease. He told me the lease expired on January 1st, which was eight months after I purchased the property.

"Q. Have you stated all the information you had with reference to the tenancy of the property?

"A. Absolutely, which came through Mr. R. L. Forrest, the agent for Mr. East.

"Cross-Examination.

"Q. You stated it is not customary to go back of the representations of the real estate agents as to leases.

"A. Not unless they are long-time leases. If they are long-time leases, it is customary to call for a copy of the lease.

"Q. I am speaking of whether it is necessary to determine the—is it customary to rely on what the real estate agent tells you?

"A. I have been dealing in real estate for 20 years, and when a reputable man tells me when it expires, I take his word for it. If it had been a long-time lease, I would have asked to see the lease.

"Q. You say the custom; that is what you do?

"A. I don't know the custom of others."

Mr. Forrest, who was examined as a witness, confirms the testimony of Cofer in the above particulars. The following questions and answers are taken from his testimony:

"Q. From what source did you get your information?

"A. I got my information, as well as I can recollect, from Capt. East. I do recall it took me some little while to find out what the rents were. I think he referred me to Mr. Hoggard, or said Hoggard could give them to me. I am

sure I got my information from Capt. East, and not from Hoggard. I don't think Hoggard told me anything about the lease or about the rent. I think it finally resulted in Capt. East giving me the information.

"Q. You never saw any written lease, did you?

"A. No, I never saw any written lease.

"Q. And you did not know anything about it except the information that you had gotten from Capt. East, or Hoggard, and passed it on to Mr. Cofer?

"A. That is all. I didn't have any conversation or communication with the defendant in any way at all. * * *

"Redirect-Examination.

"Q. You have sold, as Mr. Willcox says, considerable real estate; is it customary in this city for a purchaser, when he is informed by a reputable real estate agent that there are leases on the place which expire with the current year, to demand to see those leases in advance of the purchase?

"A. He might or might not. I never made any practice in selling Granby street property to run around with the leases.

"Q. Is it customary to demand to see the leases where they expire the current year?

"A. As a general thing, I would say, no."

Mr. Cofer also states that when he purchased the property, paid his money, and executed his notes, he had no knowledge of any written lease. This knowledge came to him later in the year, about August 1, 1919, according to the testimony of H. C. Hoggard.

The deed of May 1, 1919, of East and wife to Cofer, covenants that the grantors had done no act to incumber the land conveyed. It also appears from the record that the general custom with respect to Granby Street property was to lease the same by written lease.

[5] The contention of the plaintiff in error is that upon the state of facts appearing in the record, and substantially stated supra, Cofer should have pursued his inquiries, and therefore is chargeable as a matter of law with knowledge of the renewal provision of the written lease. The instruction given properly remitted to the jury the determination whether, or not, Cofer when he purchased the property had knowledge of such facts as would have put a reasonably prudent man on inquiry as to the contents of the lease. The jury found in favor of Cofer, and there is no reason to disturb their verdict.

This court has considered in a number of cases the doctrine of notice and inquiry. In the nature of things, each case of this character must be decided on its own facts. No standard can be established, or rule promulgated in advance, which will be readily applicable to, and without difficulty decisive of, all subsequently arising cases. The general conclusions announced by this and other courts under this head must be reasonably and intelligently applied by the court, or jury trying the case, to the facts under con-

sideration, and a conclusion reached on the merits.

In the case of *McClanachan v. Siter, Price & Co.*, 2 Grat. (43 Va.) 230, 313, this court said:

"The doctrine that whatever puts a party upon inquiry amounts to notice, is inapplicable to the provisions of the statute in regard both to registered and unregistered conveyances. The registry is not intended to put subsequent purchasers and incumbrancers upon inquiry, but to put an end to the necessity of all inquiry. It is notice in point of law to all persons of the contents, import and legal effect of the registered instrument; but not of other matters connected with the subject not apparent upon the face of the instrument. The statute contrasts this notice in point of law of registered conveyances with notice in point of fact of unregistered conveyances, and by fair construction, with notice in point of fact of any title or claim, not disclosed by a registered instrument. The notice in point of fact must be such as to affect the conscience of the subsequent purchaser, or incumbrancer. It may be either actual, in other words direct and positive, or it may be circumstantial and presumptive. But it is not sufficient if it merely puts the party upon inquiry. It must be so strong and clear as to fix upon him the imputation of mala fides."

This question of notice is very ably discussed in the case of *Fischer v. Lee*, 98 Va. 159 et seq., 35 S. E. 441, and the clear general rule that constructive notice imposes upon a purchaser such inquiry as is suggested by the facts which are known or disclosed in the transaction is fully sustained. There must be something more than the possibility that inquiry will disclose other facts inconsistent with, or in addition to those already revealed. In the course of the opinion (98 Va. 165, 35 S. E. 442), Judge Riely says:

"It was contended, however, that the duty of inquiry would not stop at insolvency, but required that the pledgees should inquire whether the property proposed to be pledged was paid for, and that this would have led to the discovery that the pianos had not been paid for, and to the further discovery of the fraud committed in their purchase. The law of constructive notice does not impose on a purchaser such latitudinous inquiry upon mere knowledge that his vendor is in greatly embarrassed circumstances, or even that he is insolvent. It only imposes upon a purchaser such inquiry as is suggested by the facts which are known or disclosed in the transaction. There must be such a connection between the facts disclosed and the further facts to be discovered upon inquiry that the former may be said to furnish a reasonable and natural clue to the latter. To go beyond this would extend the doctrine of constructive notice beyond the limit it has been carried by the courts, and would, especially in the case of personal property, unduly hamper and embarrass its transfer, and interfere with the freedom of trade."

[8] But to affect a party with notice of the fact with which he is sought to be charg-

ed, whether he made inquiry or not, he must have had knowledge of facts and circumstances naturally calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and inquire before consummating the transaction. Moreover, discovery of the fact should necessarily follow from the inquiry once embarked upon.

See, also, the case of *Arbuckle v. Gates & Brown*, 95 Va. 802, 30 S. E. 496, in which the evidence showed that the trustee in a deed of trust to secure creditors, knew that there was some agreement between his grantors and Arbuckle Bros., and had seen the paper itself, though he was in doubt whether he had seen it before, or after the assignment. The court held:

"We are of opinion that the evidence falls short of that clearness that would affect the conscience of Boudar, trustee, and fix upon him the imputation of mala fides, and that he must be held to be a purchaser for value without notice." 95 Va. 814, 30 S. E. 500.

The same question of the duty of further inquiry upon limited knowledge of a transaction, and of the effect of failure to make this inquiry, arose in the case of *Toupin v. Peabody*, cited *supra*. In that case the contract of lease made an actual demise for five years, with an option of renewal for a further term of five years. To secure the benefit of the additional term, it was held that the instrument must be recorded. When Peabody purchased the property, he was aware that the same had been leased, but was advised that the lease was not in writing, nor was he aware of the renewal privilege. The lessee insisted that upon the facts Peabody was charged with knowledge of the terms of the lease and was bound by the renewal clause. The court held that—

"The fact that a purchaser of land knew that plaintiff was in possession, as a tenant, was not sufficient to affect him with notice of the terms of plaintiff's unrecorded lease, he being informed that it was not a written one, and it being such a lease as is declared by statute invalid as to a purchaser of the land unless recorded."

See, also, *Crane's Nest Coal & Coke Co. v. Virginia Iron, etc., Co.*, 108 Va. 862, 868, 869, 62 S. E. 954, 1119.

Plaintiff in error cites two cases from other jurisdictions in support of his contention that the plaintiff was charged with knowledge of the renewal feature of defendant's lease. These cases are *Jared v. Clements*, 1 Ch. Div. 428, an English case, and *Leominster Gas Light Co. v. Hillery*, 197 Mass. 267, 83 N. E. 870, a Massachusetts case. In the first case a party, while negotiating for a piece of property, obtained actual knowledge of an unrecorded mortgage on same. He gave notice that this mortgage must be discharged. On the day of settlement the ven-

dor produced the original mortgage, and a receipt for the discharge of same, purporting to be signed by the mortgagee. Later it developed that this receipt was forged. The purchaser, however, accepted the receipt as genuine, and bought the property. Later, on discovery of the fraud, the purchaser insisted that the property was relieved from liability on the ground that he had used due diligence to have the debt discharged. The court held otherwise. Obviously this case is not the case in judgment. The purchaser had actual knowledge of the contents of the incumbrance, and gave notice that the debt must be discharged. Thereafter he proceeded at his peril. Due diligence on his part to see that the mortgage was discharged did not pay off the mortgagee's debt, and until that was an accomplished fact, the secured creditor who was in no wise at fault was entitled to the benefit of his security. This in effect is the court's decision. The following is taken from the syllabus:

"A purchaser who, before completion of his purchase, received actual notice of an outstanding equitable interest must, in order to secure a good title from his vendor, take care to see that such interest is got in or destroyed. If he chooses to complete in reliance upon the assurances of the vendor, or the vendor's solicitor, that the interest has been got in, or destroyed, he does so at his own risk, if it turns out that the interest is still outstanding."

If Cofer had had actual notice of the contents of defendant's lease, and upon assurances from his vendor, later proven to be false, that the company for value had waived its right to the renewals, had proceeded to consummate the purchase, the case cited and the case in judgment would be alike upon the facts.

In the Massachusetts case, a vendee took property under a deed containing this provision:

"Said premises are sold subject to a mortgage of \$16,500 to the Leominster Savings Bank; * * * also a lease of part of the premises to the Leominster Gaslight Company and a lease of a part of the premises to H. H. Bicknell & Co."

The lease of the Gaslight Company was for a term of five years, with a right of renewal for a further period of five years. This lease was not recorded. The purchaser of the property notified the lessee to vacate at the end of the first term. This the lessee declined to do and insisted upon his right of renewal. The court held that inasmuch as the purchaser took expressly subject to the lease, his rights were "subordinate to the plaintiff's rights under the lease." Again the facts of the instant case and the case cited are materially different. Cofer did not purchase subject to defendant's lease, or any other lease. His deed expressly states that

the "grantee shall have quiet possession free from all incumbrances; and that the parties of the first part have done no act to encumber the land." The defendant having failed to secure absolute protection against subsequent purchasers, by expending a few dollars and conforming to the registry laws of Virginia, seeks to relieve itself from the effect of its failure in that respect, and find protection for its interests in the alleged omissions of the plaintiff. So long as the latter is free of the imputation of mala fides, he is safe, even though further investigation might have revealed facts of which he was wholly unaware, and which once revealed would completely alter his status. Using the language of Judge Riely in *Fischer v. Lee*, supra, it was incumbent upon Cofer, the purchaser, to "make the inquiry suggested by the facts disclosed." To fix liability for a failure to prosecute additional inquiries, there should "be such a connection between the facts disclosed and the further facts to be discovered upon inquiry, that the former may be said to furnish a reasonable and natural clue to the latter." Cofer was aware: (a) That the defendant had a short time lease on the premises proposed to be purchased; (b) that this lease expired on December 31, 1919; (c) that there were no recorded liens against the property; (d) that the lease probably was in writing; (e) that the vendor had covenanted that he had done nothing to incumber the land; (c) that it was not customary for a purchaser who has been informed by a reputable real estate dealer of a short time lease, expiring with the current year, to ask to see the lease. There was nothing in these facts to furnish a reasonable and natural clue to the renewals contained in a brief paragraph in the elaborate signed, sealed, and duly acknowledged indenture in the hands of the defendant, or to fix upon the plaintiff the imputation of mala fides for failure to definitely ascertain that the lease was in writing, demand its production, and examine its contents, before completing his purchase. Further, this case was submitted to a local jury with an instruction which, in effect, advised them that if they believed from the evidence that at the time of his purchase Cofer had knowledge of facts which would have put a reasonably prudent man on inquiry as to the terms of the lease offered in evidence, they should find for the defendant. The jury upon the facts found for the plaintiff. It cannot be said that this verdict was without evidence to support it, or plainly wrong.

We find no error in this case, and the judgment of the trial court is affirmed.

Affirmed.

SIMS, J. (dissenting). In the case of *Toupin v. Peabody*, 162 Mass. 473, 39 N. E. 280, referred to in the majority opinion, the unrecorded lease was in writing for a term of

five years, with a covenant therein that the "lessee is to have the privilege of renewing this lease upon the same terms for the further term of five years." Before the first term expired, the lessor conveyed the premises to a bona fide purchaser without notice of the written lease. The suit was by the lessee, by bill in equity, against the purchaser to compel specific performance of the covenant for renewal in the lease.

The statute involved, so far as material, was as follows:

"A conveyance of an estate in fee simple, fee tail, or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person other than the grantor or lessor and his heirs and devisees, and persons having actual notice of it, unless it is recorded, * * *" etc.

The relief sought in that case would, if granted, have given the lessee tenant for years a longer holding than seven years from the making of the lease, to wit, a holding of ten years. The case does not involve the question whether a lease for a less term than seven years, with the privilege to the lessee of yearly renewals thereafter, extending on beyond the seven years, would or would not be valid for terms which together would not exceed the period of seven years from the making of it.

In the opinion of the court in that case, this is said:

"The intention of the particular clause in question is that a bona fide purchaser without actual notice may rely with certainty upon the fact that no instrument which does not appear of record, and of which he does not have actual notice, can give a tenant for years the right to any longer term than for seven years from the making of the instrument. * * *

"The general intention of the section in which the clause is found is that no instrument operating to create an interest in land greater than an estate for seven years shall, unless duly recorded, be valid as against any person other than the one who makes it, or his heirs or devisees, unless such person has actual notice of the instrument. * * * In fixing upon seven years from the making of the lease as the length of a term which might be valid as against a bona fide purchaser without actual notice, the Legislature intended that to be the utmost which a lessee for years under an unrecorded instrument could claim as against such a purchaser, whether the instrument demised directly a longer term or provided for its indirect creation by an agreement for renewal at the lessee's option."

However, as above indicated, that case does not involve the question which is involved in the instant case, namely, whether a lease for a less time than the statutory period, with the privilege given the lessee of yearly renewals for successive terms of one year during a certain number of years, the extreme limit of which exceeds the statutory period, is good for those terms which do not in the

aggregate exceed the statutory period against a purchase for valuable consideration without notice, although unrecorded; and the case referred to does not decide that question, as indeed the court takes care to expressly state, in effect, in the opinion in such case. The following is there said on this subject:

"We do not decide whether an instrument which makes a present demise for a term of seven years or less, and which provides for a further term which with the present demise will exceed seven years from the making of the instrument, either by way of a new lease * * * or by the effect of the lessee's mere continuance in possession after the expiration of the first term, if not recorded, is wholly void as to a bona fide purchaser without actual notice, or whether it may be good for the first term of seven years or less. It is enough for the purposes of this case to hold that as to any extension, or second term, or agreement for renewal, which will carry the possession of the lessee to more than seven years from the making of the instrument, every instrument which confers an estate for years is within the meaning of the statute."

Now, in the instant case, the "second term" covered by the agreement for renewal only is involved. That term, added to the first term demised by the lease, would "carry the possession of the lessee" to less than the statutory period in Virginia of five years. So that the Massachusetts case just referred to is no authority for the holding that the instant case, in so far as the tenancy of the lessee drawn in question therein is concerned, is within the Virginia statute; and it seems plain from what is said in the opinion in the Massachusetts case aforesaid that such court would not so hold.

Coming then to the question aforesaid involved in the instant case, the following considerations lead, as I think, to the conclusion that the provision of the contract here involved is not within the Virginia statute.

As stated in the majority opinion, the statutes involved in the case before us, when read together, provide as follows:

"Every contract in writing for the conveyance or sale of real estate, or a term therein of more than five years, shall be void both at law and in equity as to purchasers for valuable consideration without notice, unless and except from the time that it is duly admitted to record." (Italics supplied.)

The contract under consideration, therefore, falls under the condemnation of the statutes only to the extent that it was made for a holding of the premises by the lessee for "more than five years" from the making of the contract.

As the contract stood when entered into (November 24, 1917), it might have been fully performed within two years and one month and six days, as the first term provided for began December 1, 1917, and ended on the last day of December, 1919. It was only in

the event that the lessee exercised one of four options given by the contract of "four successive renewals of this lease" that the contract would not have been fully performed within that time. Before the first term expired, the lessee exercised one of his options of renewal of the contract, but expressly limited such renewal to an additional period of one year, which will be referred to as the second term. The action in the instant case was instituted by the purchaser on January 12, 1920, to recover from the lessee the possession of the premises. There is involved in this action, therefore, the validity of the contract, as against the purchaser, only in so far as it is vouched by the lessee as his authority for holding the premises for the said second term, covering the year 1920. And as the contract stood at the time the action was brought, it might have been fully performed and terminated at the end of the year 1920, only three years and one month and six days from the time of the making of the contract. At the time of the action the lessee was not obligated by the contract to renew the lease further, and he did not assert any right then existing to hold the premises for a term or aggregate term of years in excess of five years, but only for the first and second terms, aggregating three years, one month, and six days. As stated in the majority opinion itself:

"It is only when the lessee using that demise" (referring to the demise for the first term), "and the provision for renewals in conjunction asserts a right to a term of years in the premises in excess of five years, that his contract is required to be recorded to be effective against a purchaser for value. If not recorded, then with respect only to his claim for a term greater than five years should the contract be considered as avoided as to such a purchaser."

Since the lessee in the case before us did not assert, and his right to hold the premises at the time the action was instituted did not depend upon his right to assert "a right to a term of years in the premises in excess of five years," it clearly follows, as I think, that with respect to the claim of the lessee involved in this case, the contract cannot be considered as avoided by the statute. Further:

The statutory provision under consideration, in so far as concerns the language having reference to terms in real estate of "more than five years," is similar in its scope to the provision of the statute of frauds (section 2840, Code 1904) embracing "any agreement that is not to be performed within a year." Hence, in accordance with the well-settled rules of construction of the statute of frauds (see *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337), and also with the principle on which the decision of the Massachusetts case above referred to is based, I think that so much of the contract involved in the instant case as could be performed within the period of five years from the mak-

ing of it, which certainly included the second term aforesaid, is not within the Virginia statute and is therefore valid as against the purchaser, the defendant in error.

Such, indeed, it would seem, would have been the opinion of the learned trial judge if he had thought the contract severable with respect to the second term aforesaid. In the opinion of such judge in the record before us, this is said:

"It is further urged on behalf of the defendant that as the term is for only two years and one month and the contract for renewal provides for successive terms of one year each, it is valid until the term is reached which would carry it beyond the five-year period.

"This would be true if these were separate or separable contracts for each renewal, but the lease contains but one clause of renewal, and the law is well settled that where a contract is entire and relates in part to a matter which requires it to be in writing, the whole provision is void. *Engleby v. Harvey*, 98 Va. 440; *Noyes v. Humphrey*, 11 Gratt. (52 Va.) 636."

The entire contracts involved in the two cases cited in the quotation just made were verbal contracts of a party to pay both for work done and to be done for another. Such contracts are not analogous to that involved in the instant case. And the fact that there is but one writing and but one renewal clause in that writing is, as I think, immaterial. The material question is: Might that portion of the contract which is involved in the case before us, as aforesaid, have been fully performed without any obligation on the lessee thereunder for any further period? If so, the contract was clearly severable in that respect and is not within the statute. That it was thus capable of performance and thus severable seems to me to be obvious from the provisions of the contract, which, as aforesaid, did not obligate the lessee as a tenant beyond the first term as the case stood when the contract was executed, and did not obligate him beyond the second term, as the case stood when this action was instituted. The circumstance that the lessor was obligated by the contract for a longer time than the statutory period is not alone the true criterion of the length of the contract obligation. Although one of the parties to a contract is thereby bound for a certain period longer than the statutory period in question, if the other party thereto is given thereby an option to terminate the contract at a time within the statutory period, the contract will be construed as one which may be performed within the statutory period, and hence as not within the statute. In *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337, the contract bound the defendant "to buy 250 shrs. R. & D. at 89 and sell the same to T. Seddon" (the plaintiff) "at the end of 3 yrs. at 96." But it contained the further provision that, "Stock may be called at 96 at any time be-

fore expiration of 2 yrs." And it was held that the contract might have been performed within one year, and hence was not within the statute of frauds.

For the reasons stated, I feel constrained to dissent from the majority opinion.

(88 W. Va. 312)

KING v. SMITH et al. (No. 4077.)

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

1. Covenants §47—General warranty cannot enlarge estate conveyed by deed.

A covenant of general warranty in a deed cannot enlarge the estate thereby conveyed.

2. Covenants §47—General warranty restricted to estate conveyed by deed.

A covenant of general warranty in a deed, which grants all of the right, title, and interest of the grantor, is restricted to the estate conveyed, and does not warrant the title to the land described in the deed.

3. Deeds §120—Estate will not be enlarged by construction, where language clear and unambiguous.

The courts will not, by construction, enlarge the estate conveyed by a deed, where the language of the grant is clear, plain, and free from ambiguity.

Error to Circuit Court, Harrison County.

Action by Mary D. King, administratrix, against Mortimer W. Smith and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Elmer L. Stone, of Charleston, for plaintiff in error.

Harvey W. Harmer and Law & McCue, all of Clarksburg, for defendants in error.

RITZ, P. This writ of error seeks reversal of a judgment of the circuit court of Harrison county, sustaining a demurrer to plaintiff's declaration in an action of covenant.

The declaration made profert of the deed in which is contained the covenant sued upon, and after oyer of this deed was granted on motion of the defendant a demurrer to the declaration was filed, and the same sustained. The deed, after reciting that the grantors are the heirs at law, with the exception of some infants, of Augustine J. Smith; that their ancestor on the 27th day of September, 1856, by a certain paper writing or title bond, bargained and sold unto the grantee, Patrick King, a tract of land situate in Randolph county, describing the same; that the said Augustine J. Smith departed this life in the year 1888 intestate; that no deed had ever been made to the grantee by the said Augus-

tine J. Smith; that the purchase money had never been paid for said land, and that the said Patrick King was willing to take a deed from the grantors as heirs at law of the said Augustine J. Smith, and to prosecute proper proceedings to extract the title from such heirs as were infants, and to pay \$2 per acre as a consideration for said deed, proceeds to grant unto said Patrick King, with covenants of general warranty as to themselves, the grantors, their right, title, and interest in and to that certain tract or parcel of land mentioned and described in the title bond aforesaid, situate in the county of Randolph, and, after describing the land, proceeds as follows:

"The purpose and intent of this deed being to invest the party of the second part with all the right, title and interest in and to the said parcel of land that is in them as heirs at law of the said Augustine J. Smith."

The declaration declares that King had been deprived of the possession of said land by a judicial proceeding, and his title thereto held to be invalid, for which reason he claims a breach of the covenant of general warranty contained in the deed. The defendants' contention is that the deed only conveyed such right, title, and interest as they had, and that the covenant of warranty therein contained did not enlarge this grant, but was restricted in its application to the estate granted.

[1, 2] We are asked by the plaintiff to construe this deed as conveying the land in fee because of the fact that the ancestor of the grantors had theretofore made a title bond to King, and for the further reason that the covenant of general warranty is contained in the deed. That a covenant of general warranty contained in a deed will not enlarge the estate thereby granted seems to be very well settled. Such a covenant is a restricted one, and applies only to the estate granted by the deed, and does not have the effect to enlarge that estate. *Hull v. Hull*, 85 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800; *Uhl v. Railroad Co.*, 51 W. Va. 106, 41 S. E. 340; *Reynolds v. Shaver*, 59 Ark. 299, 27 S. W. 78, 43 Am. St. Rep. 36; *Sweet v. Brown*, 12 Metc. (Mass.) 175, 45 Am. Dec. 243; *White v. Stewart*, 131 Ga. 460, 62 S. E. 590, 15 Ann. Cas. 1198, and note; *Maupin on Marketable Title to Real Estate*, p. 840; 7 B. C. L., title "Covenants," § 57. It is clear from these authorities that the covenant of general warranty contained in a deed does not enlarge the estate thereby granted.

[3] Nor is there any room for construction of the granting clause of this deed. It is clear and unequivocal, and grants the right, title, and interest of the grantors in and to the parcel of land therein described. Not only is this true of the granting clause, but after describing the property it is again de-

clared that the purpose and intent of the deed is to invest the party of the second part with all the right, title, and interest of the grantors as heirs at law of Augustine J. Smith. This leaves no room for construction. It is true that it is the function of courts to determine what the parties intended by a deed or contract, but this conclusion must be arrived at from the language of the paper when it is clear and unequivocal, as it is in this case. The courts cannot arbitrarily say that the parties intended to say something by their contract or deed which the language does not import. In other words, where the language is clear and free from ambiguity, there is no room for construction, and that is the case here.

There is no error in the judgment complained of, and the same is affirmed.

(88 W. Va. 315)

SHERRARD v. HENRY. (No. 4072.)

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

1. Dead bodies §5—Equity may restrain removal when rightfully buried.

Equity has jurisdiction to restrain the removal of or interference with the remains of the dead rightfully buried in a cemetery.

2. Adverse possession §6—Those using land for cemetery purposes with owner's consent may acquire title by adverse possession.

Where a parcel of land has been set apart by the owner thereof as a place for the burial of the dead those who, with the consent and acquiescence of such owner, use the same for the purpose for which it has been dedicated, selecting and appropriating plots or squares for the burial of their dead therein free of charge, may acquire a right to such plots or squares so appropriated by adverse possession.

3. Adverse possession §6—Cemeteries §15—Adverse possession may confer right of perpetual easement in cemetery lot; equity will protect such rights.

While the right which one acquires in a cemetery lot is rather in the nature of a perpetual easement subject to be controlled by the state in the exercise of its police power, it is such a valuable right as a court of equity will protect, and the same character of adverse possession that will confer title to real estate will suffice to confer such right.

4. Adverse possession §19—Sufficiency of boundaries of burial lot for the purposes of adverse possession stated.

It is not necessary in order to the acquirement of a right in a burial lot by adverse possession that the same be fenced. If the limits of such claim are clearly defined by improvements upon the lot and by a slight barrier or ridge extending all the way around the same,

and so maintained for the period of 10 years, clearly indicating the extent and nature of the claim, it will be sufficient to confer the right by adverse possession.

5. Cemeteries §21—One who buries a body on another's burial lot may be required to remove it.

One who buries the body of his dead relative upon a burial lot which another has the exclusive right to use for such purpose will be required by mandatory injunction to disinter and remove the same.

Appeal from Circuit Court, Morgan County.

Suit by Alvernon Sherrard against Nora Henry for an injunction, with cross-bill by defendant. Decree for complainant, and defendant appeals. Reversed and rendered.

A. C. McIntire, of Martinsburg, and G. McIntire-Weaver, of Berkely Springs, for appellant.

Allen B. Noll, of Martinsburg, and Luttrell & Rogers, for appellee.

RITZ, P. Plaintiff brought this suit for the purpose of enjoining the defendant from removing the body of her uncle from a burial plot in a cemetery in Oakland, in Morgan county. From a decree perpetuating the injunction and refusing the defendant the relief prayed for in her cross-bill answer, the defendant prosecutes this appeal.

It appears that many years ago there was conveyed to certain trustees for the Methodist Church a tract of land for religious purposes. Upon a part of this land was erected a church building in which has been conducted religious services, and another part of the land was set apart as a burial ground. It appears that this part was inclosed by a fence. No charge was made for lots in this cemetery; it being the uniform and unbroken custom since it was set apart and dedicated for burial purposes for those desiring to bury their dead therein to select a lot for that purpose, and to indicate such selection by marking such lot, and by cleaning it up and keeping it in presentable condition. Both parties to this suit agree as to this phase of the case, and both of them claim the right to the lot in which plaintiff's uncle was buried, by reason of the same having been preempted in the manner above indicated. The plaintiff contends that her grandfather, Dr. B. E. Shockey, selected a row, as she calls it, in this cemetery for the burial of members of his family and their close relatives, and that this row includes the lot wherein her uncle was buried. The defendant, on the other hand, contends that she, in the year 1893, selected a square in this cemetery for the burial of her dead relatives, and marked the same off in accordance with custom, and that the lot in which plaintiff's uncle is buried is within her square, where-

fore she claims the right to compel the removal of this body and its reinterment elsewhere, and in her answer she prays that she be given this relief against the plaintiff, and against the plaintiff's father, John W. Sherrard.

The rights of the respective parties to this controversy depend largely upon the fact as to which of their burial lots include the ground in which the body of plaintiff's uncle was interred. The proof is full, in fact is uncontradicted, that this piece of land was set apart for burial purposes many, many years ago, and has been dedicated to that use ever since. The proof is just as satisfactory that the method of selection of a burial lot in this cemetery was, by the party desiring such lot, going upon the ground and marking it in some way, and improving and keeping it in presentable condition, as well as by burial of bodies of dead relatives therein and marking the graves. That the plaintiff's ancestor did select a row or square many years ago for this purpose is likewise not disputed, but it is the boundaries of this square, or the limits of it, which make the controversy here. The plaintiff's father is the principal witness upon the acts of ownership exercised by Dr. Shockey and his successors over this plot of ground. He testifies that for many, many years he worked and took care of the lot appropriated by Dr. Shockey, and that it included the space in which his brother's body was buried. Other witnesses testify that he did on many occasions clean up and work the plaintiff's plot, but not one of them have any information that he ever did anything upon that part thereof in which the body of plaintiff's uncle was interred, nor is there any evidence upon the ground defining the limits of the plaintiff's lot at that end of the plot so far as the testimony indicates. On behalf of the defendant it is shown that in the year 1893 she selected a square in this cemetery, and that at that time she made a slight ridge all the way around this square indicating that it had been appropriated; that in this square at that time she buried the body of her father, and that since that time she has had interred in this square the body of her mother, of her father-in-law, her mother-in-law, her sister, and one of her grandchildren, and that she has space reserved therein sufficient for the burial of her own body and the body of her husband. That this square so marked out by the defendant includes the space in which the body of plaintiff's uncle is buried is undisputed. The evidence is overwhelming that the defendant since 1893 from time to time worked upon this square. She has removed the brush and sprouts therefrom, and kept it planted in flowers, and sowed in grass, has provided suitable headstones at the graves of her deceased relatives buried therein, and has kept up the slight ridge around the edges thereof indicat-

ing the limits of her lot. That the father of the plaintiff buried his brother within the limits of this lot there is no question, but his contention, and the contention of the plaintiff, is that Dr. Shockey had acquired this lot prior to the time it had been appropriated by the defendant in 1893. It is clear that in 1893 there was nothing to indicate an intention upon the part of Dr. Shockey or his relatives that their lot should extend to and cover this ground, and it is just as clear that since 1893, when the plaintiff selected the lot, she has indicated by unmistakable marks upon the ground the intention to appropriate the same for burial purposes. Whether this lot was included within the original lot as intended to be appropriated by Dr. Shockey in the beginning can make little difference. There was nothing upon the ground in 1893 to indicate that his row extended in the direction of the defendant's lot beyond the last grave therein. This ground was unappropriated at that time by any person, and under an unbroken custom any person desiring to provide a place for the burial of his dead in this cemetery had a right to appropriate any ground not theretofore marked out and appropriated by some one else for that purpose. It is shown by the evidence and is not disputed that when the plaintiff's father went to the cemetery and indicated the place that he desired the grave dug for the burial of his brother's body, he was told that that was within the defendant's lot, and that he insisted, notwithstanding this information, that the grave be dug at that point. He states in his testimony that, had the defendant come to him and advised him that she claimed this lot, he would have surrendered any claim to it, and buried his brother elsewhere, but that he is now unwilling to remove the remains. This testimony is not at all consistent with his act in burying his brother in this lot after being fully informed of the defendant's claim thereto and without making any further inquiry or investigation as to defendant's rights. In addition to this the insincerity of his statement is demonstrated by the fact that immediately upon the discovery by the defendant that this body was buried in her lot, she called upon plaintiff's father to have the same removed, and informed him that the lot was hers, and she proposed to pay one-half of the expense of the removal of the body, and when this proposition was declined she proposed that she would pay the entire expense of removing it, which proposition was also declined. She then called upon the trustees who held the legal title to the property and asked them to require the plaintiff and her father to remove the body of the plaintiff's uncle from her lot, and the trustees, being advised in the premises, notified plaintiff's father to remove the body within 30 days, failing in which the defendant would have

the same removed. Before the expiration of this time this injunction was procured.

[1-3] The defendant challenges the jurisdiction of a court of equity to maintain this bill, insisting that there is an adequate remedy at law for the protection of any rights which the plaintiff may have. This claim is based upon the theory that the plaintiff is not in possession of the lot, and is therefore not entitled to go into equity to protect any rights she may have therein. That a court of equity will interfere to prevent desecration of places of burial of the dead or to prevent the removal of bodies properly buried is well established. There is no property in a dead body, and, this being true, the law can afford no remedy in a case where the removal of such a body is sought or attempted. The courts do, however, recognize that, while there is no property in the body, the close relatives have a right to protect the same, and to prevent its removal or the desecration of the grave. This being true, there is no other remedy except resort to a court of equity when the removal of a dead body is attempted or threatened, and then such relief is granted as the circumstances require, and as is in consonance with the feelings of mankind. *Wormley v. Wormley*, 207 Ill. 411, 69 N. E. 865, 3 L. R. A. (N. S.) 481, and monographic note; *England v. Central Pocahontas Coal Co.*, 104 S. E. 46. There is no doubt of the plaintiff's right to resort to a court of equity to prevent interference with the body of her dead uncle, unless it appears that it was interred in a place where the plaintiff had no right to bury it. There is no doubt but that one who acquires a cemetery lot has some interest therein. He does not acquire the fee in the land. His interest is more in the nature of a perpetual easement, and it is likewise true that the exercise of this right is subject to the police power of the state. Conditions may arise which would make such a cemetery a nuisance, in which case the state, under its police power, could require its removal and the reinterment of the bodies at some other point. 5 R. O. L. title "Cemeteries," § 10; *Grinnan v. Fredericksburg Lodge*, 118 Va. 588, 88 S. E. 79, Ann. Cas. 1918D, 729; *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769.

[4] It seems to be quite as well established that this right may be acquired by adverse possession as any other interest in real estate may be acquired, and both of the parties in this case contend that this is the way they did acquire the rights for which they respectively contend in this suit. The plot of land in controversy was not inclosed by either of the parties with any fence, and, as before stated, the limits of the Shockey lot were not definitely marked upon the ground at any time, at least not in 1893, when the defendant appropriated the lot. There are some authorities which hold that, in order to the

acquisition of title by adverse possession, where such possession is not accompanied by any color of title, the exterior boundaries must be indicated by a fence or barrier, and, if this rule is applied in this case, neither of the parties have had any adverse possession of this particular piece of ground. There is no doubt but that the extent of such claim must be indicated in some way upon the ground, and this delimitation of the claim upon the ground must be of such character as to clearly indicate that it is claimed by the party asserting the right thereto. There must be such marks as indicate that the land is under the actual control of the party claiming it. *Jacobus v. Congregation of Israel*, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; 5 R. C. L. title "Cemeteries," § 10; 2 C. J. § 71; *Hook v. Joyce*, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96; *Roumillot v. Gardner*, 113 Ga. 60, 38 S. E. 362, 53 L. R. A. 729; *Hines v. State*, 126 Tenn. 1, 149 S. W. 1058, 42 L. R. A. (N. S.) 1138; *Wooldridge v. Smith*, 243 Mo. 190, 147 S. W. 1019, 40 L. R. A. (N. S.) 752; *Illinois Steel Co. v. Billet*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905; *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 77 S. E. 525. The proof in this case is clear that the defendant had buried in her square a number of her relatives whose graves were marked by headstones indicating that at least the portion of the ground in which they were buried had been appropriated for that purpose. If this had been all that she had done, her interest might extend no further than the land occupied by these graves, but, in addition to this, ever since the year 1893 she has had this entire square, including the land where plaintiff's uncle is buried, surrounded by a ridge indicating the limits of her claim, and has cared for all of the land included within this slight barrier by sowing the same in grass, planting flowers thereon, and caring for the same from year to year as the same needed attention. This was a clear indication that this piece of ground had been appropriated by the defendant for burial purposes, and, as held in the case of *Lyons v. Fairmont Real Estate Co.*, supra, was a sufficient indication of the limits of her claim. We are therefore of opinion that the defendant was entitled to the exclusive right to bury her dead in the space where the body of the plaintiff's uncle was buried, and that neither the plaintiff nor her father had any right to appropriate this land for the purpose of interring the body of their deceased relative therein.

[5] The defendant, as before stated, asked for affirmative relief, and prayed that John W. Sherrard, the father of the plaintiff, in addition to the plaintiff, be made a party defendant to her cross-bill. This was done, and process served upon him upon the cross-bill. Defendant now insists that she is not only entitled to defeat the plaintiff's claim, but is

also entitled to a mandatory injunction here-in commanding and requiring the plaintiff and her father to forthwith remove the body of their deceased relative from the place where the same is now buried, in order that she may enjoy the rights to which she is entitled. It would seem quite clear that, where one trespasses upon the rights of another, and does some act which would prevent such other from enjoying to the full extent the privileges to which he is entitled, a court of equity will compel the guilty party to restore the status quo, and this is as true in the case of the unauthorized interment of a dead body as with any other interference. *McWhirter v. Newell*, 200 Ill. 583, 66 N. E. 345; *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903.

It follows from what we have said that the decree complained of will be reversed, and the injunction dissolved, and that a mandatory injunction will be granted to the defendant, in accordance with the prayer of her cross-bill answer, commanding and requiring the plaintiff and her father, John W. Sherrard, to forthwith remove the body of their deceased relative from the point where the same is now buried upon the defendant's lot, and the cause remanded for the purpose of executing this decree.

(88 W. Va. 231)

STATE v. BRIDGEMAN et al. (No. 3776.)

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

1. Criminal law §594(1)—Elements necessary for continuance for absence of witnesses enumerated.

A motion for continuance based on the absence of a witness is addressed to the sound discretion of the court, and it must be shown to the satisfaction of the court that the witness is material, and that due diligence has been used to obtain his attendance, and that his evidence would not be cumulative.

2. Criminal law §1151—Appellate court will not reverse denial of continuance for absence of witnesses unless for abuse of discretion.

Where a continuance because of the absence of a witness has been refused, the appellate court will not reverse unless it clearly appears that the trial court has abused its sound discretion.

3. Lewdness §10—Evidence sustaining conviction of lewd and lascivious cohabitation.

Proof that a man and woman not married to each other occupied together two adjoining rooms with a door in the partition between for approximately one year, where they slept and took their meals, she doing the cooking and other domestic work and acting as assistant

to him in his profession as a dentist, conducted in offices adjoining the two living rooms, at a wage of \$10 per week, and that she stated to various visitors that they were married, and on one occasion introduced him to her brother-in-law as her husband, he taking no exception to the introduction, but tacitly assenting thereto, that on one occasion they were found sleeping together in one of the rooms, that a boy baby was born to her there after she had been living in the rooms for approximately ten months, of which baby he seemed to be very fond, and to which he called himself "Daddy," and that on one occasion he came into the room when she had just arisen from bed, and remained until she dressed without apparent embarrassment to either, "same as any man might happen to run in on his wife if she would be dressing," is sufficient to constitute the offense of lewd and lascivious cohabitation under section 7, c. 149 (sec. 5310), of the Code.

(Additional Syllabus by Editorial Staff.)

4. Lewdness §10—"Lewd and lascivious cohabitation" defined.

The crime of "lewd and lascivious cohabitation" under Code, c. 149, § 7 (sec. 5310), means the living together of a man and woman not married to each other, in the same house or apartment, as husband and wife.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lewdness.]

Error to Circuit Court, Harrison County.

Hugh B. Bridgeman and another were convicted of lewd and lascivious cohabiting together, and they bring error. Affirmed.

Charles G. Coffman, of Clarksburg, for plaintiffs in error.

E. T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for the State.

LIVELY, J. Hugh B. Bridgeman and Eula Miller were indicted, tried, and convicted in the Criminal Court of Harrison County of lewd and lascivious cohabiting together and with each other, and the former was adjudged to pay a fine of \$100 and was sentenced to confinement in the jail at hard labor for 30 days, and the latter was fined \$100, both sentences being imposed on the 1st day of December, 1917.

Defendants assign as error: (1) The refusal of the court to continue the case; (2) the court's refusal to permit certain evidence offered by the defendants to go to the jury; (3) the court's refusal to set aside the verdict on the ground that the evidence was insufficient to convict.

Bridgeman is a dentist, and had rented four adjoining rooms on the second floor of the Elk Bridge Building in Clarksburg, the first two of which rooms he used for dental offices, and the other two, which were adjoining, all being in one suite, he occupied as living rooms. The room next to those used

for offices was furnished with a bed, piano, dresser, chairs, and the like, and the other room, the back room, was used as a dining room, in which was a table, a kitchen cabinet, a davenport, and it was otherwise fitted up for a kitchen and living room. In July, 1915, he employed Eula Miller to assist him in his dental work at \$6 per week. At that time she was 17 years old and resided with her father on Baltimore street, about one-half mile from the Elk Bridge Building. In September, 1916, she began living in these two living rooms occupied by Bridgeman, and was yet residing there at the time of the trial. In May, 1917, she was delivered of a boy baby. The following August both defendants were arrested and bound over to answer an indictment for the offense for which they were convicted, were indicted at the succeeding November term of the criminal court of that county, and tried and convicted at that term. Mrs. Cozad, a sister of Eula Miller, testified that she visited her sister at these living apartments of Dr. Bridgeman quite often before defendants were arrested in August, 1917, when she saw her sister doing the cooking and housework; that she had been there as much as two days and two nights at a time, and saw no one else rooming there or staying there at any time except the defendants; that on one occasion she saw them in bed together in the room which contained the piano, and which room opened into the kitchen, where she (witness) slept on the davenport. Eula Miller stated to the witness that she and Dr. Bridgeman were married, but Dr. Bridgeman never made such a statement. She was there at noon nearly every day for a considerable period when she worked at Gribble's store, in the near vicinity. She saw Bridgeman take his meals at the apartment, and always considered, but was in doubts, as to whether the defendants were married, as she had heard that Bridgeman was married to some other woman. Mrs. Hattie Wallace testified that she was a sister of Eula Miller, and visited the Bridgeman apartment in the summer of 1916, and on one occasion when she was there her sister was in bed in the room adjoining the dental offices, and had just got up without much clothing on, when Dr. Bridgeman came in the room and remained while she was dressing, "same as any man would happen to run in on his wife if she would be dressing; and he called himself 'Daddy' to the baby, and asked me what I thought about it, and he called me 'Aunt' to it, which I suppose I am." The defendant Eula Miller told her that she and Doctor Bridgeman were married. Mrs. Lena Ice, another sister of Eula Miller, testified that she visited her sister at the apartment one evening in November when Dr. Bridgeman came to town on a late train, and came to the apartment, when her sister Eula cooked his supper for him, and after supper they accompanied her

across the bridge to Pike street, where they met Mrs. Ice's husband, to whom Eula Miller introduced Dr. Bridgeman as her husband, and the doctor acknowledged the introduction. On that occasion her sister told witness that she and Dr. Bridgeman had been married in Cincinnati, and she (Eula) thought that they would rent a house and furnish it in the near future. This was before the baby was born. Mrs. Effie Wamsley, another sister, stayed at the Bridgeman apartments about three or four weeks while Eula Miller lived there, and slept in the rear room on the davenport a portion of the time, and sometimes in the bed in the other room. At that time, which was in September, 1916, she usually slept with her sister, and her husband slept with Dr. Bridgeman. Her husband ate his meals at the apartment, but not all of the time, and when she and her husband slept together she did not know where Dr. Bridgeman slept. She never saw him and her sister sleeping together. Her sister did go into the other room at the retiring hour, and frequently Dr. Bridgeman would go into the same room either before or after, but she could not tell whether or not he continued to stay in that room all night. Eula Miller stated to this witness also that she and Dr. Bridgeman were married. The testimony of Clyde Wamsley, the husband of Effie Wamsley, was practically the same as that of his wife. Mrs. Cozad, who visited the defendants at their apartments possibly more often than any other witness, stated: "They lived there seemingly the same as the rest of my sisters and their husbands." She testified that defendants got their meals there, her sister doing the cooking and the housework, and he was staying with her. G. W. Miller, the father of Eula, testified that after his daughter quit coming home at night and began to stay at the Bridgeman living rooms he went to see Dr. Bridgeman about the matter and remonstrated with him and asked him not to take automobile trips at night with her and "do things like that," as it would cause people to talk about them. At that time the doctor promised him that he would not do so any more. His daughter told him that they were married. He frequently visited them at the living rooms when the doctor came in and took his meals there. After some trouble had arisen and he became suspicious that they were not married, he went up to the apartments and had a talk with them, and they requested him to stop any trouble, stating that they would have everything in "shape" and would be married the following September.

All of the witnesses for the state who visited the defendants at their apartments were under the impression, from their conduct and manner of living, that the defendants were married and were living together as man and wife. Quite a number of them testified to the actions of Dr. Bridgeman after the ha-

by was born, stating that he held himself out to be the father of the child and was proud of its size and looks, nursed it, and seemed to be very proud of it.

On the other hand, the defendants are positive in their statements that they never lived together as man and wife, never held themselves out to be married, never occupied the same bed together, and that they had no illicit intercourse. She denies that he was the father of the child. Dr. Bridgeman denies that he was introduced to Mrs. Ice's husband as the husband of Eula Miller; and Miss Miller denies that she ever told any of her sisters or her father that she was married. As is usual in such cases, there is a flat contradiction between the witnesses for the state and the defendants. Dr. Bridgeman testifies that he employed Miss Miller to assist him in his profession at \$6 per week, and afterwards paid her \$12 per week for a time, until she began living at his apartments, when he paid her \$10 per week; that he rented these four rooms and paid therefor the sum of \$100 at intervals of three months; that he boarded elsewhere than at the apartments, paid no bills for Miss Miller, either for clothing or for groceries, and did not furnish any money for those purposes. He testified that he took his meals at various restaurants, and, after he was arrested in August, rented a room, near by his office, which he had occupied from that time until the trial. He flatly denies that he is the father of the illegitimate child or that he ever held himself out to be such, either by word or deed. On this conflicting evidence the jury found defendants guilty.

[1, 2] When the case was called for trial defendants moved the court for a continuance on account of the absence of Lee Rogers and Harold Dunn, claimed to be important witnesses, without whose evidence they could not safely go to trial. Rogers had been summoned, but Dunn had not been found by the sheriff. A rule was issued against Rogers, and he afterwards appeared and gave his testimony, which was not important. Bridgeman was under bond to answer the indictment, and, after the indictment was found, he did not have subpoenas issued for his witnesses until four days after. He knew Dunn very well and testified that he had lived with him at his apartments during most of the time that Miss Miller lived there, and that this witness had been at Clarksburg up until about the time of the trial, but that he did not know what had become of him. He stated that this witness lived in East End, Industrial, an addition to the city of Clarksburg. As an excuse for not having his witnesses summoned promptly, he stated that this witness had been around town all the time, and he supposed that he would be on hand at the trial or would be within reach of the sheriff when process was issued. Under such circumstances the court in its dis-

cretion refused to continue the trial, presumably because the defendant had not shown the proper diligence in preparing for the trial. It is pertinent to state that it does not appear from the testimony of any of the witnesses who visited the apartments of Dr. Bridgeman while Miss Miller lived there that the absent witness, Dunn, was ever seen there. It is well settled that a motion for continuance is addressed to the sound discretion of the trial court, under all of the circumstances of the case; and, unless it is clearly shown that the lower court has abused its discretion, and it is reasonably clear that an injustice has resulted, the appellate court will not review the holding of the lower court. It must be clear that the defendant has been prejudiced by the refusal of the continuance before the appellate court will reverse because a continuance is not granted. *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *Bank v. Ralph-snyder*, 54 W. Va. 231, 46 S. E. 206; *State v. Jones*, 53 W. Va. 613, 45 S. E. 916; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *Hewitt v. Commonwealth*, 17 Grat. 627; *Flott v. Com.*, 12 Grat. 576. In the case of *State v. Harrison*, Judge Brannon says:

"The judge presiding sees all the surroundings of the trial, and can better than we decide whether the design of a motion for a continuance is delay, or whether a continuance is really essential to a fair and proper trial."

In the case of *Ohio Valley Bank v. Berry*, 85 W. Va. 95, 100 S. E. 875, it is held:

"A motion for the continuance of a cause is always addressed to the sound, but not arbitrary, discretion of the court, and when based on the absence of a witness depends on the diligence employed to obtain his presence and the materiality of his evidence, and a judgment denying such motion must plainly appear to be erroneous, to justify a reversal thereof. There is no presumption of due diligence in such cases from the mere suing out of subpoenas for an absent witness. Diligence to obtain his presence must be affirmatively shown, as well as the materiality of his evidence if present, and that it will not be merely cumulative of other evidence, must also affirmatively appear."

Under the circumstances of this case we cannot say that the trial court abused its discretion in refusing a continuance.

Defendants attempted to show by cross-examination of G. W. Miller that on one occasion a dispute arose between him and Eula, his daughter, while she was at home, over whether the daughter or a niece should clean the parlor or wash the dishes, and as a result of the dispute he struck Eula over the head with a thin board several times, breaking the board into several pieces. The witness began telling about the occurrence, saying that he was correcting her for some of

her misdoings and for "sassing" him, and, although angry, he did not hurt her, when, upon objection, the court refused to permit further testimony along that line, saying that it was not pertinent to the issue. The witness was further asked if he and his wife did not on that occasion tell the daughter to leave home, and an objection to the question was sustained. Afterwards the witness said he did not tell her to leave home, and did not remember whether the incident was before or after she began staying with Bridgeman, but thought it was after she had begun to stay at night at the Bridgeman apartments. Defendants also attempted to show by Eula Miller that her father and mother attempted to compel her to sleep with the hired girl, who was dirty, filthy, and lousy, and that her father beat her over the head with a box and told her to leave, and that she was compelled to give up her room and occupy that of the hired girl, and upon refusal to sleep with the hired girl her mother told her to leave, and drove her away, and because of this alleged ill treatment at home she went to sleep at the Bridgeman rooms, having no other place to go. The court refused to allow this evidence and evidence of this character to go to the jury. Defendants assert that this evidence was proper to show that Eula Miller had no intent to lewdly and lasciviously cohabit with Bridgeman when she left her home to go to his apartments. Whether her intent was innocent at that time is not very pertinent. If, after going to his apartments with the purest intentions, she discarded those intentions and began a life of reproach, she would not be held guiltless. She had four married sisters living in Clarksburg, with whom she seemed to be on friendly terms. Even if life at her father's house was unendurable, the necessity for living with Dr. Bridgeman is not perceived, and her actions there are not condoned because she was driven from home. She stated to her sisters that she was married to Dr. Bridgeman. This was the reason which she gave to them why she was living with him in that manner, and not that her parents had driven her from home. We cannot see how this evidence would have changed the verdict. Should her intent have been innocent in the beginning, she remained there for over a year, creating the false impression by word and deed that she was in lawful wedlock. It is not perceived how this evidence, if admitted, would help Dr. Bridgeman. Did he take her into his apartments because she was homeless and live with her for that reason? Did he take advantage of her because she was turned out of home? If he wished to take care of her, was it necessary for him to live and cohabit with her? The evidence, if admitted, would have accentuated his guilt, and could not have helped her. The cause of her going to his rooms is not important. It is what they did during the long time she remained

there which constitutes the violation of law of which they are convicted.

The remaining ground of error alleged is that the evidence is not sufficient to justify the verdict, and that the court should have set aside the verdict and granted a new trial for that reason. We are cited to the cases of *State v. Foster*, 21 W. Va. 767, *State v. Miller*, 42 W. Va. 215, 24 S. E. 882, *State v. White*, 66 W. Va. 45, 66 S. E. 20, and *State v. Ramage*, 75 W. Va. 524, 84 S. E. 246.

[3, 4] The crime of lewd and lascivious cohabitation under section 7, c. 149, of the Code (sec. 5310) means the living and cohabiting together of a man and woman not married to each other, in the same house or apartments, as husband and wife. As stated in the *Miller Case*, occasional acts of secret illicit intercourse are not alone sufficient. It must be proved to the satisfaction of the court and jury that the parties cohabited together; that is, lived together as man and wife. It is not necessary that they should hold themselves out to the world as man and wife, as is held in the first point of the syllabus in the *Ramage Case*. The burden of the offense is the open, lewd, and lascivious conduct of the parties, not being married, and living together as if the conjugal relation existed, and in this way undermining and debasing public morals. The facts proven here are quite different from those found in the cases above cited. In the *Foster Case* the woman lived in a house used as a kitchen, near the residence of the defendant, and she did the cooking and superintended the household affairs, and all ate at the same table. This woman was hired as a cook and slept in the kitchen near *Foster's* residence, and there was no evidence whatever that they cohabited together; no evidence of any acts of illicit intercourse. In the *Miller Case* it appeared that *Miller* was clearing a piece of land he owned, and employed several workmen for that purpose, and also employed *Susan Hatton* and other women to do the housework and cook for the laborers. The house consisted of one room, where she slept, and *Miller* and various other work hands also slept in the same room. It did not appear that *Miller* had ever had illicit intercourse with *Susan Hatton*, and never even passed a day with her in the house, which was the common dwelling place of all. She was employed in February and gave birth to an illegitimate child in the following September. There was nothing in this case to show that the defendant cohabited with her in any way. These facts were clearly insufficient to sustain the verdict. In the *White Case* the defendant had leased a house to *Geneva Dunningan*, a single woman and the mother of an illegitimate child then three years old, for the purpose of keeping boarders, and he and others boarded with her in that house, which had four rooms, consisting of a dining room and kitchen, and two bedrooms in each of

which were two beds. White and other boarders occupied one of these rooms, and Geneva Dunnigan and her child and a hired girl occupied the other. There was no evidence of illicit intercourse between White and the Dunnigan woman or that any improper relations ever existed between them. They did not hold themselves out to the world as man and wife, although a short time after the house was finished they occupied it together, after which time others came there to live and board. White, as well as the other boarders, assisted in doing chores about the house. The evidence was held to be insufficient to establish the crime of lewd and lascivious cohabitation. In the Ramage Case it appeared that the defendant was the general superintendent of a coal company and lived in the same house with Maud Hunter, an unmarried woman, who had been employed by the coal company at a fixed sum per month to do the cooking and washing and general housework, and that for a year or more previous to the indictment she and Ramage had lived in the house alone; that the house contained a number of rooms, and he occupied a bedroom on the lower floor and she one up stairs; that on three or four occasions they were seen together in daylight going in the direction of the church and to ball games; and that cows and other domestic animals were kept on the premises, which she fed and attended, while he followed his occupation as superintendent of the mines. The only evidence of illicit intercourse was given by one witness, a Mrs. Pilcher, who was visiting at the Ramage house. This witness saw Maud Hunter leave her room on the second floor about 3 o'clock one morning and go down the stairs and enter Ramage's room. This evidence of illicit intercourse was flatly contradicted by both of the defendants, but the jury evidently believed Mrs. Pilcher and found the defendants guilty; but the court held that the evidence was not sufficient to sustain the indictment for lewd and lascivious cohabitation.

In the case under consideration the defendants were together occupying the two rooms, and it is very evident that they occupied them together almost continuously after she left her father's home and began sleeping at the Bridgeman apartments. The evidence of the various witnesses who visited the apartments is summed up in that of Mrs. Cozad when she said, "They lived there seemingly the same as the rest of my sisters and their husbands." Eula Miller quite consistently asserted that she was married to Bridgeman, evidently realizing that their conduct was inexcusable except as that of husband and wife. It is true that there was no evidence that Dr. Bridgeman claimed that they were married, but on one occasion he was introduced as the husband of Miss Miller and made no objection thereto. He tacitly con-

sented to the fiction. It is also true that this is denied by both of the defendants, but that was a question for the jury to determine, and evidently the jury believed the testimony of the state's witnesses in that regard. If the evidence is not sufficient to sustain the indictment for the offense charged, it would be difficult indeed to ever obtain a conviction for this crime.

Instructions were given to the jury. They do not appear in the record, and evidently properly propounded the law applicable to the facts, as no exceptions were taken thereto.

It is peculiarly within the province of the jury to pass upon the credibility of the witnesses, and, although the evidence of the state's witnesses is wholly contradicted by the two defendants, we cannot invade the province of the jury, and have concluded that the evidence is sufficient to sustain the verdict.

Affirmed.

(88 W. Va. 303)

**REGENT WAIST CO. v. O. J. MORRISON
DEPARTMENT STORE CO. (No. 4130.)**

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

1. Sales \S 62.—When contract "severable" stated.

If the part of a contract to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, such a contract is in general severable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Severable Contract.]

2. Sales \S 62, 129.—Contract for purchase of different kinds of waists severable, and purchaser may accept those complying with contract and reject remainder.

Where a retail merchant orders from a manufacturer of shirtwaists a number of such waists of different kinds and qualities, a definite price being fixed for each of such different kinds and qualities, such contract is separable in the absence of any circumstance indicating the contrary, and if the seller, in fulfillment of his contract, furnishes some of the different items in compliance therewith, and others which are not of the kind and quality stipulated for, the purchaser will have the right to accept such of said lots as comply with the contract, and to reject such as fail to comply therewith.

3. Sales \S 357(1).—Burden is upon seller in suit for purchase price to establish that the goods furnished were of kind and quality stipulated for.

The burden of proof is upon the seller, in a suit to recover the purchase price of goods

sold by him, to establish that the goods furnished are of the kind and quality stipulated for.

Error to Circuit Court, Kanawha County.

Action by the Regent Waist Company against the O. J. Morrison Department Store Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Morton & Mohler, of Charleston, for plaintiff in error.

Elmer L. Stone, of Charleston, for defendant in error.

RITZ, P. On the 2d day of October, 1917, the plaintiff's representative called at the storeroom of the defendant in the city of Charleston, and exhibited to defendant's general manager, and the person in charge of the ladies' waist department, certain samples of ladies' waists, with a view of making sales of this character of goods to the defendant. After an inspection of these samples, defendant's general manager gave an order to plaintiff's representative for 2 dozen white waists, stock No. 1138, at the price of \$2.25 each; 2 dozen flesh-colored waists, stock No. 1138, at the price of \$2.25 each; 2 dozen white waists, stock No. 1142, at the price of \$3 each; 2 dozen flesh-colored waists, stock No. 1142, at the price of \$3 each; 1½ dozen white waists, stock No. 2074, at the price of \$2.25 each; 1½ dozen flesh-colored waists, stock No. 2074, at \$2.25 each; 1½ dozen white waists, stock No. 1120, at \$3 each; 1½ dozen flesh-colored waists, stock No. 1120, at \$3 each; and 1½ dozen white waists, stock No. 1140, at \$3.50 each. Of this order the 2 dozen white waists and 2 dozen flesh-colored waists of stock No. 1138, and the 1½ dozen white waists and 1½ dozen flesh-colored waists of stock No. 1120 were to be shipped at once, and the remainder of the order in two weeks. A very few days after this order was given, the waists which were to be shipped at once, as aforesaid, together with the 2 dozen flesh-colored waists of stock No. 1142, were received by the defendant. Upon their receipt the package was opened and examined by defendant's general manager and the woman in charge of its waist department, and, according to their testimony, the 1½ dozen white waists of stock No. 1120, and the 1½ dozen flesh-colored waists of stock No. 1120, were inferior in quality to the sample from which the order was made, and were also different in style, and for this reason the defendant immediately returned these two lots of waists to the plaintiff, and notified it of such return, and of the reason therefor. Shortly thereafter the remainder of the order was shipped and was received by the defendant, with the exception that instead of 2 dozen white waists of stock No. 1142, as provided in the order, only 1½ dozen were included, and the 1½ dozen, of stock No. 1140, was not included. Upon the receipt of this shipment the defendant's general manager and the woman in

charge of its waist department examined the same and found, according to their testimony, that the 1½ dozen white waists of stock No. 1142, included in this shipment, were not in accordance with the sample, being different in style and inferior in quality. The defendant thereupon immediately returned these 18 waists, and notified the plaintiff thereof, and of the reason therefor. The remainder of the goods were retained by the defendant.

It was provided in the contract that defendant was to have 8 per cent. discount for payment within a certain time. Within the time provided the defendant deducted 8 per cent. from the cost price of the waists retained by it and sent its check to the plaintiff for the residue. The plaintiff declined to receive this check, not because it was in the form of a check, but because, under its contention, all of the waists shipped by it were in accordance with the sample, and it insisted that the defendant must receive and pay for all of them. It also refused to receive the waists returned from the transportation company. The defendant refused to pay for the waists returned by it, and this suit was brought to recover the contract price for the whole number of waists shipped. The defendant, upon the trial, tendered the amount which it claimed was due the plaintiff for the waists retained, that is, the invoice price less 8 per cent. discount, and a trial was had as to the residue of the claim which resulted in a verdict and judgment for the defendant.

The principal contention of the plaintiff is that the defendant must pay for all of the goods shipped to it, inasmuch as it received part of these goods and rejected the residue; that its reception of any part thereof bound it to receive all of them. The issue between the parties as to whether or not the waists that were returned were of the kind and quality ordered was submitted to the jury, which found for the defendant thereon. Plaintiff, however, contends that this can make no difference; that because of the fact that the defendant on the receipt of these goods retained some of them, it is bound to pay for all of them, whether they complied with the plaintiff's contract or not. And this presents the question of whether or not the contract under which the goods were purchased was separable. If it was an entire contract, that is to say, one which could not be divided for any purpose, then the defendant is bound by its acceptance of a part of the goods shipped. If, on the other hand, this contract is separable, and one part in no way dependent upon the other, the defendant had the right to reject such of the lots of goods as did not meet the warranty, and retain such as did meet the warranty. It would seem that when a sale is made as in this case of different kinds of goods, and a unit price fixed for those of each kind, that there would not of necessity be any such connection between the several kinds as would make it an entire con-

tract. If it appears that the seller would not have sold a part of the goods ordered unless the whole order was taken, then it would be an entire contract. If there is such intimate connection between the several items ordered that it may fairly be assumed that the seller would not have made the contract unless all of the goods ordered were purchased, it can safely be said that the contract is entire. This rule is not an exclusive one, however. There may be other contracts which would be held to be entire, even though it might appear that the seller would have sold a less amount than that ordered had the purchaser desired it. Of this class are those cases where a definite quantity of a particular article, such as a certain number of bushels of wheat, or a certain number of tons of iron, are ordered at a unit price per bushel or per ton. It is ordinarily held that such contracts are entire if the delivery of the whole is made at one time, and that the purchaser must reject or accept the whole thereof. It is generally held, however, that where a contract consists of several distinct items, and the price to be paid is apportioned to each item according to the value thereof, and not as one unit in a whole, or a part of a round sum, the contract will ordinarily be regarded as severable, and this rule applies even though the contract may in some sense be entire if what is to be paid is clearly and distinctly apportioned to the different articles as such, and not to them as parts of one whole. 13 C. J. 563. In this case the defendant insists that each item of waists of different kinds should be treated as a separate order, and the price apportioned to each unit of this item would fix the measure of liability therefor, while the plaintiff contends that the whole order being taken at one time is an entire contract, and that designation of different kinds of waists cannot have the effect of separating it into separate orders for waists of the separate kinds. There is no suggestion in this case that the plaintiff would not have sold the defendant the waists which were actually retained by it at the very same price at which it did sell them, if defendant had not ordered the waists which were rejected. In other words, it does not appear that the price of any particular lot of these waists was dependent upon the defendant giving the order which it did give. We can see no good reason for holding, in a case like this, that because the order was taken on one piece of paper it must be treated as an entire order, and the defendant required to accept or reject every item thereof. The rule that such a contract is separable where it is made up of several distinct items, and the price to be paid for each item is affixed thereto, in accordance with its value, seems to us to be based upon sound principles of common sense. It is a well-recognized doctrine that it is the duty of a party to a contract who has been injured by a breach thereof upon

the part of the other party to, as far as possible, minimize the damages. The rule contended for by the plaintiff would require the aggrieved party to aggravate the damages as much as possible, for it insists that the defendant should have rejected all of these goods, and then sued for damages for breach of the contract upon the part of the plaintiff. Suppose in a contract like this that the buyer had an extensive trade which would be lost to him if he had rejected all of the articles shipped. It is well known that such articles as are involved in this suit can only be sold at certain seasons. It would be unable to supply its trade by going into the market and repurchasing the articles, for the reason that by the time they could be supplied to him by some one else his customers would have made their purchases elsewhere. By retaining such of the items as met the requirements of the contract he could supply his trade to that extent and save the plaintiff the damages which would necessarily result if he was unable to meet the demands of any of his customers for this class of goods. In other words, under the plaintiff's theory, the defendant must reject all of the goods, and the plaintiff would be liable, if any single item thereof failed to meet the requirements of the contract, for all of the damages which the defendant would sustain by reason of lost profits on the sales of all of the articles; while, under the theory of the defendant, plaintiff would be relieved of any damages on account of those items in the order which met the requirements of the contract. We can conceive of no principle of convenience or necessity which makes it necessary to create a situation which would inflict upon one of the parties to a contract a hardship which could be so easily avoided. Why create a situation which would result in a damage suit of substantial magnitude when the same can very simply be reduced to a claim for damages inconsiderable in extent without injuriously affecting the status of either of the parties? An examination of the books leads us to the conclusion that not only is the defendant's contention based on reason, but it is well supported by authority.

[1] In *Hammon on Contracts*, at section 463, the author says:

"If a contract, although evidenced by one instrument, is severable into distinct and independent contracts, it is said to be divisible, rather than entire. A breach of one of these independent contracts does not constitute a breach of another, and a breach of one is actionable without reference to the performance of the others. The principal feature of a divisible contract is that either party, having fully performed any one of the several agreements into which the contract may be divided, may sue thereon for its breach by the other party, without pleading or proving performance on his (plaintiff's) part of all the several agreements.

"If the consideration of a contract is single,

the contract is, generally speaking, entire and indivisible, whatever the number of items embraced in its subject, and the promises involved in an entire contract are mutual and dependent. If, however, the part of a contract to be performed by one party consists of several and distinct items, and the consideration to be paid by the other party is apportioned to each item to be performed, or is left to be implied under the law, the contract is generally held to be severable or divisible; and the failure of the promisor to perform one item does not entitle the other party to rescind the contract, and refuse to accept further performance, nor discharge him from the obligation of paying for the other items, if they have been performed."

In 2 Elliott on Contracts, § 1544, the same doctrine is stated as follows:

"The divisibility of the subject-matter, while not controlling, is frequently of importance in determining the intention of the parties. Generally when the part to be performed by the promisor consists of several distinct items and the price to be paid is apportioned to each item according to its value and not as a part of a lump sum, the contract is considered as several."

And Prof. Williston, in his work on Contracts (volume 2, § 1719), also announces the same doctrine:

"The bargain though contemplating but a single delivery may contemplate several distinct sales, several dissociated things being ordered or contracted for, each for a distinct price. Here acceptance of part will not justify any implication of assent to become owner of the remainder, or of discharge of the seller from his legal duty with reference to the remainder. If some of the goods tendered are not in accordance with the contract, the buyer is generally held entitled to accept such of the articles tendered as fulfill the seller's obligation and reject those which do not."

These texts are well supported by the authorities. *Brown v. Exeter Machine Works*, 60 Pa. Super. Ct. 365; *Amsler v. Bruner*, 173 Ill. App. 337; *Barlow Mfg. Co. v. Stone*, 200 Mass. 158, 86 N. E. 306; *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91; *West End Mfg. Co. v. Warren Co.*, 198 Mass. 320, 84 N. E. 488; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; *Thompson v. Fesler* (Ind. App.) 123 N. E. 188; *Katz v. Bedford*, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826, and note; *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736; *Stearns Salt & Lumber Co. v. Dennis Lumber Co.*, 188 Mich. 700, 154 N. W. 91, 2 A. L. R. 638, and monographic note; *Cohen v. Pemberton*, 53 Conn. 221, 2 Atl. 315, 5 Atl. 682, 55 Am. Rep. 101; *Canton Lumber Co. v. Liller*, 107 Md. 146, 68 Atl. 500; *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17; *Schiller v. Blyth & Fargo Co.*, 15 Wyo. 304, 88 Pac. 648, 8 L. R. A. (N. S.) 1167; *Larrowe Miller Co. v. Lyons Beet Sugar Refining Co.*, 137 App. Div. 732, 122

N. Y. Supp. 567; *Molling v. Dean*, 18 T. L. R. 217.

[2] We conclude that the contract in this case was severable, at least to the extent that the defendant undertook to so treat it. It will be noted that it did not break any one of the items contained in the order, but either rejected each item entire, or accepted it entire. Whether each separate garment would constitute a separate part of the contract we are not called upon to say. It may be that a contract such as this could only be severed to the extent that was done by the defendant in this case, that is, into the separate items contained in the order, and not into the separate articles composing each of these items.

The plaintiff relies upon the case of *Manss-Bruning Shoe Co. v. Prince*, 51 W. Va. 510, 41 S. E. 907, as controlling this case in its favor, and point 3 of the syllabus in that case would seem to justify this conclusion. The facts in that case, however, were exceptional. Prince's conduct in regard to accepting or rejecting the goods was equivocal. He did not, as the plaintiff did here, upon finding that they did not answer the requirement of the contract, immediately reject those lots which were not of the quality bought, and return them, but he entered into negotiations with the shoe company in regard thereto, and even when he did finally return the same he kept some of the lots, and some of the very shoes which he claimed were of inferior quality. Under these exceptional circumstances the court held this conduct amounted to an acceptance of the whole. The syllabus of the case must be read in the light of the facts which the court was considering, and so construed. The statement contained in point 3 is broader than the facts in that case required, and in considering it it should be limited in its meaning as applying to the case made. The case of *Ohio River River Contract Co. v. Smith*, 76 W. Va. 503, 85 S. E. 671, also relied upon, is not applicable to this case. That was a sale of a quantity of piling at so much per ton. It was not a sale of separate pieces of piling at so much per piece, as is the case here. It was the kind of a contract which is ordinarily held to be entire.

The plaintiff insists that the question as to whether or not this contract was severable or entire was one of law for the court, and that the court erred in submitting the same to the jury. We agree with the plaintiff in this conclusion. Under the facts proven here, there was no question to be submitted to the jury as to the entirety or severability of this contract. It was one of construction for the court. The jury, however, gave the contract the only construction which we think it will bear, and the action of the court in submitting the question to the jury has resulted in no injury to the plaintiff.

[3] The plaintiff also claims that the court erred in instructing the jury that the burden was upon it to establish that the goods which

it furnished was of the kind and quality sold. We do not think there is any error in this. This suit was brought to recover for goods shipped upon a contract, and it is the ordinary rule of practice that when one seeks to recover upon a contract for the sale of goods he must show that the goods delivered by him in fulfillment of the contract were of the kind and quality stipulated for.

It is also insisted by the plaintiff that it is entitled at least to recover the discount which the defendant deducted from the invoice price of the goods accepted by it. We cannot agree with this conclusion. A check was sent to pay for these goods within the period allowed for discount, and was rejected by the plaintiff, not because it was a check, but because the defendant, according to its theory, must pay for all of the goods. Under this state of facts, the defendant having made good its claim that the merchandise rejected was not of the quality purchased by it, the plaintiff was in default in not accepting the payment at the time it was offered, and cannot, by its refusal so to accept it, deprive the defendant of the discount allowed by the contract.

We find no error in the judgment complained of, and the same is affirmed.

(88 W. Va. 269)

**ROUND BOTTOM COAL & COKE CO. et al.
v. BEN FRANKLIN COAL CO. OF
WEST VIRGINIA.**

(Supreme Court of Appeals of West Virginia.
March 22, 1921.)

(Syllabus by the Court.)

1. Quietting title \S 34(1) — Allegation that plaintiff is in "possession" held sufficient allegation of actual possession.

The allegation in a bill to remove cloud upon title to land that plaintiff is in possession thereof, *prima facie* means actual possession, and on demurrer constitutes sufficient allegation of actual possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Possession.]

2. Equity \S 233—General demurrer to bill setting up several grounds for relief challenges bill as a whole.

A general demurrer to a bill setting up several grounds for relief challenges the sufficiency of the bill as a whole and does not call for adjudication as to the sufficiency of each one of the several parts, and if one ground be good, the general demurrer is properly overruled.

Case Certified from Circuit Court, Marshall County.

Suit by the Round Bottom Coal & Coke Company and others against the Ben Franklin Coal Company of West Virginia. Case

certified as to correctness of order overruling defendant's demurrer. Rulings affirmed, and case recertified.

McCamie & Clarke, of Wheeling, for plaintiffs.

D. B. Evans and Charles E. Carrigan, both of Moundsville, and James Balph, of Pittsburgh, Pa., for defendant.

MILLER, J. The circuit court has certified to us the correctness of its ruling upon the defendants' demurrer to plaintiffs' bill.

The main object of the bill was to set aside and have removed as clouds upon plaintiffs' title to the coal under a tract of land known as the "Potts Tract," situated in Marshall County, two deeds dated April 14, 1919, of record in said county, in Deed Book No. 155, at pages 51 and 53 respectively; the first executed by defendant Kate Higgins, widow of the late John Higgins, to the defendant Ben Franklin Coal Company of West Virginia; the second executed by Houston Higgins, Grayce Hoffman and Everett Hoffman, her husband, and Marie Keffer and William Keffer, her husband, heirs at law of said John Higgins, deceased, to the same company; whereby Kate Higgins, grantor in the first deed, purported to convey to the grantee therein all her dower right, title and interest in and to all the coal of which said John Higgins died seized in fee simple together with all her right, title and interest in and to the mining rights appurtenant thereto and thereunto belonging, the same being all that part of said coal which was conveyed by David Roberts and wife to Simeon B. Purdy, by deed dated January 7, 1843, and subsequently through mesne conveyances to said John Higgins, and being that part of the said coal remaining after the conveyance by said John Higgins and wife to James W. Wiley, of the coal under a tract of thirteen (13) acres and eighty-seven (87) poles, with mining privileges, and the coal under a tract of 228½ acres adjoining the first tract, with like mining privileges, by two deeds, both dated May 5, 1902, the first recorded in said Marshall County in Deed Book No. 128, page 282, and the second recorded in said county in Deed Book No. 84, page 428; and whereby the said Houston Higgins and others, grantees in the second deed, purported to grant and convey to said Ben Franklin Coal Company all their three-fifths undivided interest with like mining rights and to the same coal so remaining vested in said John Higgins at the time of his death, more definitely described as that part of the coal underlying that part of the larger tract known as the "Potts Farm."

The said bill also seeks to have cancelled and removed as clouds on plaintiffs' title to the coal under the "Potts Farm" so much

of two other deeds executed by the widow and heirs of said John Higgins since his death, the first a deed to J. M. Williamson in fee for the surface of 72.82 acres, recorded in said county in Deed Book No. 137 at page 280, the second to A. H. Ferris in fee for 169.22 acres of surface, which included the surface of the 13 acres and 87 poles, recorded in Deed Book No. 141 at page 466, as purported to reserve to the grantors "a right of way or entry in and through said tract or parcel of land hereby conveyed, under the surface thereof, to the tract known as the Potts land, at such points and in such manner, under the surface, as may be necessary or useful so that the coal within and underlying the said Potts land may be mined and taken away through said right of way or entry or entries," and also that part of said deed to said Ferris providing as follows:

"Also reserving * * * the right to mine and operate on that part of the aforesaid land heretofore conveyed to the said John Higgins and described in the deed conveying the same as containing 13 acres 87 poles with the usual and customary mining rights and privileges, so as to enable the said grantors, their heirs, personal representatives and assigns to mine and remove the coal within and underlying the Potts land, and if any surface of the 13 A. 87 poles of land shall be used in the mining and removing of the said Potts coal, the same to be paid for at the rate of \$25 per acre, which payment shall be made before the said land is occupied and shall entitle the said grantors, their heirs, personal representatives and assigns to a deed in fee for the part so taken and used."

The bill further alleges that the several deeds and proceedings which it seeks to have removed as clouds on plaintiffs' title to the coal under the Potts Farm were made and executed since the decision here of the case of *Higgins v. Round Bottom Coal & Coke Co.*, reported in 63 W. Va. at page 218, 59 S. E. 1064, giving construction to the deed of David Roberts to Simeon B. Purdy, dated January 7, 1843, for the 13 acres and 87 poles, part of said 400 acre tract, as shown in the opinion in that case, the particular provision in which, now relied on by defendants, thereby construed, is as follows:

"Also the privilege, should the said Purdy, his heirs or assigns, open a coal mine on said tract of land, of undermining southward beyond the lines of said tract of land so far as not to injure the tract of land of which this was a part and now taken from."

In the former case, as in this, the questions presented were by the demurrer to the bill. In the former case we were careful not to in any way conclude the parties on the merits of the case. We quote from the opinion the following:

"What is here said is predicated on the allegations of the bill. The answer and evidence

adduced hereafter, if any, may wholly alter the case."

The bill now before us exhibits the record of the subsequent proceedings of the circuit court in the former case after it was certified back for further proceedings, showing that defendants answered and took evidence in support thereof, and that plaintiffs took no proof in support of their bill; but that when the case was matured for hearing on defendants' answer and evidence, plaintiffs were permitted by order of the court to dismiss the suit without prejudice; and it is alleged in the bill that by the dismissal thereof nothing was decreed concluding the parties, and that the rights of the parties remained the same as if the suit had never been brought or prosecuted on appeal to this court on the demurrer to the bill, sustained below but here overruled.

The question now certified is whether in view of our holding in the former case the present bill presents any basis for equity jurisdiction or for the relief prayed for. Construed in the light of the provisions of the deed there involved and the facts alleged in relation thereto, and particularly with reference to the map exhibited with the present bill purporting to show the location of the 13 acres and 87 poles with reference to the lines by which the coal in question was to be determined, we decided that the privilege or grant of coal beyond the lines of the tract specifically included the title to the coal in the residue of the larger tract of which the 13 acres and 87 poles was a part lying southwest as well as south of the granted parcel and withheld the right to make openings in said residue for mining purposes, by prescribing the mode of removal of the coal to be by means of an opening to be made in the parcel granted. That decision, as now interpreted by defendants, if they may rely thereon, would cover most if not all of the coal under the Potts Farm claimed by them. But the bill here exhibits a map or survey of the land granted, and of the lots into which the original 400 acres was divided, and with reference to which it is alleged the coal under lot No. 1, the 13 acres and 87 poles, and also under No. 3, the 228½ acre tract, was conveyed by Higgins to Wiley on May 5, 1902, and applying the rules for interpreting the deed followed in our decision in the former case, a very large portion of the coal under the Potts Farm would not be covered by the reservation or grant contained in the deed from Roberts to Purdy, of 1843. So that if the allegations of the present bill be true and the lines of the 400 acre tract are correctly shown on the map of the survey thereof exhibited with the bill, the deeds of the widow and heirs of Higgins, of April 14, 1919, and the reservations in the deeds to Williamson and Ferris would con-

stitute clouds on the title of plaintiffs to all of the coal under that part of the Potts Farm which would not fall within the extended lines of the 13 acres and 87 poles as shown on the said map and survey, and to that extent at least the bill presents good ground for relief, provided of course the possession by plaintiffs be well pleaded and then established by proof.

[1] For the purposes of the demurrer all matters well pleaded must be taken to be true. The first point of demurrer is that the fact of actual possession by plaintiffs is not sufficiently alleged, wherefore the right to relief by removal of cloud is not shown by the bill. The bill here does allege that plaintiffs were in possession of the coal. In *Sansom v. Blankenship*, 53 W. Va. 411, 44 S. E. 408, following *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682, we held that the allegation that plaintiffs were in possession, *prima facie* meant actual possession. So that on demurrer we must accept the allegation of the bill as to possession as the equivalent of an allegation of actual possession, and our opinion is that this point of demurrer was properly overruled by the circuit court. It is argued in this connection also that plaintiffs do not show clear title to the coal. But if the facts be as alleged, and as they must be regarded on demurrer, plaintiffs do have clear title to at least a greater part of the coal under the Potts Farm, not from Higgins or the Higgins heirs it is true, but by deed from J. B. Potts and wife, of April 1, 1903; and the only adverse title or claim of defendants, so far as the bill shows, was derived by the deed of the Higgins heirs, made subsequently and depending on the true interpretation and the application thereof to the ground of the privilege or grant conveyed in the deed from Roberts to Purdy, of 1843. If the allegations of the bill be true, there is certainly coal under the Potts Farm not covered by the deed of the Higgins heirs to the defendant company, wherefore there is equity in the bill to remove cloud from plaintiffs' title thereto.

[2] Plaintiffs' counsel in argument have appealed to us to settle and adjudicate finally the rights of the parties on all issues presented by the bill and exhibits. This we can not do, of course. The demurrer was general and in no way limited to any particular issue. For instance, we are requested to decide whether or not the grant to plaintiff Wiley of the coal under the 13 acres and 87 poles and under the 228¼ acres divested the Higginses of all right and title to take coal from any of the land outside of or beyond the boundaries of those deeds and of all mining privileges to remove any coal through or over those tracts from adjoining lands. The defendants' demurrer might have been both

general and specific as to those questions, but it was general, and the general demurrer would not reach the specific questions sought to be presented. As we held in *City of Wheeling v. Chesapeake & Potomac Telephone Co.*, 82 W. Va. 208, point 6 of the syllabus, 95 S. E. 653:

"A general demurrer to a bill in equity setting up several grounds for relief challenges the sufficiency of the bill as a whole and does not call for adjudication as to the sufficiency of each of the several parts."

If we might properly respond to the specific question thus sought to have decided, it would be inadvisable to do so, for the whole case may be changed on the answer and proofs at final hearing; and indeed on the question of possession the plaintiffs may not be able to establish by proof the fact of possession entitling them to relief in equity to remove a cloud, and the case may never reach a final decision on the rights of the parties.

Wherefore we are of opinion to affirm the ruling below on the demurrer, and to so certify our decision to the circuit court.

(151 Ga. 334)

BRADFORD v. STATE. (No. 2290.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law §1129(3)—Assignment of error in refusing to instruct on involuntary manslaughter insufficient where no specification as to grade.

An assignment of error complaining that the court did not charge the law of involuntary manslaughter is not a good one where no grade of involuntary manslaughter is specified.

2. Criminal law §1129(3)—Assignment on admission of evidence must show objection raised at time.

An assignment of error complaining of the admission of certain evidence over the objection of defendant's counsel is insufficient where it does not appear from the assignment what objection was raised at the time of the admission of the evidence.

3. Criminal law §815(11)—Instruction held not to exclude defendant's statement as to accidental killing.

In a homicide case, where defendant contended in his statement that the homicide was accidentally committed through misfortune, accident, or misadventure, an instruction as to the certainty of the evidence necessary to convict held not erroneous as excluding from the minds of the jury the statement of the defendant, or as having that tendency.

4. Criminal law §782(10)—Instruction as to evidence sufficient in civil case held not reversible error.

The giving of an instruction in a homicide case that "in all civil cases the preponderance of the testimony is considered sufficient to produce mental conviction" held not reversible error.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Will Bradford was convicted of murder and brings error. Affirmed.

Some of the grounds for new trial were as follows:

IV. Because the court erred in charging the jury as follows: "If, after going over all the evidence, facts, and circumstances of the case, applying the rules of law given you in charge theretofore, if you have resting on your minds a reasonable doubt as to the guilt of the defendant, you should give him the benefit of that doubt and acquit him. Now, when I say a reasonable doubt, the law does not mean some mere vague conjecture or possibility that might arise, but such a doubt as arises in an honest juror's mind, seeking for the truth, and leaves it wavering and in doubt. It may arise from having heard the evidence, the want, weakness, or insufficiency of the evidence. In this connection the law does not mean nor are you required as trial jurors before you find the defendant guilty, you must find him guilty to a mathematical certainty. Moral and reasonable certainty is all that the law requires. So, if in this case, if you should find the defendant guilty to a moral and reasonable certainty, and that beyond a reasonable doubt, it would be your duty to find the defendant guilty; if not, it would be equally your duty to acquit him."

The defendant excepts to this charge because the said charge excluded from the minds of the jury the statement of the defendant, or had that tendency. The defendant contends that the court nowhere in its charge to the jury instructed them on the defendant's contention on the trial of the case. The defendant contended in his statement before the jury that the homicide was accidentally committed through misfortune, accident, and misadventure, so the foregoing charge excluded forever from the minds of the jury the defendant's statements and contention in the case. The court nowhere in its charge to the jury instructed them on the defendant's contention on the trial of the case. The court nowhere in its charge to the jury referred to the contention of the defendant and simply charged on accidental homicide without charging the contention of the defendant in his statement. For all of these reasons the defendant assigns the foregoing charge as error.

V. Because the court erred in charging the jury as follows: "In all civil cases the preponderance of the testimony is considered sufficient to produce mental conviction."

The defendant contends that the foregoing charge refers to civil cases, and not to criminal cases, and for that reason the charge is excepted to.

—Statement by editor.

Colley & Colley and I. T. Irvin, Jr., all of Washington, Ga., and John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

HILL, J. Will Bradford was indicted and tried for the crime of murder. The jury returned a verdict of guilty, with recommendation that he be sent to the penitentiary for life. The defendant made a motion for new trial, which was overruled, and he excepted.

[1] 1. Error is assigned because the court did not charge the law of involuntary manslaughter. No grade of involuntary manslaughter is specified; and the assignment of error is therefore not a good one. Troup v. State, 150 Ga. 633, 104 S. E. 421.

[2] 2. Error is assigned on the admission of certain evidence over the objection of the defendant's counsel. It does not appear from the assignment what objection was raised at the time of the admission of the evidence, and for that reason the assignment is insufficient.

[3, 4] 3. The other assignments are without merit.

4. There was evidence to support the verdict.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 237)

SHINHOLSER et al. v. HENRY et al.
(No. 2078.)

(Supreme Court of Georgia. March 3, 1921.)

(Syllabus by Editorial Staff.)

1. Insurance §777—Objection that beneficiary was ineligible could be raised only by fraternal organization.

Where, on death of member of a fraternal organization, a person originally designated as a beneficiary and two other persons subsequently substituted as beneficiaries claimed the amount payable on the certificate, and the order filed its petition for interpleader and deposited the amount of the certificate in court, the substituted beneficiaries cannot raise any objection as to the eligibility of the person first named to be a beneficiary under the by-laws of the order, for such objection could be raised only by the order itself, and by the deposit in court the order waives the objection.

2. Trial §110—Question not objectionable as being appeal to sympathies of jury.

In an action between beneficiaries in a fraternal benefit certificate, court did not err in permitting one of the beneficiaries to testify, in answer to questions put by counsel, that she loved the deceased, and that she loved him as a daughter loved her father, as against an ob-

jection that questions were a patent appeal to the sympathies of the jury.

3. Evidence §471(14)—Testimony as to coherence of person's talk held not mere opinion.

A witness was properly permitted to testify that a certain person talked incoherently most of the time, but sometimes would talk naturally, as against an objection that the question called for an opinion, and that the answer was merely an opinion.

4. Evidence §471(12)—Evidence as to father's affection for child held not mere opinion.

Question, "What was the character and kind of association and relationship?" was not objectionable as calling for an opinion, and an answer, "Just like any other fond parent for his daughter, he was very fond of her, and foolish about her, and we all knew he was," was not objectionable as an opinion and conclusion.

5. Appeal and error §1064(4)—Errors in instructions on immaterial matter not harmful.

Errors in instructions as to immaterial matters are not reversible error.

6. Insurance §826(1)—Instruction as to mental ability to substitute beneficiaries held properly refused.

In an action between original and substituted beneficiaries in a fraternal benefit certificate, where the vital issues in the case were whether insured was mentally incapable of making the change in beneficiaries, or whether he was induced to make it by undue influence or fraud practiced upon him, court did not err in refusing written requests to charge, "Unless you believe from the evidence in the case that there was on the part of S. at that time such a mental condition as to betray a total want of understanding, or idiocy, or delusion, his mind could not be called unsound," and "Unless you believe from the evidence in the case that at the time of such signing S. was of unsound mind, you should find in favor of the validity of the change of beneficiaries."

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by M. S. Henry and others against J. W. Shinholser and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Some of the assignments of error were as follows:

(7) Because the court erred in admitting in evidence, over the objection of movants, the following testimony of Mary B. Henry, one of the contestants for the fund in court: "Q. Did you love Samuel D. Shinholser? A. Yes; I did. Q. Did you love him as a daughter loves her father? A. I did." To the question, "Did you love him as a daughter loves her father?" movant objected, on the ground that it was a patent appeal to the sympathies of the jury and utterly irrelevant. Said objection was overruled by the court, with the statement: "I think she can testify as to her affection for him, if for no other reason to combat the proposition

she willfully neglected him." Movants contend that the admission of said testimony was error, and prejudicial to movants, because the affection or feeling of Mrs. Henry for Mr. Shinholser could not be relevant to illustrate either her dependency upon him, or his mental capacity to change the beneficiary originally named in the certificate, or the influence, if any, brought to bear on him to induce such change, but could only appeal to the sympathy of the jury, to influence them to award the fund to her by reason of the affection she claimed to have for the insured.

(8) Because the court erred in admitting in evidence the following testimony of Mrs. Mary B. Henry, one of the contestants to the fund in court, over the objection of movants: "Q. State whether or not he talked, when he did voluntarily talk, did he talk incoherently, or did he talk naturally and normally? A. Most of the time he talked incoherently; sometimes he would talk naturally." To the question and answer movants objected, because the question called for an opinion, and the answer was merely an opinion. The admission of said testimony was error, and prejudicial to movants, because the said Mrs. Henry was permitted to state her mere conclusion and opinion as to a matter involving the mental condition of Mr. Shinholser, without stating any facts from which the jury might determine whether his talk was incoherent or not.

(9) Because the court erred in admitting in evidence the following testimony of Mrs. J. L. Grace, a witness for Mrs. Mary B. Henry, over objection of movants: "Q. What was the character and kind of association and relationship? (between Samuel D. Shinholser and Mrs. Henry). A. Just like any other fond parent for his daughter; he was very fond of her and foolish about her, and we all knew he was." To the question and answer movants objected, because the question called for an opinion, and the answer was an opinion, and the answer was an opinion and conclusion of the witness.

—Statement by editor.

Jones, Park & Johnston, and Richard Curd, all of Macon, for plaintiffs in error.

Hall, Grice & Bloch, John R. L. Smith, and Grady C. Harris, all of Macon, for defendants in error.

FISH, C. J. [1] 1. The objection that the beneficiary named in the certificate issued by a fraternal beneficiary order was ineligible under its by-laws can be raised only by the order itself; and an admission of liability on the part of the order, and payment of the fund into court, is a waiver of any objection to the beneficiary. *Johnson v. Knight of Honor*, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Tepper v. Royal Arcanum*, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449; *Maguire v. Maguire*, 59 App. Div. 143, 69 N. Y. Supp. 61; *Markey v. Supreme Council, etc., Legion*, 70 App. Div. 4, 74 N. Y. Supp. 1069; *Sangunitto v. Goldey*, 88 App. Div. 78, 84 N. Y. Supp. 989; *Taylor v. Hair*

(C. C.) 112 Fed. 913; Meyers v. Schumann, 54 N. J. Eq. 414, 34 Atl. 1066; Clark v. Davenport, 95 N. Y. 479; Spencer v. Myers, 150 N. Y. 269, 44 N. E. 942, 34 L. R. A. 175, 55 Am. St. Rep. 675; Johnson v. Van Epps, 110 Ill. 551 (4), 563; 1 Cooley, Ins. Briefs, 320, 815, 816. See Doody Co. v. Green, 131 Ga. 568, 62 S. E. 984; Dell v. Varnedoe, 148 Ga. 91, 95 S. E. 977; Depee v. Grand Lodge A. O. U. W., 106 Iowa, 747, 76 N. W. 798; Order of Patriarchs v. Davis, 129 Mich. 318, 88 N. W. 874; Fischer v. Malchow, 96 Minn. 396, 101 N. W. 602; Pennsylvania R. Co. v. Wolfe, 203 Pa. 269, 52 Atl. 247; Schardt v. Schardt, 100 Tenn. 276, 45 S. W. 340.

(a) Accordingly, where, on the death of a member of a fraternal order, a person originally designated as a beneficiary in the member's certificate, and two other persons subsequently named therein as substituted beneficiaries in place of the original beneficiary, claim the amount payable on the certificate, and the order thereupon files its petition for interpleader against such persons, and deposits the amount of the certificate in court, it thereby waives any objection as to the eligibility of the person first named to be a beneficiary under its by-laws, and the substituted beneficiaries cannot raise such objection.

[2-4] 2. The errors assigned on the admission of evidence are not meritorious, and are not of such character as to require special consideration.

[5] 3. In several of the grounds of the motion for new trial error is assigned upon the instructions of the court to the jury on the question as to the eligibility of the person first named to be a beneficiary in the certificate. Even if such instructions were subject to the criticisms made thereon, that question, under the ruling above made, was immaterial, and the instructions do not appear to have been harmful to the movant.

4. There was ample evidence to authorize the instructions as to the alleged mental incapacity of the insured to make a change as to the beneficiaries in the certificate, and also as to alleged undue influence and fraud practiced upon him to induce him to make such change.

5. Sam B. Shinholser, deceased, was the member to whom the benefit certificate was issued. Mrs. Mary Henry, formerly Shinholser, was named as the original beneficiary, and designated as "daughter." John W. Shinholser and Robert L. Shinholser, designated as "brothers," were the beneficiaries named when the change as to beneficiaries was made by the insured. Vital issues in the case were whether the insured was mentally incapable of making the change in beneficiaries, or whether he was induced to make it by undue influence or fraud practiced upon him. In view of the pleadings, the evidence, and the entire charge given, there was no material

error as against the movants, for any reasons assigned, in the instructions to which exceptions were taken.

[8] 6. The court did not err in refusing written requests to charge as follows:

(a) "Unless you believe from the evidence in the case that there was on the part of Samuel D. Shinholser at that time such a mental condition as to betray a total want of understanding, or idiocy, or delusion, his mind could not be called unsound."

(b) "Unless you believe from the evidence in the case that, at the time of such signing, Samuel D. Shinholser was of unsound mind, you should find in favor of the validity of the change of beneficiaries."

7. There was ample evidence to authorize the verdict, and the refusal of a new trial was not error.

Judgment affirmed.

All the Justices concur.

(151 Ga. 319)

LAWRENCE v. WALTERS et al. (No. 2110.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Cancellation of instruments \S 37(7)—Petition to declare deed void for insanity held good as against demurer.

Petition as amended in a suit to have a deed declared void on the ground that the grantor was insane at the time of the execution thereof held not subject to demurrer.

2. Descent and distribution \S 65 — Widow claiming entire estate under deed held not to elect to take one-fifth.

A widow, who based her entire defense to an action to set aside a deed on the condition that she was vested with the entire estate under the deed, which the jury found to be void, held not entitled to the benefit of the statute which provides that where there are more than 5 shares the widow shall be entitled upon election to one-fifth interest in the estate.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Suit by Estoria Walters and others against Mary Lawrence. Judgment for plaintiffs, and defendant brings error. Affirmed.

The petition alleged:

"(10) Petitioners further show that the defendant took advantage of the physical and mental condition of the deceased, having said deed prepared in the city of Dublin and being drawn for him to sign under the conditions and surroundings hereinbefore narrated, the said deed at the time of its execution being executed in secrecy so far as the members of the family were concerned."

Plaintiffs, after leave of the court first had and obtained, amended their original petition in the following particulars:

"(1) By adding at the end of the tenth paragraph and in connection therewith the following additional allegation, to wit: 'Petitioners further show in connection with said paragraph that the deceased was not only afflicted greatly in mind and body at the time of the execution of said deed and for some time prior thereto, but that his said wife by virtue of their confidential relations exercised a controlling influence over his will power, and was capable at all times of substituting her own will for his. That the defendant taking advantage of her own position and the enfeebled condition of the deceased who had been in convulsions during the night preceding the morning when said deed was executed, procured the same, thereby undertaking to deprive and defraud petitioners of their inheritance in said land, it being apparent at the time that the said J. E. Lawrence could live but a few days longer. Wherefore petitioners pray that this amendment be allowed.'"

—Statement by editor.

Ira S. Ohappell, of Dublin, and Owens Johnson, of Atlanta, for plaintiff in error.

R. Earl Camp, of Dublin, for defendants in error.

HILL, J. J. E. Lawrence died in March, 1916, leaving a wife and five children, Mrs. Estoria Walters and four others. During his life Lawrence executed a deed conveying the entire property in controversy to his wife, Mrs. Mary Lawrence, the defendant in the present case. The children of Mrs. Estoria Walters, deceased, and four others, brought suit against the widow for the recovery by each of a one-sixth undivided interest in the property; and they sought to have the deed declared void on the ground that the grantor was insane at the time of the execution thereof. A special demurrer to one paragraph of the petition was filed by the defendant, and was overruled after the petition was amended so as to meet the special demurrer. On the conclusion of the plaintiff's evidence the defendant moved for a nonsuit which was refused, and the defendant excepted. The defendant then offered evidence, and the jury returned a verdict for the plaintiff. A motion for new trial was overruled, and the defendant excepted. Held:

[1] 1. The special demurrer was met by the amendment to the petition.

2. The motion to nonsuit the case was properly overruled.

[2] 3. The second and only remaining special ground of the motion for new trial complains that the court erred in charging the jury that if they should find for the plaintiffs the latter would be entitled to recover five-sixths of the property in controversy; and this charge is criticized, first, on the ground that the evidence showed that there were more than five shares in the estate under consideration, and, second, that under the statute which provides that where there are

more than five shares the widow shall be entitled, upon election, to a one-fifth interest in the estate, the defendant in this case was entitled to the one-fifth, and that consequently the other heirs, the plaintiffs in this case, could not be entitled to one-sixth each in the estate (meaning that they would be entitled to a one-fifth of the four-fifths remaining after the widow took her share). The first criticism is without merit, because the charge complained of distinctly recognizes that there are more than five shares, as contended by the defendant; and the second exception to the charge cannot avail the plaintiff in error here, because it does not appear from the record that the widow had made an election to take the one-fifth interest in the estate which might have been allowed her under an election, but based her entire defense upon the contention that she was vested with the entire estate under the deed which the jury found to be void. *Harvey v. Moore*, 140 Ga. 691, 692 (2), 79 S. E. 772; *Snipes v. Parker*, 98 Ga. 522, 25 S. E. 580; *Farmers' Banking Co. v. Key*, 112 Ga. 301, 37 S. E. 447; *Jossey v. Brown*, 119 Ga. 758 (11), 764, 47 S. E. 350.

4. The verdict was supported by evidence. Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 322)

COMER et al. v. COMER. (No. 2132.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

Habeas corpus ~~§~~99(1)—Court did not err in awarding custody of child to mother.

In habeas corpus proceeding instituted by a wife, who had separated from her husband, against her husband and his mother for the custody of a female infant 3 years of age, where defendants alleged that plaintiff had voluntarily surrendered and abandoned the child, and was emotional, erratic, lacking in love for the child, and temperamentally unsuited to have its custody, and without means to support it, held that court did not err in awarding the custody of the child to the wife.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Habeas corpus proceedings by Pauline O. Comer against Arthur F. Comer and another for the custody of a female infant three years of age. Judgment for plaintiff, and defendants brings error. Affirmed.

Petition by Pauline O. Comer against her husband Arthur F. Comer and his mother Carmine E. Comer to obtain custody of a female infant three years of age, the child of the husband and wife, in which she alleged that she and her husband were living in a

bona fide state of separation, and that the husband and mother-in-law were wrongfully restraining the child of her liberty and keeping her illegally from the custody of the petitioner.

Respondents in their answer admitted that they refused to deliver the child into the custody of petitioner; that plaintiff voluntarily delivered the child into the custody and control of the respondents; that plaintiff is emotional, erratic, lacking in love and affection for the child, and is temperamentally unsuited to have its custody, and is without means to support, maintain, and educate it; that the associations and environments in which the child would be placed would not be for its good, happiness, and welfare; and that respondents are devoted to the child, and able and willing financially to support it.

The evidence was as follows:

Mrs. Pauline Comer, the plaintiff, having been duly sworn, testified as follows:

My little girl is being kept by Mrs. Comer, my mother-in-law, against my will. I did not voluntarily surrender, permanently, the care, custody, and control of the child to Mrs. Comer. I have endeavored to get them to let me have my baby. My baby is 3 years old, a little girl. She needs a mother's care. I am able to take care of her.

Cross-examination: My child was born on the 21st of January, 3 years ago, the year 1917. My husband left for the war a year ago, last July—I think it was on the 16th of July, 16th of July, 1919. It was not earlier than that—I think it was a year ago, last July. I don't remember that it was in the year 1918—I thought it was a year ago last July. It was in 1918 when my husband left for the war. I was living up at Newport News at the time my husband left; I had gone to see him off. We had no definite plans as to where my residence would be while he was away; the idea was that I was to come to Savannah and look for board. I was to live here in Savannah; I was to board here in Savannah. I don't remember discussing with him the question of leaving my child while he was away and taking up a career on the operatic stage. I don't remember that subject having been discussed between us before he left for the war. I have a vague recollection of one time—some months before he left—discussing about going to New York, but I don't remember what was said. I don't think he insisted, while discussing the matter with me, that the welfare of my child, while he was away, required that I should not take up any musical career. I don't remember the thing being discussed at all. I did not find a place to live when I came back to Savannah to look for a place; I came and went out to my mother-in-law's, Mrs. Comer. I lived there for a week with her until I made my plans to go North. I made my plans to go North because I was very unhappy and restless, and I felt I would like to study singing. My child then was about 21 months old. About how she was nourished at that time, she was pretty well so far as I know; she was not sick. She was a bottle baby—she was eating things. She was still taking the bottle and eating almost anything that was

wholesome for her. I had not left the child with the grandparents while I was in Newport News; I took the baby up there with me. I thought that her father would like to see her before he went to France. When I came back I went to the mountains a few weeks before I went to New York, and I took the baby with me, because she was up there at Newport News with me, and I wanted her with me. There was no reason why I should have the baby with me in the mountains—I had her with me in the mountains. I came back from the mountains I think it was the last day of August. I went to New York on the 8th of September. I lived with my mother-in-law when I came back from the mountains before I went to New York. When I was living with my mother-in-law I said I wanted to study singing while my husband was gone. I thought that was a good time to do so. I wanted to study, and everybody told me I ought to do it. So I left the child with my mother-in-law to care for her, because while in New York I would have to stay in a boarding house, and I knew, while I was gone, that the baby would be well cared for by my mother-in-law. My mother-in-law didn't insist that was not the proper course for me to pursue, and that my place was at home while my husband was away. I didn't say that my musical career was more to me than anything in the world; didn't say to my mother-in-law that my musical career was more to me than anything in the world. I didn't ask her to take the child and keep the child, and that I would surrender to her all custody, care, and control of the child; I had no permanent idea about it. I didn't make a similar statement to Mr. Joseph Comer, a brother of my husband. I never made a statement that I was permanently giving up my baby to anybody. I didn't tell them anything like that, if they didn't take the child and keep it, I would have to make another disposition of it; that I was going on the operatic stage. I wrote the letter that you show me. I wrote those letters. I was absent 6 months. I heard from my husband during the time I was away. I haven't those letters, because I didn't want to see them; I destroyed them all. When I came back to Savannah I went to see my child first; I went right there from the station. After I got back to Savannah I did not have a place where I could keep my child. I am living with my father, and if the child was turned over to me, awarded to me, I have a place to take her to now. If the child was awarded to me I would take it to my father. My father would live with me during the time I would have the custody of the child. He would be an inmate of the house with me. As to asking him to assist me in rearing and training the child, I don't think I would require any assistance; I don't consider that I would. If I needed help, I would, of course, call on him, but I don't think I need assistance. My father is a proper person to be around a house where a small child is to be reared. My father's habits as to morality are everything to be desired now. I don't know that my father associates, in a criminal way, with negro women. I don't know that he has done it. I have no knowledge on the subject at all. I never heard of it. My father never told me that he had made complaint against a negro woman for stealing money from him, and that, as a result of that com-

plaint, they both had been tried and convicted of a criminal offense. I don't know that it is true. My mother-in-law did not endeavor to persuade me not to leave Savannah; I don't remember it if she did. She didn't tell me that was not my duty to my child or absent husband. While I was in New York my father gave me an allowance of—I have forgotten—about \$35 a month, and my grandmother left me a little money, and I took some of that, and for the first three months I received some money from my husband, that he sent me to pay expenses, as I thought, and to pay certain debts. I paid \$60 a month for board. My husband did not beg me to return to Savannah to my child. I came back because I wanted to be with my baby; I didn't want a musical career then. When I got up there I was unhappy away from my baby and unhappy the whole time I was gone. I didn't come back because I found out I would not be a success in a musical way. It is not true that if I had made the success I expected I never would have come back to Savannah. After I came back I was not absent from the child, away from the child, two or three weeks at a time without devoting any care to it at all, except my mother-in-law took her away with her; with the exception of that I have seen her every day since I came back from New York, except about two days out of a year. It is not true that I have brought these proceedings, not because I want to get my child, but because I wish to force my husband to return to me and live with me, purely and simple; I brought them because I want my baby. I didn't make any statement to Mr. Comer's brother that unless he returned to me that I would force him to do so by seeking to get custody of the child. I am a Christian Scientist. I did not make the statement that in the event my child fell down and broke her leg, or sustained other physical injury, I would have only a Christian Scientist healer to attend her for any injury of that kind. I never made any such statement as that.

Q. Are you not rather changeable and emotional, and, I may say, peculiar in your disposition? A. I have been; I suppose I have been impulsive because I was very young, but I am not that way any more. In the last few years I changed my religion from Catholic to Episcopalian and from Episcopalian to Christian Science. I did not join the Christian Church. I am a member of the Christian Science Church. I have become stable in that faith.

Mrs. William P. Comer, the defendant, having been duly sworn, testified as follows:

Mrs. Pauline Comer left the infant in my care because she intended to pursue a musical career in New York. She stated that she wanted to leave the child with me, to act as a mother to the child, and I said that I would do so. I was to have the care of the child, while she was pursuing her career; that she believed she could become an operatic star. She said, if successful in her career, it would take her away many years in training and also on the stage, and I would have the care of the baby during that time. The baby was a frail baby—she was not ill at the time. At the time that she left it was taking bottle food. It was indefinite at the time how long she contemplated leaving the child with me. She was absent from

the child I think it was from September until the end of the following month. When she returned she came to me; her father came to me, and asked me to receive her, and I did. She came to my house. I allowed her to come to me. She stayed with me three weeks. She said she was going to pursue a business career—she was going to take up stenography. She was going to follow a business career as a stenographer. She went for that to a school in Savannah, called, I think, Ryan school. Presume her husband was able to provide for her and take care of her without pursuing that course. I have always cared for the child during the time that her mother left my house, and left the child in my care while she pursued a business career. The father furnished the means to support and take care of the child. I gave the child care and attention to the best of my ability. I have raised two sons. I am 49 years of age. My health is such as to enable me to take care of the child while in the custody of the father. I wish the child to remain in my custody. I think Mrs. Pauline Comer has been very inexperienced as to being a practical mother—the knowledge of how to rear and take care of a child. I say that simply because she has not done like most mothers do—take care of a child and not leave it. There was no necessity for her to leave the child with me and go on an operatic career. At the time she left there was no stated time for her return. If I had not taken the child I don't know what would have become of her. Her father came to me and asked if I would take the baby after she came back from New York, and I said that certainly I would. Mrs. Pauline Comer's temperament and disposition is emotional, erratic. Her attitude and demeanor towards the child was always affectionate when she came to it. I have not denied her access to the child. I think it would be better for the welfare of the child, in my opinion, for the child to remain in the custody of the father under my care. I am willing, if the father has the custody of the child to continue to give it care. As to whether or not there was any statement made by Mrs. Pauline Comer that she would ever return and claim the child, when she left she did not intend to return to Savannah; that she hoped her course would be successful, and did not expect to return to Savannah. The arrangement was that if I took the child in July I was to stop at Round Lake for her to see it. Not that I understood then was she to return to Savannah and return to take the child from me. Since my son's return I first learned that she had the intention of retaking the child from me. She did not at any time, while she was away, either by word or deed, signify her desire to retake the child from me. The child calls me Mother. She calls her own mother Pauline.

(No cross.)

Joseph H. Comer, a witness for the defendants, having been duly sworn, testified as follows:

I am Arthur M. Comer's brother. Mrs. Pauline Comer did make statement to me, before her departure for New York, as to the purpose of her departure. The statement was that she was going to New York to pursue a musical career, and that she never expected to return to

Savannah again. About the child, she stated that she had given the child to my mother because she would not be able to take care of the child herself while pursuing her career. She did not mention how many years she would be absent in pursuing her career; she said she had decided to pursue the career; that she did not expect to come back to Savannah; she did not expect to return to Savannah again. She said that she was going to New York to pursue this career. I live in my mother's home, where this child is kept. I am a cotton shipper. The child receives every care and attention while the mother has been away from it. As to the condition of the child now compared with what it was when its mother left it, her health has wonderfully improved. I think I know the temperament of Mrs. Pauline Comer. I consider her emotional, erratic, and selfish. Selfish, because she considered her own desire for a musical career in preference to the welfare of the child. I consider my brother a very calm, conservative man and as unselfish as the average man. The handwriting you show me is my brother's. I did not advise Mrs. Pauline Comer to leave the baby with my mother on the idea that it would change the attitude of my brother towards his wife when he returned. I did not suggest that she leave the child with my mother. I did not make any suggestion about the child just before my brother's return nor after his return. I made no suggestion whatever. About the relations between Mr. Comer and wife and baby I mentioned that if I could bring them together again I would be glad to do it.

Redirect: Mrs. Pauline Comer threatened to take the child if my brother would not accede to her wishes. Her wishes were that he immediately make up with her and live together again, and I don't remember the rest. I only know the moral habits and character of Mrs. Pauline Comer's father from what I have heard. That reputation is bad. I would not be willing for an infant of mine to be reared in a home where he is.

Recross: I don't know of my own knowledge about Mr. Overton.

Arthur F. Comer, defendant, having been duly sworn, testified as follows:

I am the father of the child now before the court. In July, 1918, I was at Camp Stewart. I was there making preparations for embarking overseas. I have been all over Europe on various missions between that time and the beginning of this year. What you show me is known as an officers' record book. It contains recommendations of the officers under whom I served in the capacity of valuing engineer, and so forth. My profession is that of an architect. My duties during the time I was in the service was valuing engineer. I was in the service 36 months. I am living in Savannah now. My profession in Savannah is that of an architect. I am financially able to take care and support and maintain my child. I have been supporting, maintaining, and taking care of my child since its birth. I am willing to continue to do so. The present surroundings of the child are the best home that could possibly be furnished her. She is receiving the best attention my mother can give it. In my opinion my mother is the better qualified to take care and rear

my child; she does not know any other mother. The child regards my mother as its mother; knows no other. The temperament and characteristics of my wife are emotional, erratic, and unstable. I say unstable because you can't depend on her for anything any length of time. She is changeable, erratic, and not dependable, first, from a religious standpoint; she has changed, to my knowledge, from Catholic to Episcopal; she has attended one or two services of the Christian Church, and has adopted the Christian Science faith. I am confident of my own knowledge that if my child was sick that her religion would dictate that she have a Christian Science healer. When I left for Europe, as to what my plans for my wife and child, I discussed with my wife that phase of their home life; the question was brought up by my wife asking permission to go to New York to study music. I told her that it would not be advisable for her to do that because of the health of the child, which was bad, and she had no place to take the child; it was no place to take the child—she had no relatives or friends there. I had that discussion with my wife one day before I left for France at Ft. Stewart. She withdrew her intention to go to New York; she said that she would go to the mountains until the 1st of October, and then return to my mother, because my brother was going into the service, and my father was on the seas, and she stated that she would make her home with my mother. I received those letters identified by my wife. I returned to Savannah, discharged from the army, on the 8th of March, of this year. The paper you show me contains my record, statements by my colonels in France. As to the care and attention my child has received at the hands of my mother since I have returned, I could not wish for any better treatment of the child, and from the testimony of my friends I am sure it could not be better while I was in the service. I do wish to retain the custody of my child. If I am permitted to have the child I will always give to it the same kind care and attention that it has received heretofore by my mother. I consider for the best welfare of the child as to where it shall be taken care of that it shall be with my mother, because it has a delicate constitution; it has recently gained strength after a case, as the doctor described it, of acidity of the stomach; the food has to be properly selected, properly cooked, and in proper quantities. The treatment my child received from its mother depended upon the daily program of my wife as to where she was going. By "depending upon the daily program of my wife as to where she was going" I mean by that if my wife had something personally to do which required her time otherwise the child did not get the proper care. I can cite one instance, among many instances, where the milk was not given to the child in its proper condition, because in her hurry to leave the house the ——— which had to go into the milk was not properly cooked. It was against my consent that my wife remained in New York pursuing her musical study. I know the father of Mrs. Pauline Comer. I know his general reputation and character in this community for morality. It is bad. I am not willing for my child to be reared in a home where he should be arbiter of that child and my wife;

I am trying not to subject my child to that exposure.

Cross-examination: My wife after she came back phoned to me once. I said I would see her some time. It is correct that she phoned me once, and I said I could not see her that night. It is correct that she asked me if I would see her the next day. It is not true that she asked if I could see her the night after that, nor the day after that. She did not the third time. I said she could see me some time during the next week if it was possible. The reason why I would not let her come to see me was because I considered what she was doing as an indirect way of attempting to live with me again. I was thinking over the matter, and when she telephoned me I was not in the mental attitude of desiring her to come. I did not have a long time to think about it. I was away from her several months. I had not written her harsh letters. She appealed to me only once shortly after I came back for an interview. She did twice in the same conversation. I had a definite arrangement. That was that I would try to see her the following week. I had become aware that she wanted to live with me again. Not through a letter that she wrote to my mother—through a statement from my brother. My brother told me that my wife wanted to live with me again. I knew that my mother had received a letter from my wife, but I did not see it. As to my acknowledging a letter, although written to my mother, you are referring to a different letter. I saw only one letter, the next to the last letter that my wife wrote to my mother. Only one letter I have seen that she wrote to my mother. That is the letter that I wrote a reply to; that is the letter that you show me. Prior to the time that I went away my wife went on to where I was stationed to see me. I was well at that time. I was not under treatment at that time by anybody. I was not under treatment at any time that my wife visited me, after I had gone into the army. The only time I ever saw a doctor, that I remember, was the time the doctor told me I had autointoxication; I saw one doctor, I believe. I was not under treatment at all while stationed at Ft. Monroe, at the training school. I was, with several others, placed in quarantine, because we were threatened with measles. I did give the information to my wife that the lavatories were very filthy around there. I remember the occasion now. I think my wife was a little over 20 when I married her. That is correct that the baby was born about 9 months after we were married. I don't know how old my wife was when her mother died; I have been told, but I have forgotten it. I never knew her mother. My wife was over 21 when her baby was born, a little over 21. She neglected the baby on many occasions. She went out with me sometimes, not quite frequently at night. My mother looked after the baby when she went out at night with me. I know the baby's food was not properly prepared, because Dr. Crawford told me so. Dr. Crawford told me and that is really the way I know about it. Mrs. Comer brought the baby to see me off. I did not think that was all right. I advised her not to do it, because I investigated the conditions in the surrounding country in Newport News, and places outside, and came to the conclusion

that the places around there were no places for a baby and a young wife to be at. It was absolutely natural for a young mother to want her only baby to see her father off to say good-bye to him; it was the most natural thing for a father to want his baby to be brought to him to say good-bye. I did not promptly shut off my wife's allowance when I found that she was in New York, studying art, and in that letter which she wrote to me, explaining the circumstances of everything like that—how she had left the baby to the tender solicitude of her grandmother and care. The allowance did not stop quickly after I found she was in New York. It didn't stop as quickly as I could stop it—it continued. It continued through the month of January, 1919. It continued six months. I got my wife's letter, telling me about her being in New York, the latter part of August, 1918. The allowance continued until January, 1919. I shut off the allowance in January, 1919, because she told me she was financially able to take care of herself. I did not know what employment she had at that time. Outside of my mother I have relatives, an aunt and uncle, to look after the baby, in their homes, Boston, Mass., and New Hampshire—nobody else in Savannah. My mother is naturally devoted to the child. She has not taught the baby to call her Mother. The child adopted it by hearing my brother call my mother Mother. The baby calls Mrs. Comer, my wife, Pauline. I have no regular income; I am in partnership with Henrik Wallin, architect. I have no income at all; I am re-establishing my business. I have been in the army, and I have no interest in any work except that secured after my return from the army.

Redirect: I have plenty of work in prospect that will insure me a competency. The year before I went into the army my earning capacity and ability was over \$4,000. I anticipate that this coming year it looks as if it will be equal to that.

Mrs. W. T. Dakin, a witness for the defendants, having been duly sworn, testified as follows:

My name is Mrs. Dakin. I live in Savannah. My husband is the Rev. W. T. Dakin. I know Mrs. Pauline Comer. I know Mrs. William P. Comer. I know Arthur Comer. I know the little child in the custody of Mrs. William P. Comer. I have had every opportunity to observe the care and treatment that child received; I live next door. The child receives excellent care. Mrs. W. P. Comer is qualified for the care and custody of the child. I do not know the temperament and characteristics of Mrs. Pauline Comer. I am not able to express an opinion as to which one would be the most qualified to rear that child. I have met Mr. Arthur Overton. I do not know the general character he bears in this community for morality. I do not know his reputation. I live next door to Mrs. C. Comer. The general reputation of Mr. Arthur Comer is good, from what I have heard.

Mrs. Augusta Lynah, a witness for the defendants, having been duly sworn, testified as follows:

My name is Mrs. Lynah. I know Mrs. Carmine Comer. I know Mrs. Pauline Comer. I have known Mrs. Pauline Comer all my life. I have known Mrs. Carmine Comer since Pauline has been married. I do not know the temperament and characteristics of Mrs. Pauline Comer very intimately. I don't know the temperament and characteristics of Mrs. Carmine Comer very intimately. I know the care and custody, attention that is being given to the child of Mrs. Pauline Comer by Mrs. Carmine Comer. It has received most careful attention. From my knowledge of the two ladies, and the care and attention that has been accorded to the child, in my opinion the child would be best protected in the grandmother. I know only from hearsay about the circumstances of Mrs. Arthur Comer leaving the child and going to New York.

Mrs. C. V. Snedeker, a witness for the defendants, having been duly sworn, testified as follows:

My name is Mrs. C. V. Snedeker. I live 924 East Henry. I know Mrs. Carmine Comer. Apparently the child of Mrs. Pauline Comer gets the best of care from Mrs. Carmine Comer. I have occasionally visited the home of Mrs. Carmine Comer. I know Arthur Comer. I know Mrs. Pauline Comer. I have not known her very long. I know nothing of the characteristics of Mrs. Pauline Comer.

Mrs. J. H. Bolshaw, a witness for the defendants, having been duly sworn, testified as follows:

My name is Mrs. Bolshaw. I know Mrs. Carmine Comer. I know Arthur Comer. I know Mrs. Pauline Comer. I know that the little child has received the best of care while in the custody and care of its grandmother.

Mrs. Pauline Comer, the plaintiff, recalled, further testified:

At the time I went away I consulted with my mother-in-law, my father, and my aunts about the propriety of my going away. Mrs. Comer, my mother-in-law, said that I had arranged everything splendidly, and said that she would be glad to take care of the baby while I was gone. There was no suggestion made, at the time I left my baby, upon the part of my mother-in-law, that it was not proper for me to leave the baby with her. There was no suggestion or intimation that I was going to leave the baby with her permanently. When I came back from New York the baby was left with Mrs. Comer, Sr., because I thought through her reconciliation might be effected, between my husband and myself, for her sake. I have a letter that I wrote to Mrs. Comer. It has been impossible for me to go to my mother-in-law's house under the conditions and treatment which have been accorded me by my husband since my return. My father's habits are good now. He is leading an entirely clean and wholesome life. He has a home and I am living with him. I have a comfortable home to take my baby to and rear it. If my baby were to get ill, I would not have any objection to her being treated by a regular practitioner of medicine. I have not

said anything about the subject to my brother-in-law. I would be perfectly willing to have it attended to by a physician.

Cross-examination: I don't know anything about my father's habits; he used to drink; he has not been doing that in 4 years. I don't know anything about his moral life.

Mrs. W. P. (Carmine) Comer, a witness, recalled, further testified as follows:

The statement made by Mrs. Pauline Comer that I advised her to go to New York, that I thought the arrangements made were admirable, that this was an opportunity for her to cultivate her voice, and that she went with my entire consent and approval is not true; I did not approve of it. I didn't state to Mrs. Pauline Comer that this was a good time for her to cultivate her voice, and I approved of her leaving her child with me and going to New York. Nothing of that kind was said by me to her.

—Statement by editor.

Robt. L. Colding, of Savannah, for plaintiffs in error.

Anderson, Cann, Cann & Walsh, of Savannah, for defendant in error.

FISH, C. J. In a habeas corpus proceeding instituted by a wife against her husband and his mother, for the custody of a female infant 3 years of age, the child of the husband and wife, the judge did not err, under the pleadings and evidence, in awarding the custody of the child to its mother.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(151 Ga. 302)

BIBB COUNTY v. JONES et al.

JONES et al. v. BIBB COUNTY.

(Nos. 1823, 1824.)

(Supreme Court of Georgia. March 5, 1921.)

(Syllabus by Editorial Staff.)

1. Trial \S 260(1)—Requested charges covered by general charge properly refused.

It was not error to refuse requests to charge where they were fully covered by the court's general charge.

2. Evidence \S 419(2)—Consideration recited in deed prima facie true.

The recital of a consideration in a deed is to be taken as prima facie true, but is subject to be overcome or explained by parol testimony, and court did not err in so charging as against an objection that it should have charged that the recital in the deed of receipt of a consideration is presumed to be true, and such presumption continues until it is overcome by evidence.

3. Evidence @—273(2)—Testimony as to statement held immaterial and irrelevant.

In an action against a county to set aside alleged gift of land to a county, testimony as to statements of donor as to how he had acquired the land was properly excluded as being immaterial and irrelevant.

Hill, J., dissenting.

Error from Superior Court, Bibb County; E. D. Graham, Judge.

Action by D. B. Jones and others against the County of Bibb. Judgment for plaintiffs, and defendant brings error, and plaintiffs file cross-bill. Reversed on main bill of exceptions and affirmed on cross-bill.

The bill of exceptions contained the following:

Be it further remembered, that during the trial of said case the testimony of Roff Sims, as follows, was offered by plaintiffs:

"I knew Aaron A. Roff; was named for him. In 1876 or 1877, when I was about 16 years old, I was frequently with Mr. Roff. At that time I was acquainted with the property known as Roff Home, and am acquainted with it now. When I was about 16 years old, I was driving by that property with Mr. Roff, and he pointed to it, and asked me if I knew that at one time he owned that place. I told him, 'Yes,' I heard that he owned it. And he said, 'Yes, you know I gave it to the county.' He said that he took it from Mrs. Donald B. Jones to pay the debt of Adams, Jones & Reynolds that was due to him, of which firm Mrs. Jones' husband was a member. He often referred to it as having been taken from Mrs. Jones to pay this obligation. On one occasion he said to me, that he was a money lender and didn't want any property and didn't feel as if, having taken this property in payment for a debt, from a woman, that he cared to liquidate it and have it to become a part of his estate, and therefore gave it away."

The defendant objected to said testimony as to all statements of Mr. Roff as to how he acquired title to the property and the consideration paid for it, and as to every other statement with reference to it, on the grounds: First, that it is hearsay; and, second, that the statements were made by Mr. Roff after he parted with title and possession of the property. The court sustained said objections, and excluded said testimony concerning the statements of Mr. Roff from the jury. To which ruling of the court, the plaintiffs then and there excepted, and now except, and assign the same as error, and say that the court erred in excluding said testimony.

That on the trial of said case, the court charged the jury as follows: "The recital of a consideration in the deed from Jones to Roff is to be taken as prima facie true, but is subject to be overcome or explained by parol testimony." To which charge the plaintiffs then and there excepted, and now except, and assign the same as error, and say the court should have charged the jury that the recital in the deed of receipt of a consideration is presumed

to be true, and such presumption continues until it is overcome by evidence.

—Statement by editor.

W. G. Smith and Jos. H. Hall, both of Macon, for plaintiff in error.

J. L. Anderson, of Atlanta, and Ross & Ross, of Macon, for defendants in error.

PER CURIAM. When this case was before this court on a former occasion (County of Bibb v. Jones, 147 Ga. 493, 94 S. E. 765) it was held that the deed of the trustee and his wife, unless void for fraud, conveyed the entire estate in the property conveyed by the deed to the husband and trustee. The fourth division of the decision then rendered is as follows:

"Having held, in the second division of this decision, that the deed from the trustee was effective to convey the entire property, unless impeached for fraud, and it appearing upon an inspection of the evidence contained in the record that the evidence was not of such a character as to require a finding that the transaction was fraudulent, the court erred in directing a verdict in favor of the plaintiffs for the property in dispute."

The evidence introduced upon that trial, for the purpose of impeaching the deed for fraud, consisted of the testimony of the wife of the trustee, which had been perpetuated under order of court. Her evidence was direct, unequivocal, and undisputed. On the subsequent trial of the case, now under review, the plaintiff offered in evidence the same testimony, and, in addition, other testimony tending to establish the same fact which upon the former trial was undisputed. Held:

1. Under the evidence in the present record, and in view of the ruling quoted above, the verdict for the plaintiffs was unauthorized, and the court therefore erred in overruling the defendant's motion for new trial.

[1-3] 2. Certain charges of the court and refusals of certain requests to charge are assigned as error in the cross-bill of exceptions. The requests to charge, in so far as legal and pertinent, were fully covered by the court's general charge to the jury, and the charges given are not erroneous for any reason assigned. The evidence, the exclusion of which is also assigned as error in the cross-bill of exceptions, was immaterial and irrelevant to any issue in the case, and the court did not err in excluding it.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur, except

HILL, J. (dissenting). In view of the ruling made in the case when it was formerly before this court, and of the evidence in the present record, I dissent from the ruling of the majority of the court in the first head-note [division of decision].

(151 Ga. 276)

HILL v. NEELY.**NEELY v. HILL.**

(Nos. 2131, 2139.)

(Supreme Court of Georgia. March 4, 1921.)

*(Syllabus by Editorial Staff.)***1. Estoppel §120—Giving Code definitions of equitable estoppel held applicable to evidence.**

Giving the definitions of equitable estoppel as pertaining to real estate set forth in Civ. Code 1810, §§ 5737, 5738, *held* not inapplicable to evidence, though the estoppel relied on was recited in written deed.

2. Estoppel §32(1)—Description in deed to constitute estoppel must be definite and accurate.

For an estoppel to operate against a party signing a deed as to a boundary line between two adjacent tracts of land, the description included in the deed of the boundary line in question must be sufficiently definite and accurate to put the party signing the deed, and who it is claimed is estopped, on notice as to the definite boundary line between the tracts of land in question.

3. Ejectment §94—Evidence should so identify land as to enable sheriff to put plaintiff in possession.

In an ejectment suit it is essential that the evidence should identify the land and locate the boundary in such a manner as to enable the sheriff to put the plaintiff in possession of just the right land and no more.

4. Ejectment §110—Instruction as to map or survey being color of title held properly refused.

In ejectment, *held*, that court did not err in refusing to charge the jury that "a map or survey is not of itself title to land nor color of title."

5. Estoppel §120 — Instruction as to notice of contents of recital in deed held properly refused.

In ejectment arising out of a boundary dispute, *held*, that court did not err in refusing to charge, "If you find from the evidence that a deed was filed by R. C. Company through R. C. as president, then R. C. is himself charged with notice of the recitals in that deed, and it is for you to decide under the evidence whether that notice would work an equitable estoppel."

Error from Superior Court, Burke County;
H. C. Hammond, Judge.

Action by R. C. Neely against L. D. Hill. From a judgment defendant brings error, and plaintiff files a cross-bill. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

Charges relating to equitable estoppel were as follows:

"Gentlemen, I charge you this on the subject of estoppel: Where the estoppel relates to the title to real estate, the party claiming to have been influenced by the other's acts or

declarations must not only be ignorant of the true title, but also of any convenient means of acquiring such knowledge. Where both parties have equal knowledge or equal means of obtaining the truth, there is no estoppel. In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped or such gross negligence as to amount to constructive fraud, by which another has been misled to his injury. I charge you that for an estoppel to operate against a party signing a deed, as to a boundary line between two adjacent tracts of land, the description included in the deed of the boundary line in question must be sufficiently definite and accurate to put the party signing the deed, and who it is claimed is estopped, on notice as to the definite boundary line between the tracts of land in question, and if it is too indefinite to put the party executing the deed on notice, then it would not amount to an estoppel. If you find that the plaintiff has not put before you sufficient evidence to prove the land claimed on the western side of Beaver Dam creek was in fact a part of the plantation known as Forest Hill, as alleged in his petition, then he cannot recover, and your verdict should be for the defendant. In an ejectment suit—and this is an ejectment suit—it is essential that the evidence should identify the land and locate the boundaries in such a manner as to enable the sheriff to put the plaintiff in possession of just the right land and no more. If the evidence for any reason fails to give you the facts on which such location can be made of the land in dispute, then your verdict should be for the defendant. In regard to the partition proceedings and plat of the Waterloo Plantation, I charge you that you are not to consider these documents as evidence of title of the plaintiff to the land sued for as part of Forest Hill Plantation, but you are to consider these documents only as evidence for what they may be worth in locating the boundaries of the land claimed by plaintiff under his own chain of title as part of Forest Hill Plantation. Gentlemen, it is for you, therefore, to say whether the plaintiff, claiming this land under a chain of title, written deeds and muniments of title extending back over a number of years as claimed, has, in the first place, shown you that any land on the western side of Beaver Dam creek is his as the purchaser and owner of the Forest Hill Plantation; next, where that land is, and within reasonable limits what are its boundaries and what is its amount. If he has successfully done that, by the greater weight of credible testimony, he should recover. If he has not, your verdict should be for the defendant."

Some of the grounds for new trial were as follows:

(12) The court erred in refusing to give in charge to the jury the following written request, duly presented by counsel for defendant: "A map or survey is not of itself title to land nor color of title"—the error arising because said request was sound in law and was applicable to the facts of the case. No evidence having been offered to prove the accuracy of the map or survey.

(151 Ga. 322)

(13) The court erred in refusing to give in charge to the jury the following written request duly presented by counsel for defendant: "If you find from the evidence that a deed was signed by R. C. Neely Company through R. C. Neely as president, then R. C. Neely is himself charged with notice of the recitals in that deed, and it is for you to decide under the evidence whether that notice would work an equitable estoppel"—the error arising because said request was sound in law and was applicable to the facts of the case.

(17) The court erred in charging the jury as follows: "In regard to the partition proceedings and plat of Waterloo Plantation, I charge you that you are not to consider these documents as evidence of title of plaintiff to the land sued for as part of Forest Hill Plantation, but you to consider these documents only as evidence for what they may be worth in locating the boundaries of the land claimed by plaintiff under his own chain of title as part of Forest Hill Plantation."

—Statement by editor.

Wm. H. Fleming, of Augusta, for plaintiff in error.

Callaway & Howard, of Augusta, for defendant in error.

GEORGE, J. [1-3] 1. "Where the estoppel relates to the title to real estate, the party claiming to have been influenced by the other's acts or declarations must not only be ignorant of the true title, but also of any convenient means of acquiring such knowledge. Where both parties have equal knowledge or equal means of obtaining the truth, there is no estoppel." Civil Code 1910, § 5737. "In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his injury." Civil Code 1910, § 5738. See *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84; *Stoncipher v. Kear*, 131 Ga. 688, 63 S. E. 215, 127 Am. St. Rep. 248; *Oats v. Jones*, 136 Ga. 704, 71 S. E. 1097; *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 23 L. Ed. 927. The charges of the court relating to the doctrine of estoppel were authorized by the evidence, and were substantially correct.

[4, 5] 2. The rulings on the admissibility of evidence, and the refusal of the court to charge the jury as requested, show no cause for reversal.

3. The evidence for the plaintiff is sufficient to identify the land claimed, and the verdict finding for the plaintiff the premises in dispute is not without evidence to support it.

Judgment on main bill of exceptions affirmed; cross-bill dismissed.

All the Justices concur, except GILBERT, J., disqualified.

WATTS v. WATTS. (No. 2140.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

Divorce — 312—Award of custody of child to mother on conflicting evidence not disturbed.

In a divorce action, where the evidence was conflicting, *held*, that the action of the court in awarding mother custody of a 13 year old child would not be disturbed.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Mrs. W. T. Watts against W. T. Watts. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 106 S. E. 731.

The plaintiff testified:

I am the mother of this girl child. She is about 13 years old. Mr. Watts has never helped me to take care of the child. He has not provided it with clothes to wear. Mr. Watts, my husband, left me during the year 1915, and went to the state of Alabama, and stayed there for some time. When Mr. Watts came back from Alabama, I told him I could not take him into my home as a husband no more, but would take him in as a boarder, like the rest of the boarders I had at my house, and let him pay me \$6 per week. This he done. We slept in the same room in different beds, but never cohabited again as man and wife. My house was raided twice, but the police and detectives did not find anything wrong with my lady boarders, but advised me to ask them to leave my home, stating that they knew that I did not know the character of the women, but that they [the detectives] did, and advised me to have them leave my home, which I did. I had three working girls in my house at the time. They worked at the cotton mills. I never did see anything wrong with them. They acted all right around me. They always conducted themselves like ladies around me. At the time that my husband left my home I was afflicted with rheumatism, and he attempted to take my child away is the reason that I called him a son of a bitch, and I threw bricks at him when he left for the state of Alabama. I am sorry that I used such language. I am not accustomed to using such language: I have supported myself and child. He has never given it anything to wear. When Mr. Watts was in Alabama, he sent the child three pennies and a pair of stockings and a dress. My rent on my houses made it so that I could live and support my child.

The defendant testified:

I am the defendant in this proceedings. I am the father of this girl child. When I came back from Alabama, I came back to my wife and little child. I was in the state of Alabama two years, during the year of 1915 and 1916. My wife told me that she would not take me back as a husband, but would take me as a stranger and boarder, and charge me \$6 per week. When I returned home, I found two women in my house of bad character. I told

my wife to get rid of them; that they were not the right kind of women to keep in her house. She refused to do this, and in a short time the house was raided by the police. The women then left the house. My home was raided twice for bad women, and in a few days after that two more women came there, and their character was not good. They would have men to come there from 10 to 12 o'clock in the nighttime. They would slip through the house into their rooms, and would stay at a late hour of the night. Automobiles would gather around my home, and I could hear men going to their rooms. At 10 o'clock one night a man came and knocked at the door, and I went to the door, and a man dressed as a soldier asked me was this 1011 Elbert street, and I told him, "Yes," and he said that a man and woman was out in the car and wanted a room, and that he heard that I had rooms to let. I told him, "No, sir; we have no rooms to let;" and I shut the door in his face and went off, and my wife remarked to me and said: "I have lost \$5 now by not taking in them." On one occasion I came from my work, and she had a pint of whisky, and I asked her where she got it, and she said a man give it to her and told her not to tell me about it. My wife is a woman that uses profane language in the presence of my little girl, and she allows her older boys by her first husband to curse around them, and allows the boys to lie around with the girls on the bed and play with them in the presence of my little child. My wife run me away from home. She told me to go to Alabama and stay there; never to put my foot in her yard again. She called me a son of a bitch. She threw bricks at me the day that I left for Alabama. During my absence in Alabama I sent the child all of the clothes that it needed, and I sent them a barrel of apples at one time. While living in Macon, I run a meat market for 10 months, and fed my wife and her boarders, and she never paid me a cent for it. My wife is not a fit and proper person to raise my little girl child. I have two sisters in Alabama and myself will take care of the child, and will provide for it and give it an education and raise it in the proper manner; that is where I propose to carry the child if the court awards her to me. That place where my child is now is no home for it. I never did mistreat my wife, nor desert her in any way. I have always treated her in a kind and affectionate manner.

—Statement by editor.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

O. C. Hancock, of Macon, for defendant in error.

ATKINSON, J. In an action for divorce, instituted by a wife, there was an issue as to the custody of a female child, eight years of age. On conflicting evidence the judge did not err in awarding the custody of the child to her mother.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

WATTS v. WATTS. (No. 2265.)

(Supreme Court of Georgia. March 16, 1921.)

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Mrs. W. T. Watts against W. T. Watts. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 106 S. E. 730.

W. O. Cooper, Jr., and John R. Cooper, both of Macon, for plaintiff in error.

O. C. Hancock, of Macon, for defendant in error.

ATKINSON, J. The exception is to a judgment overruling a motion for a new trial, in an action for divorce instituted by a wife. No complaint is made of any error of law committed on the trial. Though conflicting, the evidence was sufficient to authorize a verdict for the plaintiff, and there was no error in overruling the motion for new trial.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

LANE v. LANE. (No. 2168.)

(Supreme Court of Georgia. March 16, 1921.)

Error from Superior Court, Troup County; J. R. Terrell, Judge.

Two suits by J. E. Lane against Mrs. S. R. Lane and by Mrs. S. R. Lane against J. E. Lane. Judgment awarding alimony and the custody of a child, and J. E. Lane brings error. Affirmed.

Boyd A. Lovvorn, of La Grange, and Hall & Jones, of Newnan, for plaintiff in error.

Harvey Hill, of Atlanta, and M. U. Mooty and Hatton Lovejoy, both of La Grange, for defendant in error.

FISH, C. J. Pending two suits, one by the wife against her husband for divorce, alimony, and the custody of their daughter six years of age, the other by the husband against the wife for divorce and the custody of the same child, a hearing of the cases was had before the judge as to the questions of temporary alimony and the custody of the child. Held that, under the evidence submitted, the judge did not err in awarding the custody of the child to the mother, and allowing the sum of \$75 per month in the way of temporary alimony for the maintenance of the mother and child.

Judgment affirmed.

All the Justices concur, except GEORGE, J., absent.

(26 Ga. App. 427)

DENSON v. STATE. (No. 12029.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by Editorial Staff.)***Larceny** \S 64(6)—Evidence held to explain possession, so as to prevent conviction on proof of recent possession.

On trial for larceny of lumber claimed to have been blown from the prosecuting witness' billboard on a vacant lot, evidence concerning defendant's claim that he purchased the lumber from people giving a show on the vacant lot held to fully explain his possession, and prevent a conviction on proof of recent possession alone.

Error from City Court of Macon; F. Holmes Johnson, Judge.

Jackson Denson was convicted of simple larceny, and he brings error. Reversed.

The property claimed to have been stolen consisted of molding and other lumber claimed to have been blown from defendant's billboard on a vacant lot adjoining defendant's lot during a storm, and to have been subsequently found under defendant's house. The prosecuting witness testified that defendant told him he purchased part of the lumber from people who gave a show on the vacant lot, and that the show people gave him some of it for services; that the lumber was not concealed from public view, and that the molding was red and green in color. Another witness for the state testified to seeing the molding and telling defendant that it belonged to the prosecuting witness, and that defendant said he bought it from the show people.

Priscilla Pearce testified for defendant that she saw green lumber under the house before the storm, and that it was plainly exposed to public view. Joe Coates testified that before the storm he saw lumber under defendant's house, part of which was green, and that defendant told him he bought part of it from the show people, and they gave him some of it for favors he had done for them. Jesse Fredick testified that before the storm he saw defendant, and one of the showmen standing in front of a pile of lumber, and that he saw defendant give the showman some money; that he stopped and looked at the lumber, and that some was red and some green.

Defendant in his statement said that he did the show people certain favors, and that after the show one of the show employes sold him a pile of lumber for \$1 and gave him another pile; that when the prosecuting witness' employes claimed the lumber he denied that it belonged to the prosecuting witness, and told him he had bought it from the show people; and that he put the lumber under his

house, and it was plainly exposed to public view.—Statement by editor.

Clements & Clements and Jas. L. Wimberly, all of Macon, for plaintiff in error.

Roy W. Moore, Sol., and Harry S. Strozier, both of Macon, for the State.

LUKE, J. The conviction in this case depended wholly upon proof of the recent possession by the defendant of the property alleged to have been stolen, and, this possession having been fully explained, the evidence did not authorize the verdict, and the court erred in overruling the motion for a new trial. *Brooks v. State*, 21 Ga. App. 661, 94 S. E. 810, and cases cited.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 431)

HOWARD v. STATE. (No. 12043.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by Editorial Staff.)***Criminal law** \S 595(1)—No abuse of discretion in refusing continuance.

In a prosecution for assault with intent to murder, held, that court did not abuse its discretion in refusing to continue the case on account of absent witnesses who would testify that prosecuting witness was chasing defendant with a razor at the time, when defendant procured a pistol and fired the shot.

Error from Superior Court, Appling County; J. P. Highsmith, Judge.

Hattie Howard was convicted of assault to murder and brings error. Affirmed.

The motion to continue the case referred to in the opinion was as follows:

Now, comes the defendant, Hattie Howard, in the above-stated case at the call of same and moves the court to continue said case for this term of court, and for grounds of said motion states the following facts:

This defendant shows that she was indicted at this term of court, which court convened on April 12, 1920, and this defendant was indicted on the 12th day of April, 1920, for the offense of assault to murder one Lucile Pierce, being charged with shooting at her with a pistol and gun and hitting her, and it being charged that same was done without justification. This defendant further shows that this shooting occurred on the "turpentine quarters" of the Surrency Turpentine Company, Surrency, Ga., and at the time the shooting was done there were present Lillie Bell Norwood and Estelle Walker, both of whom reside at Surrency, Ga., both of whom were within 30 feet of this defendant at the time the shooting was done, and affiant further on oath says that since she has been indicted for said offense that she

has had issued by the clerk of this court on the 13th day of April, 1920, subpoenas for said two named persons above, to wit, Lillie May Norwood and Estelle Walker, and this defendant shows that they were present from the time the altercation started between this defendant and the said Lucile Pierce until the same was ended and wound up and saw the entire happening at said fight. This defendant further shows that these parties live in this county, and just as soon as this defendant found she was indicted as stated aforesaid she procured subpoenas and had them placed in the hands of the sheriff of this court to summon said witnesses. This defendant further shows that these two witnesses will swear that at the time the shooting was done by this defendant that Lucile Pierce, the woman who was shot by this defendant, had a razor in hand and was after this defendant, chasing this defendant with her razor and undertaking to take the life of this defendant, and this defendant procured a pistol from Estelle Walker and fired the shot at the said Lucile Pierce, and did it after she had been running this defendant for some time with the razor, and these witnesses will swear these facts, and will swear to seeing the razor, and the party heretofore named started after this defendant with said razor, and this defendant further shows that she has no other witness that was present at said time or who knows the facts about the case that she can summons to prove same, except the two witnesses named above, and this defendant does not make this motion for the purpose of delay only, but same is made for the purpose of procuring the testimony of these witnesses, and this defendant expects to have said witnesses present at the next term of this court, and these witnesses have not left the county or place where they were by the consent or procurement of this defendant, and this defendant has not agreed for one or either of them to remain away from court, and defendant expects to be ready for the trial of this case at the next term of this court. This defendant expects to further prove by the above-named witnesses that she did not start the trouble between herself and the victim of the shooting, but expects to prove by said witnesses that this party, this defendant, shot without cause or provocation, drew her razor and began cursing this defendant and took after this defendant with same, and it was the only method this defendant had of stopping said party chasing her, and which facts this defendant expects to show by said witnesses heretofore named. This defendant expects to show further that the witnesses that are subpoenaed by the state, to wit, Julia Williams and Maggie Rogers, were not present at the time the shooting occurred, nor were they close enough to see how the disturbance started, nor do they know any of the facts connected with said shooting, and this defendant is informed that said witnesses for the state will swear that they were present, and that the said Lucile Pierce was not chasing this defendant at the time the shooting was done by this defendant, and this defendant shows that she can disprove what they will swear along this line, if they should so swear as this defendant is informed they will swear, and this defendant can at least, whether they swear

or not, show that she acted absolutely in defense of herself and person at the time she fired the shot and hit the alleged victim in said indictment, and this motion is made for the purpose of getting the evidence and testimony of these two witnesses for the consideration of the jury and on the trial of this case.

This defendant shows that immediately after she found out that a bill of indictment was returned against this defendant that she delayed no time in trying to procure the attendance of said witnesses by having them served to attend as witnesses at this term of court to testify for this defendant. This defendant further shows that every fact stated in this motion with reference to what the witnesses sought to be summoned will swear is true, and this defendant states that each of the witnesses named as stated will swear what this defendant has stated herein they will swear, and this defendant makes this motion for a continuance in good faith, believing that she will be acquitted if she can get these witnesses she seeks to get.

—Statement by editor.

J. B. Moore and H. L. Williams, both of Baxley, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., of Baxley, for the State.

BLOODWORTH, J. Under all the facts shown on the motion to continue this case, we cannot say that the trial judge abused his discretion in refusing to continue the case. The verdict has the approval of the trial judge, is supported by the evidence, and must be affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 421)

ALFORD v. STATE. (No. 12002.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Master and servant §67—Burden of proof on prosecution under labor contract act.

In a prosecution under the labor contract act (Pen. Code 1910, §§ 715, 716), the burden of proof is on the state to show affirmatively that accused failed to perform the services contracted for, or failed to return the money advanced on the strength of the contract, "without good and sufficient cause."

2. Master and servant §67—Evidence insufficient to show violation of labor contract act.

In prosecution under labor contract act (Pen. Code 1910, §§ 715, 716), evidence held insufficient to show that laborer receiving an advance of \$1 failed to carry out contract or return of the \$1 without "good and sufficient cause."

Error from City Court of Leesburg; W. G. Martin, Judge.

Nig Alford was convicted of cheating and swindling, and he brings error. Reversed.

J. E. Matthews, employer and prosecutor, testified, in effect, that he hired accused under a contract for a year's services and advanced him \$1 on faith of the contract, and accused did not perform any part of the contract or return the \$1, and that he gave accused no cause to fail to carry out his contract, but that prosecutor did not know positively that accused was not sick or in jail. Prosecutor also testified that the first time he saw accused he did not demand the return of the \$1, but did demand that he pay him \$140, which accused owed him.—Statement by editor.

Zach Childers, of Americus, for plaintiff in error.

E. L. Forrester, Sol., of Leesburg, for the State.

BROYLES, C. J. [1, 2] In a prosecution under sections 715, 716, of the Penal Code of 1910 (known as the "labor contract act"), the burden is upon the state to show affirmatively that the accused failed to perform the services contracted for, or failed to return the money advanced on the strength of the contract, "without good and sufficient cause." *Allen v. State*, 22 Ga. App. 274, 95 S. E. 872, and authorities cited. Under this ruling the state in the instant case did not carry this burden, and the court erred in overruling the defendant's motion for a new trial.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 455)

MORRISON v. ALEXANDER. (No. 11931.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by Editorial Staff.)

1. Trial \Rightarrow 170 — Verdict properly directed when demanded as matter of law.

It was not error to direct a verdict against defendant where the verdict directed was demanded as a matter of law.

2. Banks and banking \Rightarrow 77(6)—In action by receiver on note pleas held properly stricken.

In an action by the receiver of a bank on notes, amended pleas alleging that defendant was held liable to a third party on an accommodation note executed to the bank and had paid the judgment and become subrogated to the judgment creditor's rights and was entitled to set off the amount paid on the judgment, and that one of the notes had been settled subsequent to the filing of the original plea in bankruptcy proceedings against a third party, held properly stricken.

3. Evidence \Rightarrow 457 — Permitting witness not making notation on note to explain abbreviation held not error.

Where a note held by a bank bore the notation, "Cr. by cash \$3,781.20, note ex. for \$3,120.00, interest \$120," it was not error to permit a witness to testify that "ex." meant exchange, though he did not make the notation.

4. Bills and notes \Rightarrow 497(1)—Proof under plea denying plaintiff's ownership of note payable to it held not to overcome presumption.

In an action by the receiver of a bank on a note payable to the bank, where there was no allegation or proof of fraud in the procurement of the note, and nothing alleged or proved negating the presumption that plaintiff was a bona fide holder and owner, a plea denying plaintiff's ownership was not sustained in view of Civ. Code 1910, §§ 4288 and 4290.

5. Banks and banking \Rightarrow 77(6)—Plea denying plaintiff's ownership should be stricken unless necessary.

Under Civ. Code 1910, § 4290, providing that the title of the holder of a note cannot be inquired into unless necessary for defendant's protection or to let in the defense which he seeks to make, where, in an action by the receiver of a bank on a note payable to the bank, its execution is admitted, a plea denying that it was the holder or owner should be stricken on demurrer where such inquiry is not necessary.

Error from City Court of Richmond County; J. C. C. Black, Jr., Judge.

Action by Irvin Alexander, receiver of the Irish-American Bank, against H. C. Morrison. Judgment for plaintiff, and defendant brings error. Affirmed.

The first assignment of error complained of the direction of the verdict.

The second and third assignments complained of the striking of amended pleas A and D. Amended plea A alleged that in a suit by the Citizens' & Southern Bank defendant was held liable on an accommodation note made by him to the Irish-American Bank and had paid the judgment and become subrogated to the rights of the Citizens' & Southern Bank against the Irish-American Bank and its receiver and was entitled to set off the amount paid on such judgment. It also alleged that the note had been settled in bankruptcy proceedings of the Industrial Lumber Company. Plea D alleged practically the same facts concerning a suit against defendant on the accommodation note and the payment of the judgment, and also alleged that subsequent to the filing of the original plea the note was claimed by the lumber company, and defendant's liability was settled, the receiver or his attorney being present and consenting to the settlement, that the credit thereon was paid by the lumber company, and not by defendant, and the note was set-

tioned by the lumber company's trustee in bankruptcy.

Assignment 4 complained of the striking of that portion of defendant's answer wherein it set up that the note sued on was not plaintiff's property.

Assignment 5 complained of the testimony of one Weinges. A note in evidence bore the notation: "Cr. by cash \$3,781.80, note ex. for \$3,120, interest \$120." Weinges, who apparently did not make the notation, was permitted to testify that "ex." meant exchange.

Assignment 6 complained of the refusal of the charge mentioned in the opinion.

Assignments 7 and 8 complained of the refusal to submit to the jury issues concerning the collateral security.—Statement by editor.

Wm. K. Miller, of Augusta, for plaintiff in error.

Archibald Blackshear, of Augusta, for defendant in error.

LUKE, J. Alexander, as receiver of the Irish-American Bank, sued Morrison upon four promissory notes. The defendant filed pleas admitting the execution of the notes, denying the indebtedness thereon as alleged, and pleaded partial payment. He pleaded further that, while one of the notes sued on was payable to the Irish-American Bank, it was not in fact the property of the Irish-American Bank, but was the property of the Industrial Lumber Company, and further that while one of the notes was payable to the Irish-American Bank, it was the property of the Citizens' & Southern Bank, and further that one of the notes showed that collateral had been given to secure it, and that no diligence was used by the plaintiff to collect the collateral pledged to secure the note sued on, and that he, the defendant, was damaged thereby more than the amount sued for. The plea was amended several times, and some of the amendments were stricken on motion of the plaintiff, and in some instances the defendant yielded to the court's judgment in striking parts of the plea or amendments, by further amending to meet the objections urged by the plaintiff. The defendant having admitted the execution of the notes sued on, and having admitted that he had received notice claiming attorney's fees, assumed the burden of proof. After the defendant had concluded his evidence, the court, upon motion of the plaintiff, directed a verdict in favor of the plaintiff for a part of the sums sued for. The defendant excepts to this judgment, as well as to the rulings of the court in striking certain amendments to his plea, in allowing certain testimony, in not submitting to the jury certain alleged issues, and in refusing a certain request to charge.

[1-3] Held: It was not error for the court to direct the verdict complained of against

the defendant, the verdict so directed, as matter of law, having been demanded; nor did the court err in any of the rulings complained of in the bill of exceptions.

[4] The plea by which the defendant sought to deny that ownership of one of the notes was in the Irish-American Bank was not sustained by proof in any particular. The note was made payable to the Irish-American Bank, and there was no proof of any fraud in the procurement of the note; neither did the plea allege fraud; there was nothing alleged nor proven which negated the presumption that the plaintiff was the bona fide holder and owner of note. See Civil Code 1910, §§ 4288, 4290.

[5] In addition to what has just been said, in a suit like the present one, by a receiver of a bank, suing for the use of the bank, on a promissory note payable to the bank, wherein the execution of the note is admitted, a plea that the bank was not the holder or owner of the note should be stricken on demurrer, where it does not appear that inquiry as to ownership of the note was necessary, etc. See *Mayer v. Thomas*, 97 Ga. 772, 25 S. E. 761. We have carefully examined the record in the instant case, and the judgment of the court upon each of the questions involved was correct. The assignment of error upon the refusal of the court to charge cannot be considered, as it does not appear that it was presented in writing. There is no merit in any of the assignments of error.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur

(26 Ga. App. 562)

BENTON TRANSFER CO. v. MARION NAT. BANK. (No. 11846.)

(Court of Appeals of Georgia, Division No. 2. March 26, 1921.)

(Syllabus by Editorial Staff.)

1. Bills and notes \S 330—Indorsement on note held a sufficient indorsement to give holder rights of bona fide holder.

The words, "For value received we hereby assign, transfer, and set over to the M. Bank all our rights, title, and interest in and to the within note and in and to the said * * * trucks for which this note was executed," written on the back of a promissory note and signed by the payee, was a sufficient indorsement to give the transferee the rights of a bona fide holder.

2. Bills and notes \S 369—Claim against payee for breach of agreement in contract of sale not available against bona fide holder.

Under Civ. Code 1910, § 4286, relative to the rights of bona fide holders of promissory notes, it was not a defense to an action by a bona fide holder that the payee in selling a

motortruck to the maker agreed to maintain a service station and service truck in the maker's city and had broken such agreement, especially where the defense was not connected with the transaction out of which the note grew.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Marion National Bank against the Benton Transfer Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The action was on a promissory note executed by defendant to the Indiana Truck Corporation September 10, 1917, and, before maturity, transferred to plaintiff for value by the form of indorsement quoted in the opinion. The answer alleged that this was a mere assignment, and that plaintiff took the note subject to all defenses and equities to which it was subject in the hands of the payee, that the truck corporation sold plaintiff a truck on October 17, 1916, and agreed in the contract to maintain a service station and service truck in Savannah during the life of the truck sold, that it failed to do so, that such failure deprived plaintiff of the use of its trucks purchased from the truck corporation for 73 days at different times, and that the reasonable market value of the use of the trucks was \$20 a day.—Statement by editor.

Saussy & Saussy, of Savannah, for plaintiff in error.

Jacob Gazan, of Savannah, for defendant in error.

HILL, J. [1] The words, "For value received we hereby assign, transfer, and set over to the Marion National Bank all our rights, title, and interest in and to the within note and in and to the said Indiana motortrucks, for which this note was executed," written on the back of a promissory note and signed by the payee, is an indorsement of the note. Vanzant, Jones & Co. v. Arnold et al., 31 Ga. 210 (2); Baldwin Fertilizer Co. v. Carmichael, 116 Ga. 762, 42 S. E. 1002; Hendrix v. Bauhard Bros., 138 Ga. 473, 75 S. E. 588, 43 L. R. A. (N. S.) 1028, Ann. Cas. 1913D, 688.

[2] 2. The defenses attempted to be set up not coming within any of the provisions of section 4286 of the Civil Code of 1910, the trial court did not err in striking them and in directing a verdict for the plaintiff, especially in view of the fact that in this case the pleadings showed that the defense relied upon was in no wise connected with the transaction out of which grew the note sued on.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 438)

ELBERTON & E. R. CO. v. NEWSOM.
(No. 11724.)

(Court of Appeals of Georgia, Division No. 2,
March 9, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 719(1)—Error must be assigned on exceptions pendente lite.

Exceptions pendente lite cannot be considered, unless error is assigned thereon either in the main bill of exceptions or in the Supreme Court by counsel for plaintiff in error before the argument begins.

2. Master and servant \S 291(6) — Pleadings held not to authorize charge on duty to select servants.

Pleadings, in an action by a servant for personal injuries, held not to authorize a charge that "the master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency."

3. Trial \S 194(20)—Instruction as to duty of jurors, where defendant rebutted presumption of negligence, erroneous.

In servant's action for injuries, it was error to charge that if defendant rebutted the presumption of negligence, "then it would be left entirely to the minds and consciences of enlightened jurors as to whether or not the plaintiff would be entitled to recover in any amount in this case."

4. Damages \S 216(8)—An instruction in personal injury case as to a method of arriving at present cash value of lost earning capacity held erroneous and confusing.

In action for personal injury, a charge as to the method of arriving at the present cash value of the recovery for lost earning capacity held erroneous and confusing.

Error from City Court of Washington; C. E. Sutton, Judge.

Action by J. N. Newsom against the Elberton & Eastern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

The petition alleged as follows:

"Third. That about 7 o'clock a. m. of said date petitioner was ordered by defendant to make a trip of inspection over defendant's railroad on a motorcar to safeguard an east-bound passenger train, because the track was dangerous and defective; the roadbed being new, wet, and insufficient to safely carry the trains operated over it at that time.

"Fourth. That petitioner responded to the orders of defendant, but objected to making said trip over said railroad in its dangerous condition, but got up a crew of five men and the only motorcar available, which appeared to be in good and safe condition, but when petitioner had gone about 6 miles from Washington, and while he was still in Wilkes county and was traveling at the rate of about 8 or 10 miles an hour, said motorcar mounted the rail to the left, left the railroad track, and came to a sudden stop, and threw petitioner in front of

the car between the rails on the ties, with several of the laborers on top of him. * * *

"Fifth. That defendant was negligent in numerous and divers ways which contributed to the injury of petitioner, and especially negligent because it furnished petitioner with a defective and broken motorcar to be used in going over its railroad. * * *

"Sixth. That defendant, through its agents and servants, had removed from said motorcar a set of good wheels, axle, and equipment, and put in their place the defective wheels, axle, and equipment as aforesaid, and had left said motorcar on one of its tracks as if in good condition and ready for use, and said defective condition of said motorcar was so obscure that petitioner could not discover the defects; and there was no duty of inspection of said motorcar upon petitioner, and the first knowledge he had of its defective condition and its insufficiency for use was when said motorcar left the railroad track and threw him between the rails on the cross-ties and rails, and injured and damaged him as herein shown.

"Seventh. That defendant was negligent: (d) Because said motorcar was set up on a track in position to be operated while it had under it a defective wheel, spindle, and axle, and allowed to be used with several rollers lost or removed from the journal of said car, which was a latent defect known to defendant, or which should have been known to defendant by inspection, but which was unknown to petitioner, and there was no duty upon petitioner to know of said latent defect."

Amendment to Petition.

"Now comes J. N. Newsom, plaintiff in above stated case, and amends his petition of file as follows:

"(1) Amending the third paragraph of said petition by inserting in the second line thereof, and between the words 'defendant' and 'to,' the following, to wit: 'Through its general manager, C. L. Wickersham.'

"(2) Amending paragraph 6 of said petition by adding to the end of the first line thereof the following, to wit: 'A. C. Pounds, one of defendant's track foremen.'

"(3) Amending paragraph 7(d) of said petition by inserting in the second line thereof, between the words 'operator' and 'while,' the following, to wit: 'By defendant through its servants Mose Ferrell, Bollin Willis, Loyd Jones, Bosie Coleman, and Paul McLendon.'"

The court charged:

"That will be a question for you to arrive at, as to what the plaintiff's expectancy will be, taking into consideration his age and manner of living, his present health, his increase in wages or decrease in wages, the reduction of his earning capacity, or any other matter satisfactory to yourselves, taking into consideration these rules of law which I have given you in charge and the evidence given you as to whether his wages might be increased by his increased ability, in determining what the plaintiff's loss under this item of damages would be—that is, lost earning capacity, past, present, and future."

"When you arrive at the number of years he would be entitled to live, and when you de-

termine the wages or earning capacity of the plaintiff in the case, then you would multiply the number of years of the plaintiff's expectancy by his earning capacity, using any method suitable to yourselves, and figuring on a basis of 7 per cent. interest, and in this manner you would arrive at a lump sum, which would be the item of damages caused by the lost earning capacity, past, present, and future."

"In any event, gentlemen of the jury, you will not reach separate items of damages, but you will take into consideration the previous item of pain and suffering, present, past, and future, and combine the two items, and in the event you do find for the plaintiff, combining your computations on the basis of 7 per cent. interest, you would render your verdict for one lump sum, which would cover the entire damages in the case."

"I charge you that in computing the items of damages in this case, past, present, and future damages, that you can use any method practicable to yourselves, figure it on an interest basis of 7 per cent., and reduce the damages to a present cash value."—Statement by editor.

Calloway & Howard, of Augusta, and W. A. Slaton, of Washington, Ga., for plaintiff in error.

Hill & Adams, of Atlanta, and L. D. McGregor, of Warrenton, for defendant in error.

LUKE, J. [1] 1. Exceptions pendente lite cannot be considered unless error is assigned thereon, either in the main bill of exceptions or in this court by counsel for plaintiff in error, before the argument begins. In the instant case, there is no assignment of error on the exceptions pendente lite. The ruling complained of, having been made some several months before the bill of exceptions was presented, cannot be considered. See *Shaw v. Jones Newton & Co.*, 133 Ga. 446, 66 S. E. 240; *Ponder v. State*, 25 Ga. App. 768, 105 S. E. 318.

[2] 2. Neither the pleadings nor the evidence raised an issue which would authorize the charge (complained of in ground 2 of the Amendment to the motion for a new trial) that—

"The master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency."

[3] 3. It was error to charge the jury that—

If the defendant rebutted the presumption of negligence, "then it would be left entirely to the minds and consciences of enlightened jurors as to whether or not the plaintiff would be entitled to recover in any amount in this case."

[4] 4. The charge of the court, as complained of, upon the measure of damages, was erroneous; and in the court's effort to correct the erroneous charge the jury was still left confused as to the method of arriving at the present cash value of his recovery, if he was entitled to recover.

5. There were many inaccuracies in the charge of the court which are not here dealt with, but they are such inaccuracies as will not likely recur upon another trial of the case. It was error to overrule the motion for a new trial.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 494)

HARDWICK v. FIGGERS. (No. 11765.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Municipal corporations ⇨706(1)—Petition for damages from horse shying at object permitted to fall in street held not demurrable.

In an action for damages to plaintiff's horse and buggy, alleged to have been caused by his horse shying at a bale of cotton falling from defendant's dray, and plunging into the side of an automobile, petition held not subject to general demurrer.

2. Municipal corporations ⇨706(6)—In action for damages from fright of horse at bale of cotton left in street, questions held for jury.

Whether defendant's employee was negligent in permitting bales of cotton to fall from his dray on a street, or in permitting them to remain there an undue and unreasonable length of time, whether such bales showing white spots were calculated to frighten an ordinary roadworthy horse, and whether such negligence constituted the proximate cause of the horse shying and running into an automobile, were questions for the jury.

3. Negligence ⇨59—Rule as to proximate cause stated.

Where a wrongful act puts other forces in operation, resulting in injury to another, which the jury may be authorized to say were the direct, natural, and probable consequences of the original act of negligence, the wrongdoer can be held liable, but where the resultant injuries could not reasonably be foreseen as natural, reasonable, and probable consequences, there can be no recovery.

4. Negligence ⇨113(1)—Contributory negligence need not be negated.

Ordinarily, plaintiff's contributory negligence is an affirmative defense, of which defendant can avail himself by proper proof, but it is not the general rule that one seeking to recover for another's negligence must, by his petition, negative lack of care on his own part.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Jake Figgers against C. E. Hardwick. Judgment for plaintiff, and defendant brings error. Affirmed.

The petition alleged that an employee of the defendant hauling cotton with one of de-

fendant's vehicles allowed three bales to fall in the street; that the bagging of one of them was torn so as to show a white spot, and formed such an object as naturally tended to frighten an ordinary roadworthy horse that petitioner was driving along such street at a rate of speed of from six to eight miles an hour, on the right side of the street; that his horse was an ordinary roadworthy horse with normal proclivities; that it suddenly shied from such cotton and plunged into an automobile, injuring the horse and breaking the buggy. It sought to recover the cost of repairing the buggy, the amount paid a veterinarian for treating the horse, and the loss of the reasonable hire of the horse. It alleged that defendant was negligent in not tying or bracing the cotton so that it would not fall from the dray, in overloading the dray so that it would fall off, and not keeping a lookout to prevent it from falling and replace it after falling, in allowing the cotton to remain on the street, in not removing it, in permitting it to remain when of such a nature as to frighten horses, and in placing no light on the cotton.

Hugh M. Gannon and Lee Cotton, both of Savannah, for plaintiff in error.

H. Mercer Jordan and David S. Atkinson, both of Savannah, for defendant in error.

JENKINS, P. J. [1, 2] 1. The petition was not subject to general demurrer. Whether the defendant was negligent in permitting the bales of cotton to fall from the dray upon the city streets, whether he was negligent in permitting them to there remain for an undue and unreasonable length of time, whether such bales of cotton, showing the white sample spots, when left at night in such an unusual place, were calculated to frighten an ordinary roadworthy horse, were all questions of fact, which were properly left to the determination of the jury. In like manner, under the allegations of the petition, it was for the jury to say whether the negligence of the defendant, if it was negligence, constituted the proximate cause of the runaway and injury. *Central of Ga. Ry. Co. v. Hartley*, 25 Ga. App. —, 103 S. E. 259 (1); *Ga. Ry. & Power Co. v. Ryan*, 24 Ga. App. 288 (1), 100 S. E. 713. "The most generally accepted theory of causation . . . is that of natural and probable consequences." *Mayor & Council of Macon v. Dykes*, 108 Ga. 847, 848, 31 S. E. 443.

[3] Thus, where a wrongful act puts other forces in operation, resulting in injury to another, which the jury might be authorized to say were the direct, natural, and probable consequences of the original act of negligence, the wrongdoer can be held liable on the theory of his responsibility for the first efficient cause. Where, however, as in the case just cited, the resultant injuries could not reasonably be foreseen as the natural,

reasonable, and probable consequences of the original wrongful act, there can be no recovery.

[4] 2. Ordinarily, contributory negligence on the part of the plaintiff is an affirmative defense of which the defendant can avail himself by proper proof; but it is not the general rule that one who seeks to recover for the negligence of another is required to negative, by his petition, such lack of care on his own part. *Great Cosmopolitan Shows v. Petty*, 7 Ga. App. 236, 237, 66 S. E. 624; *Fisher Motor Car Co. v. Seymour & Allen*, 9 Ga. App. 465 (1), 71 S. E. 764.

3. The verdict was authorized by the evidence.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 429)

DEVEREAUX v. STATE. (No. 12030.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law §129(6)—Error as to exceptions pendente lite must be assigned in main bill of exceptions on exceptions pendente lite.

Before exceptions pendente lite can be considered by the appellate court, error must have been originally assigned in the main bill of exceptions on the exceptions pendente lite, and not merely on the judgment complained of in the exceptions pendente lite, or such an assignment must be made by the permission of the appellate court before the argument of the case there.

2. Highways §186—Evidence as to building on side of road held competent in prosecution for speeding around curve.

In a prosecution for unlawfully operating a motor vehicle at a greater speed than 10 miles an hour on approaching and traversing a sharp curve, court did not err in permitting solicitor to ask witness, "What was on the left and right hand side?" and witness to answer, "There was a building on the side of the road," as against an objection that it was irrelevant and immaterial, and illustrating no issue of the case, and could in no way show the sharpness of the curve.

3. Highways §186—Testimony as to inability to see around curve held admissible in prosecution for speeding around curve.

In a prosecution for unlawfully operating a motor vehicle at a greater speed than 10 miles an hour on approaching and traversing a sharp curve, court did not err in permitting solicitor to ask witness, "Could you see around the curve?" and the witness to answer, "No, on account of a building," as against an objection that the question and answer were irrelevant, immaterial, and illustrated no issue in the case,

and could in no way show sharpness of the curve.

4. Highways §186—Testimony as to how far one could see on bed of road admissible in prosecution for speeding around curve.

In a prosecution for speeding around a curve, there was no error in asking a witness, "Standing where the curve begins, how far can you see on the bed of the road?" or "Disregarding any building, or other obstructions, and standing at the beginning of curve, how far can you see on the bed of the road?" and the witness answering, "Twenty feet," and "About twenty feet," as against objection that the questions and answers were irrelevant, immaterial, and illustrating no issue in the case, and could in no way show the sharpness of the curve.

5. Highways §186—In prosecution for speeding around curve, testimony as to length of curve held admissible.

In a prosecution for speeding around a curve, there was no error in asking a witness, "In traversing the curve, you go about how many feet before entering stretch of the road?" and the witness answering thereto, "Seventy-five feet."

6. Highways §186—Witnesses §248(2)—Testimony as to condition of road admissible in prosecution for speeding around curve.

In a prosecution for speeding around a curve, court did not err in permitting solicitor to ask witness, "What is the condition of the road?" and the answer thereto, "It curves," as against an objection that the question and answer were irrelevant, and could in no way show the sharpness of the curve, and that the answer was not responsive to the question proposed.

7. Criminal law §437, 444—Court did not err in admitting diagram of road made by witness while on stand.

In a prosecution for operating a motor vehicle at a greater speed than 10 miles per hour on approaching and traversing a sharp curve, court did not err in admitting in evidence a diagram of the road, made by a witness for the state while on the stand, as against an objection that the diagram was not made by an expert, was only an opinion of the witness, was not made on the scene, nor from data and figures made by witness at scene, nor according to scale, and was not proven to be correct.

8. Criminal law §1160—Approved verdict, supported by evidence, not disturbed on appeal.

A verdict in a criminal case, approved by the trial judge, will not be interfered with on appeal, where there was evidence to support it.

Error from City Court of Macon; Will Gunn, Judge.

Willie Devereaux was convicted of unlawfully operating a motor vehicle at a greater speed than 10 miles per hour at a sharp curve, and brings error. Affirmed.

Some of the grounds of the amended motion for new trial were as follows:

(1) Because the defendant contends the court erred in admitting over the objection of the defendant's counsel the following question and answer of Wilse Birdsong, a witness for the state; said question being propounded by the solicitor: "Q. What was on the left and right hand side of the road? A. There was a building on the side of the road." Movant objected to the admission of said evidence at the time the same was offered, upon the ground that said question and answer were irrelevant, immaterial, and illustrated no issue in the case, and could in no way show the sharpness of the curve, which objection the court overruled, and in so doing, defendant contends, committed an error prejudicial to the defendant.

(2) Because the defendant contends the court erred in admitting over the objection of the defendant's counsel the following question and answer of Wilse Birdsong, a witness for the state; said question being propounded by the solicitor: "Q. Could you see around the curve? A. No; on the account of a building." Movant objected to the admission of said evidence at the time the same was offered, upon the ground that said question and answer were irrelevant, immaterial, and illustrated no issue in the case, and could in no way show the sharpness of the curve, which objection the court overruled, and in doing so, defendant contends, committed an error prejudicial to the defendant.

(3) Because the defendant contends the court erred in admitting over the objection of the defendant's counsel the following question and answer of Wilse Birdsong, a witness for the state; said question being propounded by Hon. Will Gunn, presiding judge at the trial: "Q. Standing where the curve begins, how far can you see on the bed of the road? A. Twenty feet." Movant objected to the admission of said evidence at the time the same was offered, upon the ground that said question and answer were irrelevant, immaterial, and illustrated no issue in the case, and could in no way show the sharpness of the curve.

(4) Because the defendant contends the court erred in admitting over the objecting of the defendant's counsel the following question and answer of Wilse Birdsong, a witness for the state; said question being propounded by Hon. Will Gunn, presiding judge at the trial: "Q. Disregarding any building or other obstacles, and standing at the beginning of curve, how far can you see on the bed of the road? A. About twenty feet." Movant objected to the admission of said evidence at the time the same was offered, upon the ground that said question and answer were irrelevant, immaterial, and illustrated no issue in the case, and could in no way show the sharpness of the curve, which objection the court overruled, and in doing so, defendant contends, committed an error prejudicial to the defendant.

(5) Because the defendant contends the court erred in admitting over the objection of the defendant's counsel the following question and answer of Wilse Birdsong, a witness for the state; said question being propounded by Hon. Will Gunn, presiding judge at the trial: "Q. In traversing the curve, you go about how

many feet before entering a stretch of the road? A. Seventy-five feet." Movant objected to the admission of said evidence at the time the same was offered, upon the ground that said question and answer were irrelevant, immaterial, and illustrated no issue in the case, and could in no way show the sharpness of said curve.

(6) Because the defendant contends the court erred in admitting over the objection of the defendant's counsel the following question and answer of Wilse Birdsong, a witness for the state; said question being propounded by the solicitor: "Q. What is the condition of the road? A. It curves." Movant objected to the admission of said evidence at the time same was offered, upon the ground that said question and answer were irrelevant, immaterial, and illustrate no issue in the case, and could in no way show the sharpness of the curve, and further on the ground that the answer was not responsive to question propounded.

(7) Because the court erred in admitting over the objection of the defendant's counsel, a diagram of the road made by Wilse Birdsong, a witness for the state, while on the stand. Movant objected to the admission of said diagram at the time the same was offered, upon the following grounds, to wit: (a) Because said diagram was not made by an expert. (b) Because said diagram was only an opinion of the witness. (c) Because said diagram was not made on the scene, but from memory only. (d) Because said diagram was not made by witness from data and figures made by the witness at the scene of the curve. (e) Because said diagram was not made to scale. (f) Because said diagram was irrelevant, immaterial, and illustrated no issue in the case. (g) Because said diagram was not proven to be a correct representation of the curve, nor a correct diagram of the road at the place of the said curve. (h) Because said diagram was not proven to be a correct representation of the curve at the time the offense was alleged to have been committed by defendant.

—Statement by editor.

Clements & Clements and Jas. L. Wimberly, all of Macon, for plaintiff in error.

Roy W. Moore, Sol., and Harry S. Strozler both of Macon, for the State.

BLOODWORTH, J. An accusation charged that the defendant unlawfully operated a motor vehicle upon a public highway "at a greater speed than ten miles per hour upon approaching a sharp curve and traversing said sharp curve." A demurrer to the accusation was overruled and exceptions pendente lite were filed. This ruling and the overruling of the defendant's motion for a new trial are assigned as error in the main bill of exceptions. Held:

[1] 1. "Before exceptions pendente lite can be considered by this court, error must have been originally assigned in the main bill of exceptions upon the exceptions pendente lite, and not merely upon the judgment complained of in the exceptions pendente lite, or such an assignment must be

made, by the permission of this court, before the argument of the case here. *Jones v. Ragan*, 136 Ga. 653, 71 S. E. 1098; *Sovereign Camp of Woodmen of the World v. Warner*, 25 Ga. App. 449, 103 S. E. 861; *Carhart v. Mackle*, 25 Ga. App. —, 103 S. E. 855." *Ponder v. State*, 25 Ga. App. 768, 105 S. E. 318 (1). Under this ruling the exceptions pendente lite in this case cannot be considered.

[2-7] 2. None of the grounds of the motion for a new trial points out any error that would authorize the grant of a new trial.

[8] 3. There was evidence to support the verdict, it is approved by the trial judge, and this court will not interfere.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 322)

MURPHREE v. WRENS MOTOR CO.
(No. 11712.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(*Syllabus by Editorial Staff.*)

1. Bills and notes \S 518(1)—Failure of consideration not shown by evidence.

In action against drawer of a check indorsed by payee to plaintiff, evidence held insufficient to sustain defense of failure of consideration.

2. Bills and notes \S 370—Evidence as to failure of consideration not admissible, where plaintiff was bona fide holder.

In action against drawer of a check indorsed by payee to plaintiff, exclusion of testimony of defendant in respect to failure of consideration for which he had given check to payee was proper, where there was no sufficient evidence to overcome presumption that plaintiff was a bona fide holder for value before maturity.

3. Bills and notes \S 459—Not error to refuse to compel making indorser of a check a party defendant.

In action against drawer of a check indorsed by payee to plaintiff, it was not error to refuse to compel plaintiff to make the payee as indorser a party defendant to the action.

Error from Superior Court, Jefferson County; R. N. Hardeman, Judge.

Action by the Wrens Motor Company against W. J. Murphree. Judgment for plaintiff, and defendant brings error. Affirmed.

J. R. Sims, sworn for the defendant, testified as follows:

I am one of the partners composing the firm known as the Wrens Motor Company, which firm is the plaintiff in this case. The Wrens Motor Company purchased this check (referring to

the check subsequently admitted in evidence and hereinafter fully set out and described) from Mr. A. W. Williams for a valuable consideration. I do not know exactly when this purchase was made, but when I received the check I was acting in the capacity of the representative of the Wrens Motor Company, and it is my custom to deposit all checks received by me in this capacity not later than two days after the same come into my possession, and therefore I believe this check was purchased by the Wrens Motor Company on or about December 21, 1918.

Defendant offered in evidence without objection from plaintiff, the following check:

\$185.00. Louisville, Ga., Nov. 15th, 1918.

Bank of Louisville: Pay to the order of A. W. Williams one hundred and eighty-five dollars.
W. J. Murphree.

Indorsed on back:

A. W. Williams.

Wrens Motor Co., by J. R. Sims.

Pay to the order of any bank, banker, or trust company, all previous indorsements guaranteed. Dec. 23, 1918, Citizens' Bank, Wrens, Ga., ——— Cashier.

First National Bank, Louisville, Ga., W. R. Sinquefeld, Cashier.

Attached thereto:

Payment stopped by drawer. Bank of Louisville, Ga.

The court refused to permit defendant as witness to testify in respect to the consideration for which witness had signed and delivered the check to A. W. Williams, the court refused to permit witness to testify that the consideration supporting the check sued upon had failed either in whole or in part, the court would not permit witness to testify in reference to any defense that witness may have had against A. W. Williams as the payee of the check sued upon, and the court ruled that the defendant had not overcome the presumption that the plaintiff was a bona fide purchaser of the check, for value, without notice, and before maturity, and therefore could not be let in to his defense against the payee, A. W. Williams, or set up such defense against the plaintiff.

The amended motion for new trial was based on the following grounds:

(1) Because the court erred in refusing to abate the suit until A. W. Williams, the indorser of the check sued upon, could be made a party defendant in said case.

(2) Because the court erred in refusing to compel the plaintiff to make A. W. Williams, the indorser of the check sued upon, a party defendant in said case.

(3) Because the court erred in refusing to allow the defendant, W. J. Murphree, to testify that the consideration supporting the check sued upon had failed, either in whole or in part.

(4) Because the court erred in repelling all testimony which tended to establish that the

consideration supporting the check sued upon had failed either in whole or in part.

(5) Because the court erred in directing a verdict for the plaintiff in the said case.

—Statement by editor.

W. T. Revell and Phillips & Abbot, all of Louisville, for plaintiff in error.

M. C. Barwick, of Louisville, for defendant in error.

LUKE, J. [1] 1. Suit was brought by Wrens Motor Company against Murphree upon a check drawn upon a bank, payable to one Williams, and by Williams indorsed in blank to Wrens Motor Company. Murphree admitted a prima facie case in the plaintiff, and assumed the burden of proving a defense of failure of consideration. The evidence was not sufficient to legally carry the burden, and the verdict in favor of the plaintiff was demanded.

[2, 3] 2. The special grounds of the motion for a new trial, wherein the defendant complains of rulings upon the admissibility of evidence, and of the court's refusal to compel the plaintiff to make the indorser upon the check a party defendant, are without merit. See *Bedell v. Scarlett*, 75 Ga. 56. For no reason assigned was it error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 404)

JOINER v. WILDES. (No. 11909.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 1005(3)—Approved verdict on conflicting evidence conclusive.

Where the jury found a verdict for plaintiff on conflicting evidence and the verdict was approved by the trial court, it will not be disturbed on appeal.

2. Witnesses \S 236(1)—Question to plaintiff as to whether amount of items and credits were all right held proper.

In an action on an open account, it was not improper for plaintiff's counsel to call her attention to each item and credit of the account, and ask her if they were all right, the objection being that testimony was coming from the attorney.

3. Limitation of actions \S 54(2)—Not error under evidence to deny motion to strike items of account from petition.

In an action on an open account in which the evidence showed that plaintiff furnished board to defendant, and payments were made in merchandise and money, it was not error to deny motion to strike items of account from petition

the motion being based on theory that the account was not a mutual one and that limitations had run.

4. Limitation of actions \S 200(1)—Charge on mutual account held sustained by the evidence.

In an action on an open account in which it was shown that plaintiff furnished board to defendant, and that he made payments therefor in money and merchandise, a charge, relative to limitations, on mutual account, held applicable.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by Mrs. W. M. Wildes against J. P. Joiner. Judgment for plaintiff, and defendant brings error. Affirmed.

The amended motion for new trial was based on the following grounds:

(1) Because the court erred in permitting the plaintiff, Mrs. W. M. Wildes, on the direct examination, to testify as follows: "Plaintiff's counsel asked the witness the following question: 'Mrs. Wildes, I will ask you if these amounts are all right, a balance due on board of \$23 in 1915?' Answer: 'Yes, sir'—and so on as to every item in the account and every credit shown thereon, through May, 1918, as to debits and through May, 1917, as to credits; counsel for defendant then and there objecting to the admission of said evidence on the ground that the testimony should come from the witness, and not from the plaintiff's attorney.

(2) Because the court erred in overruling motion of counsel for defendant, made after the evidence for the plaintiff was all in, to strike from plaintiff's petition all items of account shown on statement attached bearing date on and prior to March 23, 1916, for the reason that the evidence failed to show any mutuality of accounts, as alleged in the petition, between the parties, and it appearing that such items, the subject of said motion, were barred by the statute of limitations.

(3) Because the court erred in charging the jury as follows: "An account which is more than four years old is barred, and cannot be recovered on unless you find that there was a mutual account between the parties. Now a mutual account is where there is an indebtedness on both sides—it must be mutual. The court charges you that a mere payment on an account where, if a man owes you, say, \$100 and pays you \$50—that does not make a mutual account, and does not keep that particular account in date. Partial payments do not add anything to the life of an account, but to extend an account, the life of an account, there must be a mutual account—where one party owes another and where credit is expended upon the faith of such account. A mutual credit is expended upon the faith of such account. A mutual account must be between the parties themselves and not between others. Where there is a mutual account, the statute does not begin to run except from the date of the last item of such mutual account." Said charge of the court is error, for the reason that the evidence fails to make any issue upon the question

of mutual accounts; it appearing therefrom without conflict that there was only one account, to wit, the account of Wildes against Joiner, and that payments were made thereon from time to time by Joiner in money and in merchandise.

(4) Because during the progress of the trial, after it had been conclusively shown that the defendant had not boarded at Wildes' house after the 28th day of May, 1917, the statement of account attached to the petition, showing that the defendant was indebted for board up to June 1, 1918—one year after the evidence disclosed he had left the house of plaintiff, counsel for plaintiff's counsel, without offering any amendment and without the knowledge or consent of the court, made in pencil on the itemized statement of account attached to the original petition the following material changes, to wit: The year 1915, being the date when the account began according to said statement of account, was changed to 1914, and the years 1916, 1917, and 1918 were, respectively, changed to the years 1915, 1916, and 1917, said petition, so altered and changed, having gone out with the jury after the charge of the court. Counsel for defendant saw counsel for plaintiff making said change but did not know that it was the original petition upon which said alterations were being made.—Statement by Editor.

Patterson, Copeland & Slater, of Valdosta, for plaintiff in error.

W. L. Cranford and Walker, Small & Little, all of Valdosta, for defendant in error.

PER CURIAM. [1-4] This case arose by reason of a suit upon an open account. Upon conflicting evidence the jury found a verdict for the plaintiff, the verdict has the approval of the trial judge, and, there being no merit in the special grounds of the motion for a new trial, it was not error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE and BLOOD-WORTH, JJ., concur.

(26 Ga. App. 495)

GOLDING v. PARRISH et al. (No. 11769.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Private roads §8—Removal of obstructions is matter for ordinary.

The removal of obstructions from a private way is a matter for the decision of the ordinary.

2. Certiorari §36—Not dismissed because exceptions to decision not tendered at the time.

A certiorari to a decision will not be dismissed because exceptions to the decision were not tendered at the time in writing.

3. Private roads §8—Matters to be shown before obstructions removed stated.

An applicant for the removal of obstructions from a private way must show, not only uninterrupted use for more than seven years, but that the way is not more than 15 feet wide, that he has kept it open and in repair, and that it is the same 15 feet originally appropriated.

4. Certiorari §70(8)—Judgment refusing to sanction certiorari not disturbed when supported by evidence.

Where, in a proceeding before the ordinary, there was some evidence to sustain each necessary ingredient of the case, a judgment of the superior court refusing to sanction a certiorari will not be disturbed as not supported by the evidence.

5. Evidence §502—Qualification of opinion testimony on cross-examination construed.

In a proceeding to remove obstructions from a private road where one of the petitioners testified positively on direct examination that the roadway was not over 15 feet wide, his statement on cross-examination, that he would not swear to such fact positively as he had never measured it, could be understood as qualifying his previous testimony only to the extent of disclaiming his ability to swear with mathematical exactness to a distance which had not been measured.

6. Evidence §589—Party's testimony to be construed in accordance with manifest intent.

While the evidence of a party testifying in his own behalf should generally be construed most strongly against him, it should still be construed in accordance with the manifest intent and purpose of the witness as disclosed by his testimony.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Suit by J. B. Parrish and others against E. V. Golding to reopen a private road and remove obstructions placed therein by defendant. Judgment for petitioners and certiorari refused by the superior court, and defendant brings error. Affirmed.

H. J. MacIntyre, of Thomasville, for plaintiff in error.

Louis S. Moore, of Thomasville, for defendants in error.

JENKINS, P. J. [1, 2] 1. "The removal of obstructions from a private way is a matter for the decision of the ordinary, not the court of ordinary, and a certiorari to a decision on such a matter will not be dismissed, because exceptions to the decision were not tendered at the time in writing." Fortson v. Mattox, 67 Ga. 282 (1).

[3] 2. "Before an applicant can have obstructions removed from a private way, he must show not only that there has been an uninterrupted use for more than seven years, but that it is not more than 15 feet wide, that he has kept it open and in repair, and that it is the same 15 feet originally appropriated.

ed." *Forrester v. McKaig*, 144 Ga. 702, 87 S. E. 1060.

[4] 8. Since the respondent's petition for certiorari attacks the judgment only on the ground that it is not supported by the evidence, and since there is some evidence to sustain each necessary ingredient of the applicant's case, the judgment refusing to sanction the certiorari will not be disturbed. *Horton v. State*, 123 Ga. 145 (2), 51 S. E. 287; *Burley v. City of Atlanta*, 14 Ga. App. 815, 82 S. E. 357.

[5, 6] 4. The showing made by the applicants was weakest in so far as it pertained to the proof that the private way in question was not more than 15 feet wide. One of the applicants testified positively on direct examination that the roadway was not over 15 feet wide. On cross-examination he stated that he would not swear to such fact positively, as he had never measured it. While it is the general rule that where a party testifies in his own behalf, his evidence should be construed most strongly against him (*Farmer, Adm'r, v. Davenport*, 118 Ga. 289, 45 S. E. 244), still, in the proper application of this rule, such evidence should be construed in accordance with what was the manifest intent and purpose of the witness as disclosed by his testimony; and in so viewing it, the witness, even though a party, could be understood to have thus qualified his previous testimony only to the extent of disclaiming his ability to swear with mathematical exactness as to a distance which had not been measured.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 435)

BUTLER et al. v. STATE. (No. 12058.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law §126(2)—Change of venue mandatory when evidence reasonably shows danger of lynching.

Under the express provisions of Acts 1911, p. 74, it is mandatory on the judge to grant a change of venue in a murder case when the evidence submitted reasonably shows that there is probability or danger of lynching or other violence.

2. Criminal law §126(2)—Affidavits held to show danger of lynching requiring change of venue.

Affidavits on a motion for a change of venue in a murder case after reversal of the judgment on the first trial held to show such probability or danger of lynching or other violence as to require a change of venue under Acts 1911, p. 74.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Dink Butler and another were convicted of murder, and they bring error. Reversed.

See, also, 103 S. E. 809.

The following affidavits were used on the motion for a change of venue:

Personally comes J. A. Beazley, who deposes and says as follows: He was attorney for defendants in the above-stated case. That immediately following the shooting there was grave danger of lynching and same was narrowly averted by some of the citizens of Crawfordville and the officers. These citizens promised the crowd which surrounded the jail the night of the shooting that, if they would not molest the negroes, they would see that a special term of court was called and the negroes speedily tried and executed. A special term was called, same being called for January 3d. Deponent heard repeated remarks that they were going to get the negroes. At the time of the trial feeling was very high on the part of the friends of the dead man and others bent upon mob violence. Deponent heard repeated threats to lynch the negroes himself. He heard, through reliable sources, of plans and threats to lynch them. He was warned a number of times by friends that an effort would be made to do this deponent violence and there was grave danger at that time of violence being attempted upon the negroes and their counsel. Deponent knows positively that this danger still exists, and while he does not believe the danger to deponent himself is as grave as it was, he does know that the danger to the defendants is greater since the Supreme Court decision. There is now a deliberate determination and plan to get them when they are brought back for trial. At the last August court, when it was thought defendants might again be tried, deponent was warned by a number of persons who claimed to know their plans, and deponent does believe that these informants know the plans. These informants even gave the details of the plans to lynch defendants at the last August court if they should have been brought back for trial. Deponent has kept in close touch with the situation. He is intimately acquainted with the situation to-day. He swears positively that there is not only a grave danger of a lynching if defendants are brought back to Taliaferro county for a trial, but he swears that efforts to lynch the defendants are, in deponent's opinion, an absolute certainty. Deponent himself has heard the threats. He has had reports on the situation from those who were in position to know the facts and who are reliable and he knows that an attempt to lynch is certain and said efforts will be made with such determination as to be almost certain of success. Defendants show that they are now in jail at Augusta, and that the superior court convenes there in November, and a trial could be had at that court. Police protection will be ample and the trial will be removed from the scene of the tragedy. This affidavit made to be used as evidence in the above-stated case. Sworn to and subscribed before me this 25th day of October, 1920.

J. A. Beazley.

Personally comes W. J. Sturdivant, who on oath says he is sheriff of said county; that on the — day of December, 1919, Will Rainey and Dink Butler got into an altercation, and Will Rainey received a mortal wound from which he died in several days. There were a number of shots fired by both Rainey and Butler according to the testimony at the trial. On the night of the homicide, when the negroes were placed in jail at Crawfordville, a crowd gathered around the jail and there was grave danger of mob violence. A number of prominent citizens of the town came out and a lynching was averted. The next day the negroes were carried to Washington, Ga., where they were kept till the trial on January 3, 1920. They were convicted of murder—Butler sentenced to hang; Fewes given life sentence. The case was appealed to the Supreme Court, and the court reversed the lower court, holding that the evidence was not sufficient to convict. The defendants are now in jail at Augusta for safe-keeping, as it is very probable that violence would be done or attempted on them if kept here. Deponent is conversant with the situation in the county now, and believes most strongly that if an attempt is made to bring the defendants back to this county for trial that an attempt to lynch them will be made and might succeed. This has been rendered more certain by decision of the higher court, and parties realizing that a conviction of murder may not stand would be more likely to resort to violence than before. Deponent knows that these threats have been made and believes they will be attempted and possibly carried out.

This affidavit is made to be used in the above-stated application. W. J. Sturdivant.

Personally comes O. F. Portwood, a practicing physician of Crawfordville, and on oath says that he attended Will Rainey at the time he was shot by Dink Butler, and was conversant with the situation as regarded the danger of lynching at that time.

That a crowd formed in Crawfordville the night of the homicide, and it was with great difficulty that a lynching was averted. Deponent believes that had they not been carried to Washington they most probably would have been killed.

Deponent believes now that it is very probable that, if they are again brought to Crawfordville, an attempt will be made to lynch them. O. F. Portwood, M. D.

Personally comes W. C. Chapman, one of the county commissioners of said county, and chairman of the board and makes this affidavit to be used as evidence in the above-stated application.

Deponent was called on on the night of December, 1919, just after Will Rainey was shot, to help the sheriff prevent violence being done Dink Butler and Fate Fewes, who had just been lodged in Taliaferro county jail.

Deponent found a large and angry crowd around the jail who seemed determined to lynch the defendants.

Deponent, together with Rev. J. E. O'Quinn, the Baptist minister of Crawfordville, and other citizens, sought to have the crowd desist from such efforts and with difficulty prevented any violence that night. The next day the defendants were carried to Washington jail.

The defendants were tried and found guilty of murder. The case was carried to the Supreme Court, and the lower court reversed.

Threats of violence were made against the defendants and even against their attorney. Deponent fears that since the Supreme Court has rendered it probable that the defendants cannot be hung legally that there will be grave danger of a lynching when defendants are brought back here again for trial.

W. C. Chapman.

Personally appears O. Parham, who on oath deposes and says that he is a resident of Taliaferro county, and that he knows of conditions in said county with reference to the safety of Dink Butler and Fate Fewes, and that he is thoroughly satisfied that if these defendants are brought to said county for trial an attempt will be made to lynch them, and, knowing conditions as they exist, he believes said attempt would be successful.

Deponent last August court was invited to join in a plan and purpose to take the negroes away from the sheriff at Barnett when he brought them up, it being thought then that they would be tried at the August term of court.

Deponent knows that the danger of violence being done the defendants at that time was most grave and indeed certain, and he knows that the same conditions prevail now.

This affidavit made to be used as evidence in application for change of venue.

J. C. Parham.

R. W. Golucke, sworn by the state:

Question by the Solicitor: Mr. Golucke, you are clerk of the superior court Taliaferro county? A. Yes, sir.

Q. Do you consider it likely that violence will be done the defendants if brought back here for a trial? A. Well, if I were asked to point out a leader who I thought would lead a crowd to do so, I don't think I could do so.

Q. Do you think it likely that violence would be done them? A. Well, not unless the Rainey boys did it. I do not think any one else would do so. The Rainey boys might. Outside of them, I don't hardly think any others could get together enough to lynch the negroes. The people in Mr. Rainey's community want to see them punished, but know of no one who would act as a leader to do violence. I heard a lot about lynching them just after the killing of Mr. Rainey, and at the trial here and at the last August term of the court, when people thought they would be brought back for trial. [Signed] Ralph W. Golucke.

J. A. Beazley, of Crawfordville, for plaintiffs in error.

R. C. Norman, of Washington, Ga., and M. L. Felts, Sol. Gen., of Warrenton, for the State.

LUKE, J. [1] 1. Upon the hearing of a motion to change the venue in a murder case, upon the ground that there is probability or danger of lynching or other violence being done to the petitioner, if the evidence submitted reasonably shows that there is probability or danger of lynching or other violence, then it is mandatory upon the judge

to change the venue to some county in the state, where, in his judgment, the petitioner can be safely tried. Acts of 1911, p. 74; Kennedy v. State, 141 Ga. 314, 80 S. E. 1012; Graham v. State, 141 Ga. 812, 82 S. E. 282; Newman v. State, 143 Ga. 270, 84 S. E. 579; Bivins v. State, 145 Ga. 416, 89 S. E. 370; Marshall v. State, 20 Ga. App. 416, 93 S. E. 98.

[2] 2. Under the above ruling and the evidence submitted upon the hearing of the motion to change the venue in the instant case, the court erred in denying the motion.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 465)

PORTER v. FORSYTH. (No. 11941.)

(Court of Appeals of Georgia, Division No. 1. March 9, 1921.)

(Syllabus by Editorial Staff.)

1. Brokers ⇨82(1)—Description of property held not to render petition subject to general demurrer.

Where a contract giving one an exclusive agency for the sale of real estate was headed "Atlanta, Ga.," the description of the property giving the street and number, the size of the lot, the number of rooms and stories, and a description as to the finish of the house, etc., was not so vague and indefinite as to render the petition in an action for commissions subject to general demurrer, where it alleged that the broker had procured a purchaser ready, able, and willing to buy on the terms stated.

2. Brokers ⇨43(3)—Description of property in agency contract held sufficient to be applied to subject-matter by proper proof.

Where a contract giving one an exclusive agency for the sale of real estate and describing the property by street and number and giving the size of the lot, the number of rooms and stories, etc., was headed "Atlanta, Ga.," the property would be treated prima facie as in Atlanta, and the description could be applied to the subject-matter by proper proof.

3. Contracts ⇨10(1) — Contract of agency held not unilateral, where purchaser had been procured.

In an action on a contract giving plaintiff an exclusive agency to sell defendant's real estate signed only by defendant, a petition alleging that defendant procured a purchaser ready, able, and willing to buy, and who actually offered to buy, held not subject to demurrer on the ground that the contract alleged was unilateral.

4. Brokers ⇨82(1)—Petition held not demurrable, because not attaching contract with purchaser or alleging binding contract.

In a broker's action for commissions, a petition alleging that plaintiff found a purchaser ready, able, and willing to buy, and who ac-

tually offered to buy, on defendant's terms, held not subject to demurrer for failure to attach the contract between defendant and the purchaser, or show that there was a binding contract under which the purchaser was bound to accept the property.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by C. A. Forsyth against J. E. Porter. Judgment for plaintiff, and petition for certiorari overruled by the superior court, and defendant brings error. Affirmed.

The action was for a broker's commission on a sale of real estate. The petition alleged that defendant entered into a contract in writing constituting petitioner his sole agent for 15 days for the purpose of negotiating a sale of said property, that under the terms of the contract defendant was to be paid a specified commission, that on a day specified, and during the agency, petitioner found a purchaser ready, able, and willing to buy, and who actually offered to buy, on the terms stipulated by defendant, and that defendant had refused to consummate the sale. A copy of the contract between petitioner and defendant was attached, and described the property as stated in the opinion. It was signed only by defendant. No copy of the contract between defendant and the purchaser was attached. The grounds of demurrer, as stated in the petition for certiorari, were as follows:

That said petition does not set forth the cause of action; that the description of the real estate was insufficient to create a binding contract; that the contract is unilateral; that the written contract to buy should be attached to petition; that no binding contract is set up in said petition, showing that the purchaser is bound to accept the property; that said contract is incomplete, and cannot be connected up with any other written document for the reason that no other writing is referred to in said contract of listing; that the contract purports to be complete and covered by the writing and that parol evidence would not be permissible to add to, to take from, or to connect up said contract with any other writing by which a complete contract could be set forth by which the purchaser would be bound to accept the property as alleged in plaintiff's petition.

—Statement by editor.

Randolph & Parker and Lovick G. Fortson, all of Atlanta, for plaintiff in error.

Holbrook, Corbett & White, of Atlanta, for defendant in error.

LUKE, J. [1] Where a contract for the sale or exchange of land was headed "Atlanta, Ga., 3/1/1920," and described the property to be sold as "S. Boulevard St., No. 667, size of lot 50x200, No. of rooms, 6, stories 1, with description as to the finish of the

house, etc., the description was not so vague and indefinite as to render subject to general demurrer a petition for the recovery of a real estate broker's commission, wherein the broker alleged that he had procured a purchaser ready, able, and willing to buy on the terms stated, etc.

[2] Prima facie, the property mentioned in the contract would be treated as in Atlanta, Ga., in the absence of anything appearing to the contrary, and while the description was carelessly made, it could be applied to its subject-matter by proper proof. The above is in principle the ruling in *Bush v. Black*, 142 Ga. 157, 82 S. E. 530. See also *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387; *Tolbert v. Short*, 150 Ga. 413, 104 S. E. 245.

[3, 4] The petition was not subject to any ground of demurrer urged by the defendant. This case differs from the ruling in *Glover v. Newsome*, 132 Ga. 797, 65 S. E. 64. For no reason assigned was it error for the judge of the superior court to overrule the petition for certiorari.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(26 Ga. App. 402)

HINES, Director General, v. EDWARDS.
(No. 11896.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

Carriers ~~408~~(4)—**Liability for injury to sample scales in trunk shown by evidence.**

In action in justice court for damage to sample scales bolted in steel banded trunk, evidence held sufficient to authorize a recovery on theory of rough handling.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Action in justice court by A. L. Edwards against W. D. Hines, Director General. Judgment for plaintiff, certiorari denied by superior court, and defendant brings error. Affirmed.

Answer of justice to writ of certiorari:

Now comes T. C. McBryde, justice of the peace, in answer to the writ of certiorari in the above-stated case, and says that the facts set out in the certiorari are true, with the exceptions to paragraphs 3 and 4. A. L. Edwards, testified: That on the 9th day of November, 1919, I purchased a first-class ticket from Dalton, Ga., to Gainesville, Ga., over the Southern Railway, and delivered to the baggage master at Dalton, Ga., for shipment, three pair of automatic scales to be checked. I told the baggage master what the trunks contained,

and described the nature of the scales to him. In addition to this, each trunk had a printed sign on it, fully exposed to view, marked, "Glass, Handle with Care." The trunks in which the scales were contained were very strongly built, and the scales were securely bolted to the trunks. They were so well packed that with any ordinary handling it would have been impossible to have broken them. In these trunks the scales can be slid down an ordinary stairway without breaking them, and unless they were handled very roughly they would not break. Judging from the injury they received, it is my opinion that they were thrown out of cars and roughly and negligently handled. When the scales were checked to Gainesville, the agent required excess charges, and I paid the excess charges which he demanded. I was not asked by the agent to place a valuation on the scales, and for that reason I did not do so. These scales were packed in the trunks by myself, and I know that they were in good condition when delivered to the Southern Railway Company. When I got to Gainesville, Ga., and received the three trunks containing the scales from the agent at Gainesville, Ga., and opened the trunks in the presence of the baggage agent at Gainesville, I found that two pair of the scales were badly damaged. That I called the attention of the baggage agent to the damaged condition of the scales, and asked the agent what to do about it. The agent told me to have the scales repaired, and that the railroad company would pay me the cost of the repairs. That I had the scales repaired, and the actual cost was \$65, which amount was paid by me, the plaintiff, and that I filed a claim with the railway authorities for this amount and that payment was refused and suit brought.

Plaintiff introduced a pamphlet showing a picture of the scales, and illustrating how they were bolted to the trunks, how they were built, and what the damage consisted of; illustrating, also, how hard it was to injure the scales by ordinary handling. The trunks had steel bands on the corners as a protection. The plaintiff further testified that he carried the scales as samples, and that it was not customary to sell and deliver the scales he carried, but that he carried for samples only.

On cross-examination he admitted that he had at some times sold his sample scales, but that was not his custom; that the reason he had three pair of scales with him on this particular trip was that he intended to put another salesman on the road at Gainesville, if he could procure another man to work for him, and that he intended to deliver one pair of the scales to that man; that he always carried two pair of scales, which he used for demonstrating purposes.

—Statement by editor.

Jas. J. Copeland and Maddox, McCamy & Shumate, all of Dalton, for plaintiff in error.

F. K. McCutchen, of Dalton, for defendant in error.

LUKE, J. Upon the answer of the justice of the peace to the petition for certiorari, and upon the certiorari, it was not

error for the judge of the superior court to overrule the certiorari.
Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(26 Ga. App. 443)

ZAPF REALTY CO. v. BROWN.
(No. 11888.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by the Court.)

1. Money received ¶1—Action lies where another has received money which plaintiff is entitled to recover.

An action for money had and received lies in all cases where another has received money which the plaintiff, *ex sequo et bono*, is entitled to recover, and which the defendant is not entitled in good conscience to retain.

2. Pleading ¶248(13)—Vendor and purchaser ¶341(2)—Amendment to petition by vendee to recover earnest money held not to set out new cause of action, or fail to allege sufficient acts of fraud.

Where a buyer alleges that a realty company had in its possession money deposited with it to bind a client of that company to convey certain land to the buyer, upon condition that the title to the land could be made merchantable within a reasonable time, and that if the title could not be made merchantable within such time the money would be returned to the buyer, an amendment alleging that the company induced the buyer to turn over the money to it by fraudulently representing that the title was free from incumbrances, when, as a matter of fact, it had specified incumbrances on it, merely amplified the cause of action set out in the petition, and was not objectionable, either as setting out a new cause of action or as failing to allege sufficient acts of fraud.

3. Vendor and purchaser ¶35—Petition to recover earnest money held to state cause of action.

The petition set out a cause of action, and was not subject to general demurrer.

4. Vendor and purchaser ¶341(2)—Petition to recover earnest money not subject to demurrer in not showing implied contract to return money.

Nor was the petition subject to demurrer upon the ground that the facts alleged did not constitute an implied contract.

5. Vendor and purchaser ¶341(2)—Petition to recover earnest money not demurrable as not showing implied promise to pay.

The petition was not demurrable upon the ground that it showed that no implied promise to pay arose until January 1, 1920.

6. Pleading ¶192(3)—Paragraph alleging admission not subject to demurrer.

A paragraph of the petition which substantially alleges that the defendant admitted a material fact contrary to its interest is not subject to demurrer.

7. Vendor and purchaser ¶341(1)—Sale held not prematurely brought.

It was not error to strike the plea in abatement alleging that the suit was prematurely brought.

8. Vendor and purchaser ¶341(4)—Charge held full and fair.

The judge's charge was full and fair, and was not subject to any of the criticisms of it made in the motion for a new trial.

(Additional Syllabus by Editorial Staff.)

9. Vendor and purchaser ¶341(4)—Whether title was merchantable within reasonable time under contract held for jury.

In an action by an intending purchaser of land to recover a deposit which was to be repaid if title could not be made merchantable within a reasonable length of time, whether title made merchantable December 15th was made so within a reasonable time after September 3d, when plaintiff notified defendant of his objections to the title, held for the jury.

Broyles, C. J., dissenting.

Error from City Court of Sandersville;
E. W. Jordan, Judge.

Action by J. A. Brown against the Zapf Realty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The charge of the court was as follows:

Gentlemen of the jury, J. A. Brown has brought an action against the Zapf Realty Company; he sues for money, having a receipt. The plaintiff alleges in 1919, in August, he deposited with the Zapf Realty Company the sum of \$514, to be applied to the purchase price of a certain tract of land, provided the title to the land was merchantable, or provided the owner of the land could make good title, and that if the title was not merchantable or made merchantable within a reasonable time then the money was to be refunded by the Zapf Realty Company to him. The plaintiff in this case contends, under the terms of the contract, he had until the 5th day of September, 1919, to look into the title and ascertain the condition of the title; he alleges he found various incumbrances outstanding over the land; he alleges that the Zapf Realty Company and the owner of the land did not within a reasonable time remove these incumbrances, so as to make the title to the land merchantable; he demands that his money be refunded and the defendant declines to return the money, and he now brings his suit for \$514. The plaintiff further alleges that this contract was procured from him by fraud; that the defendant's agent represented to him at the time the contract was signed that there was no lien or incumbrance of any character over the land; he alleges if he had

known the land was incumbered he would not have entered into the contract, and after ascertaining it was incumbered he demanded his money and thereby to rescind the contract.

The Zapf Realty Company admits receiving the money, but contends that within a reasonable time, as provided by the contract, that the title to the land the plaintiff agreed to buy was made merchantable and put in good shape, and that by the time the plaintiff was required to make his next payment upon the land the title was then in good condition and in merchantable shape. The defendant alleges that the plaintiff really breached the contract.

Gentlemen of the jury, I charge you in this case that you are to ascertain from your knowledge of human nature and the circumstances of this case what was a reasonable time for the Zapf Realty Company to make the title to this land merchantable. Now, if you believe from the evidence in this case that within a reasonable time after September 5th the Zapf Realty Company, or the owner of this land, put the title in merchantable shape, that that was done within a reasonable time, I charge you in this case that the plaintiff could not recover; that the amount so paid by him, \$514, would go to the purchase price of the land; that he could not recover. I charge you, however, that if you believe from the evidence in this case that this title was not put into merchantable shape within a reasonable time after September 5th, and after an examination disclosed the incumbrances or liens over the land, if you find it was not put in merchantable shape within a reasonable time, then in this case the plaintiff would have the right to recover, and the obligation would be upon the defendant, the Zapf Realty Company, to refund the deposit of \$514 so received. If you believe these are the conditions and facts of the case, then the plaintiff in this case would have the right to recover and ought to recover. If you believe in this case the seller of this land, or the agent of the Zapf Realty Company, made representations that there were no incumbrances upon this land nor liens outstanding against it, and if you furthermore believe that the plaintiff, Brown, entered in on that representation in purchasing the land, and you believe the representations were untrue, then I charge you the plaintiff in the case would have the right to rescind his contract and recover for \$514, that is, if you believe the contract was entered into by fraudulent representations as to the conditions of the title. The defendant contends, of course, that the contract was not founded upon fraud; that no misrepresentations were made as to the nature and character of the title prior to the time the contract was signed.

Now, Gentlemen of the jury, as to the language of the contract, the material parts of it, it is as follows: "I have today deposited with the Zapf Realty Company \$514 as part of the main purchase money to bind this trade until January 1, 1920, having until September 5, 1919, as time being allowed for examination of title by my attorney. If said title is merchantable I agree to make settlement as above stated, but if said title is not merchantable, and cannot be made merchantable within a reasonable time, cash payment is to be refunded to

me and contract canceled." Time is the essence of this contract. I charge you it was the duty of the plaintiff under this contract to look into and examine this title by September 5, 1919; that was the time under the contract to look into it; and then it was his duty to disclose to the Zapf Realty Company any defects, obligations, or incumbrances to the title, and it was incumbent upon the Zapf Realty Company, or the owners of the land, to cause these incumbrances to be removed within a reasonable time after September 5, 1919.

As I have said to you, you are the judges of what is a reasonable time under the circumstances of this case. You may consider the nature or character of the trade; you may consider all the evidence in this case and all the circumstances and all the conditions in order to ascertain what was a reasonable time. If the defendant did not within a reasonable time remove all incumbrances, then the plaintiff ought to recover in this case. On the other hand, if you believe within a reasonable time, of which you are to be the judges, these incumbrances were removed and this title was made merchantable, then you should find for the defendant.

Under the rules of law I have given you in charge, if you find for the plaintiff, the form of your verdict should be, "We, the jury, find for the plaintiff \$514, with interest at 7 per cent.," stating from whatever time he should recover, and the principal and interest should be stated separately.

If you find for the defendant, the Zapf Realty Company, the form of your verdict should be, "We, the jury, find for the defendant."

—Statement by editor.

Evans & Evans and W. M. Goodwin, all of Sandersville, for plaintiff in error.

Roy V. Harris, of Louisville, and J. C. Newsome, of Sandersville, for defendant in error.

LUKE, J. The plaintiff's petition substantially alleged that the defendant was in possession of \$514 belonging to plaintiff, which the defendant was in equity and good conscience bound to repay him on an implied promise so to do; that on March 1, 1919, the plaintiff, through the defendant, entered into a contract with one Cobb, whereby he agreed to purchase from Cobb described lands; that the plaintiff then and there deposited with the defendant \$514 to bind a sale until January 1, 1920; that the said contract provided that the plaintiff should have a certain time to examine the title to the land, and that if the title was not merchantable, and could not be so made within a reasonable time, the said cash payment was to be returned to the plaintiff and the trade rescinded; that at the time of filing the petition the title was not merchantable, because Cobb had no title to the land, and it was incumbered with a security deed, securing a debt of \$4,000; that a reasonable time had elapsed for the title to be made merchantable, and that it had

not been so made; and that the defendant refused to repay \$514 in its possession.

A contract dated August 1, 1919, signed by the plaintiff and accepted in writing by Cobb, a copy of which was attached to the petition, provided that the plaintiff should pay a fixed sum for the land, \$514 of which was to be paid in cash, an additional amount on January 1, 1920, and the balance in equal annual installments on January 1 of each year, with the privilege of paying the full balance of the purchase price on the date fixed for the payment of any installment. The contract further stated that the plaintiff had deposited with the defendant, "for good will, \$514, as a part of the purchase money to bind this trade until January 1, 1920, until September 5, 1919, time being allowed for the examination of the title by my attorney," "and if said title is merchantable, I agree to make settlement as above stated, but if said title is not merchantable, and cannot be made merchantable within a reasonable length of time, the said cash payment is to be returned to me and the trade canceled. Time is the essence of this contract."

The plaintiff was allowed to amend his petition by alleging that the contract was void and not binding, because his signature to it was procured by fraud, in that the defendant represented to him that there were no incumbrances upon the land, whereas at the time of the contract it was incumbered by a certain security deed given by the then holders of the title to the Life Insurance Company of Virginia, and that, upon discovery of this fact, he offered to rescind his contract and demanded the return of his money. The defendant denied the material allegations of the petition, and also pleaded that it had until January 1, 1920, or a reasonable time thereafter, to make the title merchantable, and that it was ready and able to do so.

[1-3] An action for money had and received lies in all cases where another has received money which the plaintiff, *ex æquo et bono*, is entitled to recover and which the defendant is not entitled in good conscience to retain. *Whitehead v. Peck*, 1 Ga. 140 (3); *Knight v. Roberts*, 17 Ga. App. 527, 87 S. E. 809. Under this broad rule, the petition clearly sets out a cause of action. The amendment setting up that the defendant represented the land to be free from incumbrances alleged a fact tending to show that the plaintiff was entitled to recover money which the defendant should not in good conscience keep. This amendment merely amplified the cause of action as laid, and it was not error to allow it. The contract attached to the petition is not aptly expressed, but, reasonably construed, it in effect states that the money sued for was deposited with the defendant to bind the trade until January 1, 1920; that the plaintiff had from August

1, 1919, the date of the contract, until September 5, 1919, to investigate the title to ascertain if it was merchantable; and that if it could not be so made within a reasonable time the cash payment was to be returned to the plaintiff, time being of the essence of the contract.

While it appears from the evidence that the plaintiff, prior to bringing his suit, did state that he demanded his money back and withdrew from the trade, and while the evidence further shows that plaintiff stated during the month of September that he was ready to make a settlement in full, he further said that he would not do so because "of outstanding obligations." The plaintiff had from August 1, 1919, until September 5, 1919, to examine the title. On September 3, 1919, he notified the defendant of his objections to the title, and on October 7, 1919, he brought his action. The security deed outstanding and dated March 1, 1917, was not canceled of record until December 8, 1919. On December 9, 1919, certain parties conveyed the land by warranty deed to one Parnell, and on December 15 Parnell conveyed the land to Cobb. On or about December 15, 1919, defendant presented to the plaintiff a deed from Cobb with draft attached.

[9] It therefore clearly appears that Cobb was not in a situation to make a merchantable title to the plaintiff prior to December 15, 1919. The jury, by their verdict, sustained the plaintiff's contention that the title was not merchantable, and not so made within a reasonable time, and, under the evidence, this court cannot say that the jury's view of the matter was not correct.

Judgment affirmed.

BLOODWORTH, J., concurs.
BROYLES, C. J., dissents.

(26 Ga. App. 483)

SHIFLETT v. STATE. (No. 12016.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law §1160—Verdict, supported by evidence and approved by trial judge, not set aside, though evidence weak.

Where one witness for the state testified positively to the commission of the offense, and the verdict of guilty had the approval of the trial judge, it cannot be set aside for alleged insufficiency of the evidence, though the evidence is weak.

2. Criminal law §670—Exclusion of evidence not error, when court not apprised of expected answer.

The exclusion of a question asked a witness on direct examination is not reversible

error, where the court was not apprised of what the answer of the witness was expected to be.

3. Witnesses \S 379(2)—Exclusion of evidence of admission by witness for the state held not error.

On a trial for malicious mischief, the exclusion of evidence that a witness for the state told defendant's witness that he did not see defendant commit the act, and only knew what another told him, was not error.

4. Criminal law \S 814(17)—Failure to charge on circumstantial evidence held not error.

Where one witness for the state testified positively to the commission of the offense, the failure to charge the law of circumstantial evidence, as embodied in Pen. Code 1910, \S 1010, held not error.

5. Criminal law \S 938(1)—New trial not granted for cumulative and impeaching evidence, not likely to produce different result.

Where newly discovered evidence was cumulative and impeaching, and would not probably produce a different verdict on another trial, it was not error to deny a new trial.

Error from City Court of Polk County; John L. Tison, Judge.

Emory Shiffett was convicted of malicious mischief, and he brings error. Affirmed.

The third ground of the amended motion for a new trial complained of the exclusion of testimony that Bill Flippins, a witness for the state, told the witness he did not see defendant commit the act charged, but that Mrs. Dunn did, and that he knew nothing except what she told him.

The fourth ground complained of the failure to charge the law of circumstantial evidence as contained in Pen. Code 1910, \S 1010.

Mundy & Watkins, of Cedartown, for plaintiff in error.

J. A. Wright, Sol., and J. K. Davis, both of Cedartown, for the State.

LUKE, J. [1] 1. The defendant in this case was convicted of a misdemeanor. The evidence was conflicting. If the jury had believed the evidence for the defendant, a verdict in his favor would have been demanded. The evidence for the state was weak, but the jury believed the one witness for the state, who testified positively to the commission of the offense. Therefore, the verdict of guilty having the approval of the trial judge, under repeated rulings of the Supreme Court and of this court, this court cannot set it aside because of alleged insufficiency of evidence.

[2] 2. The assignment of error in ground 2 of the amendment to the motion for a new trial, upon the court's refusal to admit evidence, falls within the rule that requires the court to be apprised of what the answer of the witness is expected to be, when the witness is upon direct examination.

[3, 4] 3. There is no merit in grounds 3 and 4 of the amendment to the motion for a new trial.

[5] 4. The newly discovered evidence was both cumulative and impeaching, and would not probably produce a different verdict upon another trial. For no reason assigned was it error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 481)

GAMMON v. STATE. (No. 11988.)

(Court of Appeals of Georgia, Division No. 1. March 9, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 822(1)—Instructions to be considered in connection with entire charge.

When instructions complained of present no ground for reversal when considered in connection with the entire charge, the judgment will not be reversed.

2. Witnesses \S 343—Impeachment of prosecuting witness in bastardy case limited to period of gestation.

On a trial for bastardy, the court did not err in limiting evidence of immoral and improper conduct between the prosecuting witness and men other than defendant, offered to impeach her testimony, to the period of gestation.

3. Criminal law \S 1064(4)—Ground of motion for new trial not considered, when not showing pertinent question was asked and answer ruled out.

Where a ground of a motion for a new trial merely set out evidence in narrative form, followed by the statement that it was ruled out, without showing that any pertinent question was asked and that the court ruled out the answer, it could not be considered.

4. Criminal law \S 1064(4)—Grounds of motion for new trial complaining of exclusion of evidence without showing materiality not considered.

Grounds of motion for new trial complaining of the exclusion of an affidavit and a copy of a letter, without showing their materiality, or how they affected the case, without examining other parts of the record, were not in proper form for consideration.

5. Criminal law \S 1147—Amount of fine within limits fixed by law within trial court's discretion.

Imposition of penalties within the limits fixed by law rests upon the trial judge's sound discretion, which cannot be controlled by the Court of Appeals; and hence there was no merit in a ground of a motion for new trial complaining of a fine for \$900 and costs for bastardy, on the ground that it exceeded the amount of the bond designated by statute.

Error from City Court of Polk County; John L. Tison, Judge.

Richard Gammon, Jr., was convicted of an offense, and he brings error. Affirmed.

Defendants sought to impeach the prosecuting witness by proving improper and immoral conduct on her part with the witness and others. The court ruled that such evidence should be limited to the period of gestation, and that evidence of acts prior to that period would be excluded. This is the ruling complained of in the second ground of the amended motion.

The third ground sets out the evidence, the exclusion of which is complained of, in narrative form, without questions, answers, objections, or rulings, followed by the statement "This evidence the court ruled out."

The sixth ground complained that the court exceeded his authority in fining defendant a sum in excess of the amount of the bond designated by statute, the fine being \$900 and costs.—Statement by editor.

Mundy & Watkins and Bunn & Trawick, all of Cedartown, for plaintiff in error.

LUKE, J. [1] 1. The instructions complained of in the first ground of the amendment to the motion for a new trial were authorized by the evidence, and, when considered in connection with the entire charge of the court, present no reason for a reversal.

[2] 2. The court properly excluded the testimony complained of in the second ground of the amendment to the motion for a new trial.

[3] 3. "In order for the exclusion of oral testimony to be considered as a ground for a new trial, *it must appear that a pertinent question was asked* [italics ours], and that the court ruled out the answer; and that a statement was made to the court at the time showing what the answer would be; and that such testimony was material, and would have benefited the complaining party." *Griffin v. Henderson*, 117 Ga. 382(2), 43 S.

E. 712. Under the above ruling, the third ground of the amendment to the motion for a new trial cannot be considered.

[4] 4. Grounds 4 and 5 of the amendment to the motion for a new trial, as to the exclusion of evidence, are incomplete and not in proper form for consideration by this court. These grounds, except a copy of an affidavit and a copy of a letter attached thereto as exhibits, are as follows:

"Because the court erred in ruling out the affidavit of Charlie Galloway, sworn to before J. C. Knight, J. P., on the 13th day of April, 1920. This affidavit was offered, having been identified by the witness and ruled out by the court. A copy of this affidavit is hereto attached and marked Exhibit A and made a part of this ground of the motion for a new trial."

"Because the court erred in ruling out a letter from George Lindsey, under date of April 11, 1920, and identified by the witness and offered in connection with his testimony. That portion of the letter hereto attached, marked Exhibit B, and made a part of this ground of the motion for new trial."

The materiality of the affidavit and letter, and how they affected the case, could not be ascertained without examination of other parts of the record. See *Corona v. De Laval Separator Co.*, 24 Ga. App. 683(1), 102 S. E. 44.

[5] 5. "The imposition of penalties within the limits fixed by law rests within the sound discretion of the trial judge, and this court has no jurisdiction to control such discretion." *Griggs v. State*, 17 Ga. App. 301(1), 86 S. E. 726, and cases cited. Under this ruling the sixth ground of the amendment to the motion for a new trial is without merit.

6. There was evidence to authorize the verdict, which has the approval of the trial judge, and for no reason assigned was it error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(181 N. C. 237)

WOOD v. WOOD. (No. 386.)

(Supreme Court of North Carolina. April 20, 1921.)

Divorce ~~§ 66~~ — Action properly brought in county in which wife separated from husband resided.

Under Revisal 1905, § 1559, as amended by Pub. Laws 1915, c. 229, providing that divorce action shall be brought in the county in which either the plaintiff or the defendant resides, an action by a wife separated from husband was properly commenced in the county in which the wife resided, instead of that in which the husband resided; the common-law rule that the wife's residence was that of the husband having been changed by such statutes.

Appeal from Superior Court, Davidson County; Ray, Judge.

Action by F. N. Wood against K. K. Wood. From order denying motion to remove the trial to the county of defendant's residence, defendant appeals. Affirmed.

This is an action for divorce a mensa et thoro because of cruel treatment, which rendered feme plaintiff's condition intolerable and her life burdensome. It is not necessary to set forth in detail the specific allegations of cruelty. The case is here upon a motion to remove the same for trial to the county of Davie, where plaintiff's husband resides and has his domicile.

J. R. McCrary, of Lexington, and A. T. Grant, Jr., and E. L. Gaither, both of Mocksville, for appellant.

Walser & Walser, of Lexington, for appellee.

WALKER, J. The defendant contends that the domicile of the wife is that of her husband, and therefore the action should have been brought in Davie county, and relied mainly upon *Smith v. Morehead*, 59 N. C. 360, where the husband resided in one county of this state, and the action was brought by the wife in another county. The court dismissed the bill for want of jurisdiction because, according to the common law, the residence of the wife was that of her husband, and therefore the venue had been improperly laid.

Conceding that to be the rule of the common law, it does not apply to this case, as the law has been changed by statute. In Revisal of 1905, § 1559, it is provided, under the title of "Venue," that, "In all proceedings for divorce, the summons shall be returnable to the court of the county in which the applicant resides," and by Public Laws of 1915, c. 229, that section was amended by striking out the final words "the applicant resides" and inserting in place thereof, the words "either the plaintiff or defendant resides," so that it now reads:

"In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides."

Either one of these sections, the original one or that which was changed by amendment, is sufficient, in our judgment, to show clearly the intention of the Legislature to change the rule of the common law, as laid down in *Smith v. Morehead*, supra. If this is not so, why change the statute at all, or why not simply have provided that the action should be brought in the county where the husband resided or had his domicile? The section before amendment required the action to be brought in the county "where the applicant resided." This obviously implied that each of the possible applicants might have a different residence from the other, but this would not be so if the ancient common-law rule still prevailed, because there was but one domicile, which was that of the husband. And the amended section is, if anything, much more significant of an intention to change the law and accord to the wife, if plaintiff in the action, the right to sue in the county of her residence, as distinguished from that of her husband, for the section, as it now reads, provides that the venue in an action for divorce may be laid in the county where the plaintiff or the defendant resides, thereby plainly recognizing that the parties to the suit may have different residences, for the purpose of determining the venue or place of trial. We cannot admit, for a moment, that the Legislature would do so vain and useless a thing as to enact and then change the statute without intending to alter the former rule of law as stated in *Smith v. Morehead*, supra.

The defendant contends, though, that there are several cases decided since Act 1871-2, c. 193 (Revisal, § 1559), was enacted which have cited *Smith v. Morehead*, supra, with approval, and the inference is drawn therefrom that it has been affirmed on this point, as will appear in the report of those cases, which are the following: *Hicks v. Skinner*, 71 N. C. 539, 17 Am. Rep. 16; *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; *Moore v. Moore*, 130 N. C. 335, 41 S. E. 943; *Cook v. Cook*, 159 N. C. 46, 74 S. E. 639, 40 L. R. A., (N. S.) 83, Ann. Cas. 1914A, 1137. We have carefully examined all of those decisions, and none of them applies to this case. *Hicks v. Skinner* was an action to determine the equities of the wife in a trust fund held by Mr. B. F. Moore; the plaintiffs, who were her husband's creditors, alleging that all her rights had passed to her husband because of the unity of husband and wife. *State v. Ross*, supra, was an indictment for fornication and adultery, and involved the validity in this state of a marriage between a white person and a negro, contracted and solemniz-

ad in another where such marriages were lawful and valid. In *Moore v. Moore*, supra, the plaintiff, who was the wife, had gone to another state for a temporary purpose, and at her husband's request, with the intention of returning to this state, and afterwards she did return to this state, and after being disowned by her husband, she resided here separately from him for more than the required two years. The court sustained her action against a motion to dismiss it. That case would, in principle and legal effect, seem to be against the defendant. The question in *Cook v. Cook*, supra, was not one of venue, but related to the pendency of another action. It is, however, to be noted that the defendant in that case, who was the husband, did not ask for a change of venue from Wake county, where his wife had sued him for divorce a mensa, to Alamance county, where he had sued his wife for divorce a vinculo, but virtually admitted her right to sue in Wake county, although her husband resided in Alamance county. The only question presented and decided in that case was as to the plea of the pendency in Alamance county of his suit for divorce a vinculo. So while the court did not discuss or decide the question herein presented, it was tacitly conceded that the suit had been brought in the proper county. In none of those cases was any reference made, even remotely, to the change in the law as to venue, which was wrought by Revisal, § 1559, because, we suppose, there was no need to do so, as the question we have here was not raised in any of them. The nearest to it is what was said in the *Moore Case*, and that impliedly holds that the wife can have a separate domicile for the purpose of venue, for the plaintiff there did live in this state, and away from her husband for two years or more before her suit was commenced.

Some of the courts in other jurisdictions hold that where the wife is compelled by her husband's conduct to separate herself from him and dwell in a home of her own, she may bring her action for divorce in the county of her own actual domicile, but we are not required to decide as to the correctness of this view, and express no opinion upon it.

The result is that there was no error in refusing to remove the case.

Affirmed.

(181 N. C. 230)

BRAENDER TIRE & RUBBER CO. v. R. K. MOTOR CO. (No. 389.)

(Supreme Court of North Carolina. April 20, 1921.)

1. Trial \Leftarrow 356(1)—Judgment cannot be rendered without jury's answer on issues submitting counterclaim supported by evidence.

In an action for a breach of contract, where defendant pleaded a counterclaim and introduc-

ed evidence to support it, a judgment cannot be rendered for plaintiff for the amount found by the jury to be due on his cause of action, where the jury failed to answer the issues relating to defendant's counterclaim.

2. Trial \Leftarrow 365(1)—Finding for plaintiff on defendant's liability not answering issues on counterclaim is not finding against counterclaim.

The fact that the jury answered the issues submitting plaintiff's cause of action favorably to plaintiff, and made no answer to the issues submitting defendant's counterclaim, cannot be construed as a finding against defendant on the counterclaim, as well as on plaintiff's cause of action.

Appeal from Superior Court, Guilford County; Ray, Judge.

Action by the Braender Tire & Rubber Company against the R. K. Motor Company. Judgment for plaintiff, and defendant appeals. New trial.

Civil action to recover the sum of \$414.50, balance alleged to be due on contract for certain automobile tires sold and delivered the defendant under a written jobber's agreement. Defendant admitted execution of the contract and the nonpayment of a balance of \$226.38 for tires duly received, but set up in defense and by way of counterclaim that the plaintiff had breached the contract and had failed and refused to make shipments as specified in the agreement, by reason of which defendant alleged and offered evidence tending to show that it had been damaged in the sum of \$1,800.

Upon issues joined, the following verdict was rendered by the jury:

"(1) Is defendant indebted to plaintiff; and, if so, in what amount? Answer: Yes; \$414.50.

"(2) Did plaintiff breach its contract with defendant? Answer: ———.

"(3) What damages, if any, is defendant entitled to recover of plaintiff? Answer: ———."

Defendant, in apt time, lodged a motion to set aside the verdict, because the second and third issues, relating to its counterclaim, had not been answered. This motion was overruled, and his honor rendered judgment in favor of the plaintiff for \$414.50.

Brooks, Hines & Kelly, of Greensboro, for appellant.

Justice & Broadhurst and O. O. Cox, all of Greensboro, for appellee.

STACY, J. [1,2] There was ample evidence tending to support the defendant's counterclaim, and we think the issues raised thereby must be answered before any final judgment can be entered in the cause. We are not at liberty to say that the jury intended to answer the issues against the defendant, because they did not answer them at all; nor do we think the answer to the first

issue a necessary denial, by implication, of defendant's counterclaim. It is true the jury evidently accepted plaintiff's contention as to the correct balance due for the tires sold and delivered to the defendant; but upon the question as to whether there was any breach of the contract, as alleged, and a refusal to ship other tires, which resulted in loss to the defendant, the verdict is silent.

In the case of *McKenzie v. McKenzie*, 153 N. C. 242, 69 S. E. 134, the following expression was used in speaking of a similar point raised on that appeal:

"The material issues of fact raised by the pleadings should be submitted to the jury, and of course answered by them. *Davidson v. Gifford*, 100 N. C. 18, and the issues with the responses thereto must be sufficient to support the judgment and dispose of the matters in controversy." *Falkner v. Pilcher*, 137 N. C. 449, 49 S. E. 945.

As suggested in *Wilson v. Railroad*, 165 N. C. 499, 81 S. E. 634, we think his honor should have sent the jury back, with directions to answer the remaining issues before receiving the verdict.

Had there been no evidence to support the counterclaim, it might have been disregarded, but in the present state of the record the defendant's motion to set aside the partial verdict, as rendered, should have been allowed.

New trial.

(181 N. C. 501)

BOONE v. NEWSOM et ux. (No. 396.)

(Supreme Court of North Carolina. April 20, 1921.)

Appeal and error ¶1002.—In trespass involving location of a line, held, that the jury's finding on a disputed fact as to whether a deed covered land in controversy must stand.

In an action for trespass involving the location of a boundary line, wherein plaintiff alleged ownership of a tract, including the locus in quo, and it was not denied that the parties were abutting owners, and defendants contended plaintiff's deed did not cover the land in controversy and that their own possession was rightful and lawful, the jury's finding for defendants on this disputed fact must stand.

Appeal from Superior Court, Guilford County; Ray, Judge.

Action by P. V. Boone against J. A. Newsom and wife. Verdict and judgment for defendants, and plaintiff appeals. No error.

The action is for trespass involving the true location of the dividing line between the premises of plaintiff and defendants, who were adjoining landowners. The locus in quo is a strip of land about 28 feet wide, to which both parties claimed title and possession.

H. W. Cobb, Jr., and Fentress & Jerome, all of Greensboro, for appellant.

S. B. Adams and R. C. Strudwick, both of Greensboro, for appellees.

PER CURIAM. Plaintiff's exceptions and assignments of error relate only to the charge of the court upon general propositions of law and, after a careful investigation of the record, we find no sufficient reason for disturbing the verdict and judgment.

Plaintiff alleged that he was the owner and in possession of a certain tract of land, including the locus in quo. It was not denied that plaintiff and defendants were abutting property owners, but it was the contention of defendants that plaintiff's deed did not cover the land in controversy, and that their own possession of said premises was rightful and lawful. Upon this disputed question of fact, the jury's verdict was adverse to the plaintiff.

The exceptions must be overruled.

No error.

(181 N. C. 95)

PARKER v. SEABOARD AIR LINE RY. et al.
(No. 99.)

(Supreme Court of North Carolina. March 16, 1921.)

1. **Appeal and error** ¶1004(3), 1005(4)—Refusal to set aside verdict because against weight of evidence and excessive not reviewable on appeal.

Assignments that court erred in refusing to set aside the verdict because it was against the weight of the evidence, and because the damages were excessive, are matters that are not reviewable on appeal.

2. **Railroads** ¶5½, New, vol. 6A Key-No. Series—Director General and railroad proper parties in personal injury action.

In an action for personal injuries, both the Director General of the railroad and the corporation itself are proper parties, under Act Cong. Feb. 28, 1920, §§ 206 and 210.

3. **Railroads** ¶312(11)—Negligence to back train without light or signal.

The running of a freight train backward, in the dark, without a light, signal, or other warning of its approach over a crossing, is negligence.

4. **Railroads** ¶350(8)—Negligence in backing cars without light held for jury.

Where sun set at 5:36 p. m., whether it was negligence not to have a light on the advancing end of a backing freight train going over a crossing a few minutes after 6 o'clock, when it was cloudy and drizzling rain, held for the jury.

5. **Railroads** ¶312(16), 347(9)—Ordinance requiring lights admissible.

In an action for injuries by a train moving backward, in the dark, without light or signal, at a crossing, there is no error in admitting proof of an ordinance of the city requiring a light at each end of a train at night, as such ordinance does not change the law as to the railroad's duty.

6. Railroads **↔**307(4) — Negligence to back over crossing without flagman.

It is negligence to back a freight train over a much-frequented crossing in the daytime without a flagman.

7. Railroads **↔**330(3)—Automobilist may assume usual alarm will be given.

An automobilist going over a much-frequented crossing, where railroad maintained a watchman, has the right to expect that the railroad will not omit to give the usual alarm before backing a freight train over the crossing.

8. Railroads **↔**346(5) — Burden of proving contributory negligence upon railroad.

In an action for injuries received in a collision at crossing, the burden of proof is upon the defendant on the issue of contributory negligence.

9. Negligence **↔**93(1) — Negligence of automobile driver not imputed to passenger.

Negligence of driver of an automobile struck at railroad crossing cannot be imputed to a passenger having no control over the movements of the automobile.

10. Railroads **↔**334 — Automobile passenger not negligent in jumping at direction of watchman at crossing.

A female passenger in automobile is not guilty of contributory negligence in jumping from the automobile into the path of a backing freight train in the dark, where she acts upon the spur of the moment, in obedience to the directions of the watchman at the crossing.

11. Railroads **↔**350(5)—Negligence of watchman giving warning held for jury.

In an action for injuries received in a collision with a backing freight train, whether the watchman at the crossing gave timely warning held for the jury.

12. Damages **↔**178—Proof that injuries were embarrassing and humiliating proper.

In an action by a woman for personal injuries, consisting of the loss of both feet, proof that the injuries were embarrassing and humiliating was admissible.

13. Railroads **↔**347(8)—Evidence of incompetency of watchman admissible.

In an action for injuries received in a collision at a much-frequented crossing, evidence as to the physical and mental condition of the watchman at the crossing is competent to show negligence in having a watchman incompetent physically in such place.

14. Trial **↔**260(1)—Refusal to give special instruction substantially given not error.

Exceptions to refusal to give a special instruction cannot be sustained, where it was substantially given in the charge.

15. Railroads **↔**327(12) — Care required of guest in automobile.

All that can be required of a guest in an automobile who has no control over it is to look and listen and warn the driver of approaching danger at a crossing.

16. Negligence **↔**93(1)—Automobile driver's failure to stop at crossing not imputed to guest.

Failure of driver of automobile to stop, after warning given by a watchman at a railroad crossing of the approach of a train in time to stop the automobile, cannot be imputed to a guest in the automobile who had no control over it.

Walker and Stacy, JJ., dissenting.

Appeal from Superior Court, Halifax County; Lyon, Judge.

Action by Jennie S. Parker against the Seaboard Air Line Railway and another. Judgment for plaintiff, and defendants appeal. No error.

This action is brought to recover \$100,000 damages for personal injuries sustained in a crossing accident at Weldon, N. C., February 10, 1920. Action was originally brought against Seaboard Air Line Railway Company and Walker D. Hines, Director General of Railroads, but at the trial, by consent of counsel, John Barton Payne, Director General of Railroads, as agent, designated by the President under the Transportation Act, was substituted as defendant in lieu of Walker D. Hines.

Plaintiff alleges negligence, in that the defendant's crossing watchman caused the driver of the automobile in which plaintiff was riding as a passenger to be stopped on the railroad track immediately in front of a train moving backward, in the dark, without a light, and without giving any signal, at a greatly frequented crossing in the town of Weldon, and in that the defendant failed to keep a proper lookout at the crossing and failed to have a light at the rear of the train, as required by ordinance of the town of Weldon. Plaintiff suffered the loss of both legs, one above and one below the knee, as the result of the accident.

Defendants based their defense upon three theories of the case: First, that there was no negligence on the part of the defendants; second, that the plaintiff was guilty of contributory negligence; and, third, that the negligence of plaintiff's sister, who was driving the car, was the proximate cause of plaintiff's injury.

The jury returned a verdict for \$45,000, and defendants appealed.

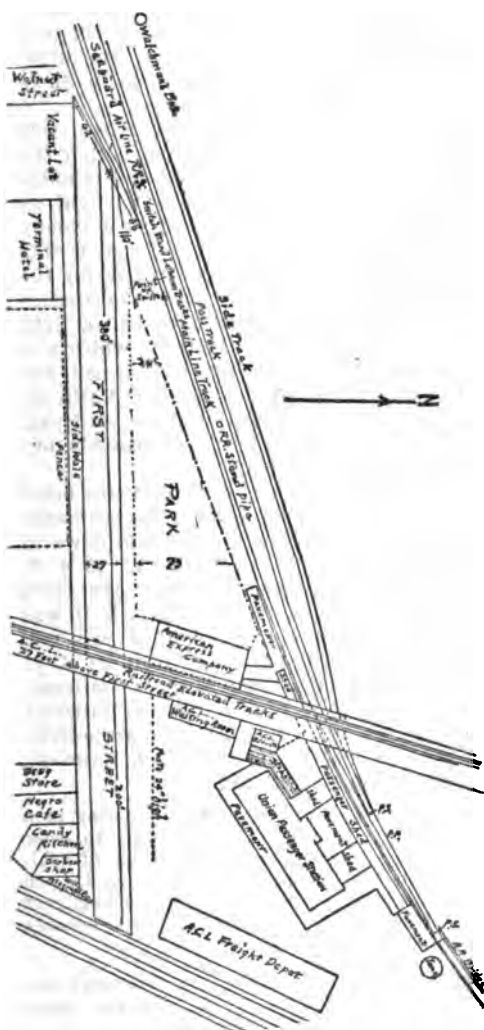
Geo. C. Green, of Weldon, R. C. Dunn, of Enfield, and Murray Allen, of Raleigh, for appellants.

Travis & Travis, of Savannah, Ga., Ashby Dunn, of Scotland Neck, and Daniel & Daniel, for appellee.

CLARK, C. J. The plaintiff was riding as a passenger in an automobile, and on February 10, 1920, at a greatly frequented crossing, a little after 6 p. m., the automobile

(106 S.E.)

was struck by the rear car of a backing train. It was a drizzly, rainy evening and in the automobile besides the driver, Mrs. Scott, there were the plaintiff, seated on the front seat to the right of the driver, four young ladies, and Mrs. Scott's son, when it reached the crossing in front of the Terminal Hotel, in Weldon. At that point, where the defendant's railroad crosses the street there are four tracks which converge until the street which is the First street in the town (and on which the party was traveling) intersects Walnut street. Beyond the crossing the railroad and First street, extended, are almost parallel with each other, going west, the direction in which the automobile was moving. Before the intersection of said First street and the railroad the angle is very acute, and the railroad was to the right of the street, getting nearer and nearer until the crossing is reached.



The rear of the car had the curtains in place, but on the front seat, where the plain-

tiff sat, there were no curtains; she being on the right and the driver, Mrs. Scott, to the left. The evidence is that the car was being driven along the street slowly and came almost to a standstill, and the evidence is that both Mrs. Scott and Mrs. Parker looked across the tracks and up and down the tracks, and both testified that they were clear. As they drove along First street, going west towards the crossing, which is just in front of the hotel, the plaintiff testified she saw some freight cars standing still at the right some 400 feet, near the Union Station. Just prior to the approach of the automobile to the crossing, a freight train of 19 cars had come from the direction of Roanoke Rapids to Weldon, and had pulled up across this crossing and then had gone on in the direction of the Union Station and had passed the switch between the crossing and the Union Station preparatory to backing into another track, and these cars were standing still, according to the plaintiff's testimony, near the Union Station. As the automobile slowly approached the crossing these cars commenced backing towards the crossing slowly, without a light or any one upon the advancing train to give warning.

The evidence is that the conductor had gone into the yard office to report the train and sent out one of his brakemen, who reached the train too late. The engineer was at the other end of the 19 cars down towards the river beyond Union Station, and knew nothing of the collision until he had put his train away. One of the brakemen, who was on the other side of the train at the switch, could not see the automobile, and the other brakeman was about halfway the train and knew nothing about what was happening. According to the evidence, this was the situation as the automobile approached the crossing, which, it is testified, was clear. The defendant had provided a flagman or crossing master at that point. He had formerly worked in the express office, but on account of his age and infirmities the company had retired him, and the defendant had then employed and stationed him at this point. The evidence was that he was old and infirm, and that at this crossing more vehicles passed in a day than at any other crossing in the county.

The evidence is that just as the automobile started across the track this agent appeared and cried, "Stop! stop! stop! jump! jump! jump!" Mrs. Parker, who was on the right and nearest the car on the backing train, started to open the door and attempted to get out. One foot was on the ground and one on the running board, when the forward car, moving slowly and noiselessly, struck her on the shoulder, knocked her down, ran over and crushed one of her legs just above the knee; and then the train, for some unexplained reason, moving back, cut off the

other leg between the ankle and the knee; her shoulder was also broken. The automobile was struck just in rear of the front wheel and pushed around. The front door was battered and the front fender bent. One of the young ladies was thrown over the head of another who was trying to leave the car.

The plaintiff was 44 years of age, and her normal weight before injury was 223 pounds. There was testimony as to her injuries and sufferings by physicians and others.

There is evidence that the sun set February 10, 1920, at 5:36 p. m. This was not a scheduled train, and the crossing master who gave the order to jump was not examined as a witness.

[1] Both defendants assign as errors that the court refused to set the verdict aside because it was against the weight of the evidence and because the damages were excessive, but these are matters that are not reviewable on appeal. *Edwards v. Phifer*, 120 N. C. 405, 27 S. E. 79, and citations in *Anno. Ed.*; *Trust Co. v. Ellen*, 163 N. C. 47, 79 S. E. 263; *Boney v. Railroad*, 145 N. C. 255, 58 S. E. 1082, in *Anno. Ed.*; *Oook v. Hospital*, 168 N. C. 256, 84 S. E. 352, L. R. A. 1915D, 611, *Ann. Cas.* 1917C, 158.

The defendant railroad company and the Director General, John Barton Payne, filed separate answers, and the railroad company seeks to avoid liability on the ground that it was being operated by the government.

The act of Congress to provide for the termination of the federal control of railroads, approved February 28, 1920 (section 206a [41 Stat. 461]), provides that actions at law "of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an agent designated by the President," and "such actions * * * may * * * be brought in any court which but for federal control would have jurisdiction of the cause of action had it arisen against such carrier." Another subsection provides that final judgment shall be promptly paid out of the revolving fund created by section 210 of said act.

[2] This exception need not be again discussed, as it has been fully considered, and we have repeatedly decided that both the Director General and the corporation itself are proper parties in such actions as this. *Clements v. Railroad and Hines*, Director General, 179 N. C. 225, 102 S. E. 399; *Hill v. Director General*, 178 N. C. 609, 101 S. E. 376, citing numerous cases. The above have been reviewed and reaffirmed since in *Gilliam v. Railroad*, 179 N. C. 508, 103 S. E. 10; *Vann v. Railroad*, 180 N. C. 659, 104 S. E. 170; *McGovern v. Railroad*, 180 N. C. 219, 104 S. E. 534.

[3] The plaintiff rests her case largely upon the ground that it was dark, and the or-

dinances of Weldon required that there should be a "light at the rear end of the train and front end of the train at night," and, even if it was not night or not dark, the defendant failed to give timely warning, and there was evidence that there was no light at the end of train and no notice given of the approach of the train, except the warning to jump given by the defendant's crossing master, which contributed, it would seem, if it did not cause, the injury to the plaintiff. In any event, the running of the train backward without a light, signal, or other warning of its approach was negligence. *Shepherd v. Railroad*, 163 N. C. 518, 79 S. E. 968, quoting numerous cases, among them *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953, in which the plaintiff's intestate was killed by a backing train in the same town of Weldon and at a short distance from the scene of this occurrence; the train backing into the depot without displaying a light from the front end of the leading car and without a flagman to give warning. The precedents are too numerous, as quoted in *Shepherd's Case*, to be again reviewed.

[4] The evidence in the present case was that the sun set at 5:36 p. m., and that the injury to the plaintiff occurred a few minutes after 6 o'clock; that there was no light on the advancing train; that it was a cloudy evening and drizzling rain; and that it was a most frequented crossing. It was for the jury to say whether or not it was negligence for the defendants not to have had a light on the advancing end of the train, which was running backwards (*Powers v. Railroad*, 166 N. C. 602, 82 S. E. 972; *McNeill v. Railroad*, 167 N. C. 396, 83 S. E. 704; *Dunn v. Railroad*, 174 N. C. 258, 93 S. E. 784), and also whether there was a light or not.

[5-7] There was no error in admitting proof of the ordinance of the town. The ordinance did not change the law already laid down in *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953. It was negligence to back the train over the crossing without a light, if it was dark, or without a flagman, if it was not. *Lloyd v. Railroad*, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; *Mesic v. Railroad*, 120 N. C. 490, 26 S. E. 633; *Allen v. Railroad*, 149 N. C. 260, 62 S. E. 1079. The authorities are thus summed up in *Russell v. Railroad*, 118 N. C. 1109, 24 S. E. 512:

"A person who drives up to a crossing in a town or city, where it is the custom to close the gates so as to prevent the passage of vehicles when trains are approaching and open them when there is no danger, is not negligent if he drives * * * upon the track because the watchman is not on duty."

The plaintiff had the right to expect the company would not omit to give the usual alarm, and is not culpable for acting upon that supposition. The watchman should have known if this train was going to back. The

train had passed there a few minutes before.

The occupants of the automobile had a right to rely upon the protection that should have been given at this public crossing by a light on the front end of the backing car, or by a flagman or by a watchman, especially as there were no gates. It would seem from the evidence that when the watchman discovered that the train was backing he did run out and give a warning by shouting to "Stop! stop!" but this must have been too late, as he added, according to the evidence, "Jump! jump! jump!" and in obedience to that direction the plaintiff did jump and was injured. It was for the jury to say where the flagman was and what he did and whether he gave sufficient and timely warning. As the injunction to stop and the order to jump were given simultaneously, it must have been too late and the train must have already reached the crossing, as the plaintiff was injured in obeying the instructions to jump. Evidently the flagman did not appear until the automobile was either on the track or near enough to it to be struck by the backing train. There was evidence that the watchman had been sick for a long time before he was given this appointment, and on account of his infirmities had been retired by his former employer, the express company. He was old and slow in his movements. There was ample evidence to submit to the jury the question as to negligence of the defendants, and it was fairly submitted to the jury, who have found it in the affirmative.

[8, 9] As to the contributory negligence, the burden of which was upon the defendants, the plaintiff was not driving the automobile, but was only a guest or passenger in the car. There is no evidence that she had any control over the movements of the car, and the negligence of the driver, if there was any, cannot be imputed to the passenger. *Duval v. Railroad*, 134 N. C. 333, 46 S. E. 750, 65 L. R. A. 722, 101 Am. St. Rep. 830; *Baker v. Railroad*, 144 N. C. 43, 56 S. E. 553, and citations in *Anno. Ed.*; *Hunt v. Railroad*, 170 N. C. 444, 87 S. E. 210, which distinguishes *Bagwell v. Railroad*, 167 N. C. 611, 83 S. E. 814, which was relied upon by the defendants; *Thompson on Negligence*, § 502; 20 R. C. L. Negligence, § 137; *Hermann v. R. I., L. R. A.* 1915A, 766, note (36 R. I. 447, 90 Atl. 813).

[10] In sudden peril or emergencies, while the plaintiff was "bound to take active measures to preserve herself from impending harm, she was by no means held to the same judgment and activity under all circumstances. The opportunity to think and act must be taken into consideration. And although she may not have taken the safest course or acted with the best judgment or greatest prudence, she can recover for injuries sustained upon showing that she was required to act suddenly or in an emergency,

without opportunity for deliberation. It has been said that when a choice of evils only is all that is left to a man he is not to be blamed if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty or danger at the time and compelled to decide hurriedly." *Dyer v. Railroad*, 71 N. Y. 228; *Hainlin v. Budge*, 56 Fla. 342, 47 South. 825; *Railroad v. Toubey*, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109; *Gannon v. Railroad*, 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833; *Elec. Co. v. Hudgins*, 100 Va. 419, 41 S. E. 736. The subject is elaborately considered by *Hoke, J.*, in *Norris v. Railroad*, 152 N. C. 513-515, 67 S. E. 1017, 27 L. R. A. (N. S.) 1069, citing numerous cases; and especially is this so in this case, where the injunction to jump came from a watchman of the defendant. It could not be negligence for her, upon the spur of the moment, to act upon such direction from the servant of the defendant, even if it might have been wiser, if she had had full time for reflection, to have done otherwise.

[11] There was no error in admitting the town ordinance, and we think it has been properly proven (C. S. 2825), and the instructions of the court in respect thereto were correct. There was sufficient evidence to go to the jury of the negligence of the defendant, and the question whether a timely warning was given was properly submitted to the jury, which found that this was not done.

[12] Nor can we see any foundation for the defendants' objection to admission of proof that the injuries of the plaintiff were embarrassing and humiliating. The authorities are ample that this testimony was properly admitted. *Britt v. Railroad*, 148 N. C. 37, 61 S. E. 601; *Carmichael v. Telephone Co.*, 157 N. C. 21, 72 S. E. 619, 39 L. R. A. (N. S.) 65, Ann. Cas. 1913B, 1117.

[13, 14] Evidence as to the physical and mental condition of the watchman was competent as tending to show negligence in having a watchman incompetent physically in that place. The exceptions to the refusal to give special instruction No. 5 cannot be sustained, as it was substantially given in the charge.

The criticism of the charge that it is in conflict with *Kimbrough v. Hines* loses sight of the important fact that the plaintiff in this action was not the driver of the car. It was held in the *Kimrough Case* that, while the law does not impose on the driver of the car the absolute duty to stop, his failure to do so may be considered by the jury on the question of the exercise of ordinary care, and that it was error to omit this element in the charge; but this principle can have no application to the plaintiff, who was a guest in the car, to whom the negligence of the driver, if any, will not be imputed, and who had no control over the car and could not stop it.

[15] All that could be required of the plain-

tiff was to look and listen and to warn the driver of approaching danger, and this duty was imposed on her in the charge.

The prayers for instructions are also objectionable on the same ground, in that they, in effect, required the judge to charge that the plaintiff could not recover if the driver of the car was negligent.

The court charged on the above phases of the case as follows:

"If you should find from the evidence that the plaintiff in approaching the crossing could have seen, by looking, this moving train, and could have known the train was moving towards the crossing, by listening, and that she could have seen it in time to have requested the driver of the car to stop, and you find that if she had requested the driver of the car to stop she would have stopped in time to avoid the injury, that would be the proximate cause of the injury and not the negligence of the defendant, and you should answer the first and second issues 'No.'"

"If you find from the evidence that the watchman was there with his board and gave timely warning—the defendants contend that he told them to stop and waved his board when they were 20 feet away, and contend that there was plenty of time in which the car could have been stopped before reaching the crossing."

"Or if you shall find that Weaver, one of the brakemen, was there at the crossing, and before the automobile got within 20 feet of the crossing he warned them of danger and told them to stop, and they disregarded such warning and drove on, the defendant company would not be liable, and you would answer the first issue 'No.'"

"If you find from the evidence and by the greater weight thereof, the burden being on the defendant to so satisfy you, that the plaintiff, by looking and listening, could have seen this moving train in time to have prevented the injury, and that her sister, Mrs. Scott, would have stopped the car if she had been requested to do so, and find that was the cause of the injury, she would be guilty of contributory negligence and you would answer the third issue 'Yes.'"

"If Mrs. Scott was guilty of contributory negligence in driving the car, her negligence would not be imputed to the plaintiff. The plaintiff is not responsible for the negligence of Mrs. Scott, unless you find that the plaintiff was negligent in not looking and listening and not requesting Mrs. Scott to stop, and further find that Mrs. Scott would have stopped if the plaintiff had so requested."

"If you find that Mrs. Scott was negligent in driving the car, and you find that was the sole cause, the sole proximate cause, of the injury, why then you would answer the first and second issues 'No.'"

[16] As to exceptions 17, 18, and 19, it is sufficient to say that if there was warning given in time to stop the automobile, which the plaintiff's evidence contradicts, this cannot be imputed to the plaintiff. In the recent case of *Humat v. Railroad*, 179 N. C. 444, 87 S. E. 211, it is said by Hoke, J.:

"There was evidence tending to show that the driver of the automobile looked and listened before entering on the crossing, and it is held with us that it is not always, and as a matter of law, required that a vehicle should come to a stop before endeavoring to cross. *Shepard v. Railroad*, 166 N. C. 539, and *Elkin v. Railroad*, 76 W. Va. 733. Furthermore, it is held by the great weight of authority that negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this state. See a learned opinion on the subject by Associate Justice Douglas in *Duval v. Railroad*, 134 N. C. 331, citing *Crampton v. Ivie*, 126 N. C. 894, both of these decisions being approved in the more recent case of *Baker v. Railroad*, 144 N. C. 37-44. And see, also, a valuable article on the subject in 2 *Ruling Case Law*, §§ 42 and 43, in which the position is also stated with approval, and *Non v. Railroad*, 232 Ill. 378. There is nothing in the case of *Bagwell v. Railroad*, 167 N. C. 611, that in any way militates against this position. On the contrary, the principle announced in *Crampton v. Ivie* is there expressly approved, and the verdict and judgment in favor of the railroad was sustained on the ground that, under the charge of the court, the jury had necessarily negatived any negligence on the part of the defendant."

An examination of the whole charge shows that it presented every phase of the controversy to the jury, and in some respects was perhaps more favorable to the defendant than it was entitled to have.

On careful consideration of all the exceptions, we find no error.

WALKER, J. (dissenting). There was testimony tending to show that the automobile in which were Mrs. Scott and Mrs. Parker (the plaintiff) was being driven very slowly as it approached this dangerous crossing, which was a well-known one to the driver, as she had passed over it before. Mrs. Scott herself testified:

"As I came on towards the crossing, where we were to cross, I slowed down my car almost to a standstill."

And again she stated:

"I went towards this crossing; I was going slowly, because I had just crossed some tracks. Possibly I was going along there about two or three miles an hour. When I first saw these cars I was going very slowly. I had come by express office very slowly. I always go slowly along there, for I realize the danger of the point, and always slow down."

The defendants' testimony tended to show that the signal to stop was given when the car was as much as 25 feet from the track on which the backing train moved, and it varied from that down to 10 feet. Ed. Weaver testified that Mr. Poe, who was stationed at the crossing, was waving his "stop signal," and

witness hollered to them, "Look out, ladies, stop;" and at that moment the car had reached a point 10 feet from the pass track, on which was the train. Mr. J. S. Holliday testified that, when they were told to stop, the car was about 25 feet from the track. The testimony tends to show that several, Ed. Weaver, Mr. Poe, and J. S. Holliday, and perhaps others, signaled them to stop at short intervals from the time the car was as much as 25 feet distant to the time it was 10 feet from the track, and even afterwards, as Mr. Poe did so until the near approach of the train compelled him to leave the track and he barely escaped to a place of safety. Ed. Weaver and Mr. Poe were close by the car when they signaled, and Mr. Holliday was about 40 yards away, but everything, as he said, was in plain view.

There can be no question, if the defendants' testimony is credible, that ample warning was given to stop the car because of imminent danger ahead, as Poe had the danger signal in his hand and was waving it, and all of them at the place were frantically warning them, with loud voices, to stop then and there. The strong evidence that they did hear the signal was that of Mr. Holliday, who stated that he was coming from the toolhouse, and when he was about 40 yards distant from the crossing he first heard the signal given by Mr. Poe and Ed. Weaver.

Some of the witnesses testified that they heard the watchman and brakeman "yelling" for them to stop, and L. J. Holloman that he heard some one yelling "Stop" when he was about 125 yards from there. Several witnesses testified that it was daylight when the accident occurred.

There is other evidence for the defendant upon the question of timely warning to stop the car and not cross the tracks, but it is not the strength or weight of the evidence we are so much concerned with as the fact that there was evidence that sufficient warning was given.

In view of this testimony, the defendant requested that certain instructions be given to the jury which were refused, and exception taken thereto, and also to an instruction by the court, as follows:

"If you find from the evidence and by the greater weight thereof, the burden being on the defendant to so satisfy you, that the plaintiff by looking and listening could have seen this moving train in time to have prevented the injury, and that her sister, Mrs. Scott, would have stopped the car if she had been requested to do so, and find that was the cause of the injury, she would be guilty of contributory negligence, and you would answer the third issue 'Yes;' but unless you do so find you would answer the issue 'No.'"

The instructions rejected were as follows:

"(1) If the jury shall find from the evidence that the driver of the automobile heard the warning of the crossing watchman and stopped

the automobile near the track and at a place of safety, and that she then started the automobile and drove upon the track, and that plaintiff, in attempting to get out of the automobile, fell and was run over by the train and injured, the jury will answer the first issue 'No' and the second issue 'No.'"

"(2) If the jury shall find from the evidence that the defendant's conductor sent the defendant's switchman, Ed. Weaver, to watch the crossing, and that Ed. Weaver was standing at the crossing as the automobile and the train approached the point of collision, and that he gave the driver of the automobile notice that a train was approaching in time for the driver to have stopped the automobile before driving on the track, the jury will answer the first issue 'No' and the second issue 'No.'"

In view of this testimony, the judge was in error when he charged the jury that the driver of the car, as she approached the crossing, was required only to look and listen, and if she did both and neither saw nor heard the moving train, which was backing on the track, it was not negligence for her to proceed and cross the tracks. The duty to look and listen was the only one the law imposed upon Mrs. Scott, or the plaintiff, as the jury would be led to infer from the instruction, whereas we have held, in *Kimbrough v. Hines*, 180 N. C. 274, 104 S. E. 684, that a person approaching a crossing is required to do more than merely to look and listen, as he must also exercise the care which a person of ordinary prudence would use in the same circumstances, and that the failure to stop before crossing the tracks might be considered on the question of due care, with such other evidence as bore upon the question. We also held in the *Kimrough Case* that, if there was negligence of the plaintiff in the respect indicated, it would not be excused by the failure of the defendant's engineer to ring the bell or blow the whistle as a signal that the train was moving, or about to move, toward the crossing. There was evidence to support this view, for some of the witnesses said that it was daylight and the plaintiff, as well as the driver, could have seen the train if they had looked, or heard it if they had listened, or at least there was evidence from which the jury could have found as much.

But his honor charged the jury that, if Mrs. Scott, the driver, was guilty of negligence, it would not be imputed to the plaintiff, unless the plaintiff was negligent in not looking and listening and not requesting Mrs. Scott to stop the car, and the jury find that Mrs. Scott would have complied with the request. There are two objections to this instruction: (1) It should have been qualified by the further instruction that if Mrs. Scott was negligent, and this was the sole proximate cause of the injury, the plaintiff could not recover, and the jury should answer the first issue "No," as, in that case, the plaintiff would be bound by Mrs. Scott's negligence,

though she was a mere guest in the car. *Crampton v. Ivie*, 126 N. C. 894, 36 S. E. 351; *Bagwell v. Railroad*, 167 N. C. 611, 83 S. E. 814; 2 R. O. L. 1205. The negligence of Mrs. Scott would not be imputable to plaintiff only if it united with defendants' negligence to cause the injury. If it was itself the proximate cause of the wrong to plaintiff, the doctrine of imputable negligence had no application whatever, and the instruction must have misled the jury. (2) But the judge further stated in this instruction, and two others, that if the plaintiff would have seen, or heard, the moving train from her side of the automobile, if she had looked and listened in time to have prevented the injury and Mrs. Scott would have stopped her car, if plaintiff had requested her to do so, and the jury find that this was the cause of the injury, it would be negligence on her part, and they should answer the first issue "No" and the second issue "Yes." If the plaintiff knew the train was backing towards them, it was her duty to have warned the driver; Mrs. Scott, and requested her to stop the automobile, regardless of whether she would have done so or not. If she could have seen or heard the train moving had she looked and listened, and she failed to look and listen, she was negligent, as the car was approaching a railroad crossing, which is a place of danger always, where trains are continually passing. There was no positive evidence to show that Mrs. Scott would have stopped, but the law of self-preservation raises a strong presumption that she would instinctively have done so. But the learned judge, as it appears, confused the doctrine of imputable negligence with the independent negligence of the plaintiff herself, whereas they are two quite different things in the law. As we have already said, whether Mrs. Scott's negligence was imputable to the plaintiff depended upon whether it was concurrent with that of defendant, and if so it was not so imputable. If Mrs. Scott's negligence was the sole proximate cause, the negligence of the plaintiff, if any, was a negligible quantity, as Mrs. Scott's negligence in that case would alone be sufficient to defeat plaintiff's recovery, that is, if it was the sole proximate cause of the injury, and his honor so instructed the jury, but not in connection with or as a qualification of his previous instruction just commented upon. The jury could not therefore tell which one was correct. *Edwards v. Railroad*, 132 N. C. 99, 43 S. E. 585.

But, however the case may be so far, the instruction that the jury should answer the first issue "Yes," if the defendant had a watchman at the crossing and he failed to give timely warning of the moving train, and no other warning or signal was given by bell or whistle, or otherwise, until the plaintiff was too near the track for it to avail her, and this was the proximate cause of the injury, was erroneous. This instruction en-

tirely excluded such notice or warning of the approaching train as plaintiff or the driver would have acquired by looking and listening, or by otherwise exercising the care of an ordinarily prudent person before crossing so dangerous a place, as every one described it to be. We must keep in mind that the jury were instructed to answer the first issue "Yes," if the particular warnings enumerated in the instruction were not given.

It also excluded from consideration the notice she would have received from stopping if under the circumstances an ordinarily prudent person would have done so at such a dangerous crossing, as the plaintiffs themselves admit it is, and as this court describes it. But it cannot be successfully questioned that it was error to make the plaintiff's exercise of proper care depend upon what her sister and companion, who was driving the car, would have done. She should have performed her part without regard to her sister's conduct, and then she could well acquit herself of any blame. Her sister's negligence cannot be imputed to her, and would not affect the case adversely to her, unless it was the sole proximate cause of the injury to her. There is no statute of this state abolishing grade crossings or requiring gates to be maintained at them to prevent accidents of this kind. This is a matter of public policy, and is peculiarly within the province of the Legislature to deal with, but even the absence of gates does not excuse the failure to look and listen in proper cases, and there was evidence that it was daylight, and the photograph tends to show that the train could have been seen by the exercise of ordinary care, and the *Kimbrough Case*, 180 N. C. 274, 104 S. E. 684, requires that the driver of the car should look and listen and stop, if necessary for safety in crossing.

The question as to whether the plaintiff exercised proper care when she jumped from the car was for the jury, even though she was confronted by a sudden peril. She must have acted as a person of ordinary care would have done in similar circumstances.

As to the federal statute: This act of Congress was passed when the railroads were returned to the owners in 1920, and this action was brought since its passage. The act of 1920 requires that all suits be brought against the agent appointed to represent the government, and not otherwise, and that any judgment recovered shall be paid out of the revolving fund. The railroad company is not a necessary or proper party under this act, the government's agent being the only defendant. There was a perfectly good reason for this change. The government thereby assumed sole responsibility for all damages sustained during its administration, and provided a fund to pay them and a speedy method of collection. The cases therefore which are cited in the opinion of the court have no application, as they were based entirely upon

prior statutes, and the act of 1920 was not considered by any of them. It would therefore seem that the action should have been brought against the federal agent and not against the company, as the agent is constituted the sole defendant. *Lanier v. Pullman Co.*, 180 N. C. 406, 105 S. E. 21, refers to this method of adjustment, but does not refer specifically to the act of 1920, as the question was not involved in that case.

In our opinion, the action should be dismissed as to the railroad company or, at least, that, as there was material error, there should be a new trial.

STACY, J., concurs.

(181 N. C. 539)

STATE v. STOKES. (No. 274.)

(Supreme Court of North Carolina. April 13, 1921.)

1. Assault and battery \S 100—Constitutional law \S 250—Assault statute in proviso held not a discrimination denying defendant equal protection of law.

Defendant convicted on his plea of guilty of statutory assault on a female and sentenced to confinement in the common jail for three months, assigned to work on the roads, etc., cannot object to the legality of the punishment imposed on the ground he is denied the equal protection of the law by C. S. \S 4215, providing that in all cases of assault the person shall be punished by fine or imprisonment or both, provided that, where no deadly weapon has been used, etc., the punishment shall not exceed a fine of \$50 or imprisonment for 30 days, except that the proviso shall not apply to cases of assault to kill or commit rape, or to cases of assault by any man or boy over 18 on any female.

2. Assault and battery \S 100—Defendant, assailant of female, properly sentenced to jail for three months.

Under C. S. \S 4215, defendant convicted on his plea of guilty of statutory assault on a female could be sentenced in the discretion of the trial court to confinement in the common jail for three months, with assignment to work on the roads, etc.

3. Criminal law \S 1213 — Three months' imprisonment for assault on female not cruel and unusual punishment.

Sentence to confinement in the common jail for three months, with assignment to work on the roads, imposed on defendant under C. S. \S 4215, for statutory assault on a female, was not a cruel and unusual punishment within the constitutional inhibition.

Appeal from Superior Court, Pender County; Cranmer, Judge.

J. G. Stokes was convicted of statutory assault on a female, and he appeals. No error.

Indictment was for an assault and battery on Jessie Brown, etc. On hearing defendant

pleaded guilty of statutory assault on a female (Consolidated Statutes, \S 4215). It was admitted by the solicitor that no deadly weapon was used and no serious damage done. There was judgment that the defendant be confined in the common jail for three months, assigned to work on the roads, etc. Defendant excepted and appealed.

Stevens, Beasley & Stevens, for appellant.
James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. The statute more directly applicable (Consolidated Statutes, \S 4215), provides that:

"In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person."

[1] Defendant objects to the legality of the punishment imposed upon him in this case on the ground chiefly that the statute presents an unwarranted discrimination against him and others in like case, and to the extent of denying to him the equal protection of the law, but we cannot so hold. In many authoritative decisions dealing with the question, both state and federal, the power of classification as to the objects of statutory regulation has been referred very largely to the legislative discretion, and its exercise may not be interfered with by the courts unless the same is clearly arbitrary. *State v. Burnett*, 179 N. C. 735, 102 S. E. 711; *Smith v. Wilkins*, 164 N. C. 136, 80 S. E. 168; *Efland v. Railroad*, 146 N. C. 135, 59 S. E. 855; *Tullis v. Railroad*, 175 U. S. 348-353, 20 Sup. Ct. 136, 44 L. Ed. 192; *Insurance Co. v. Daggs*, 172 U. S. 562, 19 Sup. Ct. 281, 43 L. Ed. 552; *Magoun v. Savings Bank*, 170 U. S. 286, 18 Sup. Ct. 594, 42 L. Ed. 1037.

In *Efland's Case* the court stated the principle as follows:

The Legislature had the right to extend the statutory provisions in question to "certain classes of pursuits and occupations imposing these requirements equally on all members of a given class; the limitation of this right of classification being that the same must be on some reasonable ground that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

And in *Tullis v. Railroad*, *supra*, the Supreme Court of the United States, the final

arbiter in these matters, held as the approved position on the subject:

"That the power of the state to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion; that it was sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably arbitrary."

Applying the principle in *State v. Burnett*, a statute was upheld by which citizens of the state under 14 entirely, and under 16 to a great extent, were withdrawn from the ordinary effect and operation of the criminal laws of the state, to be dealt with by the special regulations established in the statute, a classification based upon difference of age. And in *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, the difference of sex was recognized and approved as a proper basis for classification. Speaking to the question in the opinion, Associate Justice Brewer said in part:

"Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against her full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but, looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."

That was a decision involving the validity of a statute making special regulations as to her hours of labor, and involving her right and capacity to make a living. And all the more should the distinction be recognized in crimes of violence where the superior physical strength of the man puts her at a disadvantage and wherein the purpose of graver injury is not infrequently present. On reason and authority, therefore, the exception based upon an alleged and unlawful classification made by the statute must be disallowed.

[2] Defendant insists further that the imposition of a severe sentence of this kind can only be upheld under a statute affirmative in terms, and is not justified in the form now presented and by way of an indefinite exception, but this to our minds is not based on a proper concept of the law. On the contrary, the statute by correct interpretation and in effect provides in affirmative terms that in all cases of assault with or without the intent to kill the person convicted shall be punished by fine or imprisonment in the discretion of the court, and within this provi-

sion shall be included "assault with intent to kill or with intent to commit rape and cases of assault and battery on a female by a man or boy over 18 years of age"; this last being the offense for which defendant's submission has been entered.

[3] The objection that the sentence should be annulled on the grounds that it constitutes cruel and unusual punishment is without merit. The constitutional inhibition relied upon here may only be invoked in cases of manifest and gross abuse on the part of the presiding judge.

From a careful consideration of the record, while we are justified in saying that there appears to have been no other purpose on the part of defendant than to aid his mother in the discipline of a child committed to her care and control, we are of opinion that there has been no error committed to defendant's prejudice, and that the sentence is not in itself so severe as to justify the court in disturbing it as a matter of law.

No error.

(181 N. C. 238)

LEMMONS v. SIGMAN, Register of Deeds.
(No. 401.)

(Supreme Court of North Carolina. April 20, 1921.)

Marriage \Leftrightarrow 25(6)—In action for penalty for negligently issuing license to minor, evidence held to require submission to jury.

In an action against the register of deeds under C. S. §§ 2500, 2503, for issuing a marriage license to plaintiff's daughter without reasonable inquiry as to her age, she being under 18 years, conflicting evidence as to the girl's appearance with respect to age, and the facts as to reasonable inquiry not being admitted, held to require submission of such issue under proper instructions to the jury, who alone may pass on its weight and the witness' credibility.

Appeal from Superior Court, Davidson County; Ray, Judge.

Action by C. E. Lemmons against F. E. Sigman, Register of Deeds of Davidson County, and from a judgment of nonsuit the plaintiff appeals. Reversed.

Civil action to recover of defendant, register of deeds of Davidson county, the penalty of \$200 allowed by sections 2500 and 2503. Consolidated Statutes, for issuing a marriage license to one John W. Galloway and plaintiff's daughter, Alma Lemmons, without the consent of her parents and without reasonable inquiry as to her age, she being at the time under the age of 18.

Upon the question of reasonable inquiry, the only point of difference in the case, there was evidence on behalf of plaintiff tending to show that his daughter lived with him in Winston-Salem at the home of one R. F. Bryant; that she was only 15 years old, hav-

ing reached this age on her last birthday, March 31, 1920, and that plaintiff, at the time, did not know of, or consent to, his daughter's marriage. R. F. Bryant testified:

"I know Alma Lemmons. She was living with her father, C. E. Lemmons, at my house. She was only a child. I would call her about 15 years old."

The defendant, F. E. Sigman, testified that on April 23, 1920, John Galloway made application to him, as register of deeds of Davidson county, for license to marry Alma E. Lemmons. And further:

"I did not know John Galloway. At the time of the application there were present Ernest Lemmons and Alma Lemmons, and I took the statement from all three of them as to the age of the parties to be married, and they stated that Alma Lemmons was 18 years old. I did not know Ernest Lemmons. I observed the young lady, and she looked like she might be a young girl of 18 or 19 years old from her general appearance and dress. She looked like she weighed 125 pounds, had on a long dress and hat turned down over her face, and her face gave the impression of one 18 or 19 years of age. John Galloway was a man clean-shaven, about 25 years old, and weighed 135 or 140 pounds. Had dark hair and dark skin, and had the appearance of being about 20 or 21 years old. They said they were from Winston. I had Ernest Lemmons, Alma Lemmons, and John Galloway, each of them, to sign statement and swear to it as it appears on the license. Before issuing the license I made inquiry as to the reliability of the parties applying for the license. I went into the sheriff's office, and saw Dr. M. A. Bowers, and told him there was a party from Winston-Salem wanting to secure a marriage license; that the contracting parties were Alma Lemmons and John Galloway, and I asked Dr. Bowers if he knew them. He said he did not know Alma Lemmons, but did know John Galloway. I asked him if he was a fellow of reliability, and he said he was a good reliable fellow, and a carpenter at Winston, and said, 'I know him; I am his physician.' I have known Dr. Bowers 10 years. I knew him at Thomasville where I lived, and where he was a practicing physician. Knew his general character was good. Dr. Bowers has lived in Winston more than a year, and he witnessed the license and the affidavit. And the parties applying were at the time in my office."

Cross-examination:

"I made no effort to call up the parties at Winston, either C. E. Lemmons or Virginia Lemmons. The girl said there was no phone at their home. I relied upon the statement of Dr. Bowers as to the reliability of John Galloway. Dr. Bowers told me John Galloway was

a reliable party. I knew Dr. Bowers was a man of high character and a good physician, and whatever he said to me I could rely upon. I did not ask Dr. Bowers how long he had known Galloway, or what chances he had to know his character. All I wanted to know was if he knew him, and if he was a reliable man."

Dr. M. A. Bowers made an affidavit which, by consent, was used as a deposition. He stated, in part, as follows:

"I told him [register of deeds] that I did not know Alma Lemmons, but that I did know John Galloway, and told him that he was a carpenter. I also told him that in my opinion any statement that Galloway would make could be relied upon, as I had no reason to think otherwise from my personal knowledge and information I had of him. Then after the license was written out and sworn to by the contracting parties, I witnessed their signatures and their marriage in the register of deed's office by John Moyer, J. P."

At the conclusion of all the evidence, defendant renewed his motion for judgment as of nonsuit. Motion allowed.

T. W. Kallam, of Winston-Salem, for appellant.

J. R. McCrary and Raper & Raper, all of Lexington, for appellee.

STACY, J. The testimony as to the appearance of the girl, with respect to her age, is conflicting; and, upon the question of reasonable inquiry, the facts are not admitted. Hence, considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the case should have been submitted to the jury under proper instructions. *Snipes v. Wood*, 179 N. C. 349, 102 S. E. 619; *Julian v. Daniels*, 175 N. C. 549, 95 S. E. 907; *Gray v. Lentz*, 173 N. C. 346, 91 S. E. 1024, L. R. A. 1917E, 863.

As said in *Furr v. Johnson*, 140 N. C. 157, 52 S. E. 664:

"Where there is a conflict of evidence, whether there has been 'reasonable inquiry' is to be submitted to the jury upon all the evidence under proper instructions, but if the facts are agreed, it is a matter of law"—citing *Joyner v. Roberts*, 114 N. C. 389, 19 S. E. 645.

The jury alone may pass upon the weight of the evidence or the credibility of the witnesses.

The judgment of nonsuit will be set aside, and the case referred to another jury.

Reversed.

(115 S. C. 524)

STATE v. HARTLEY. (No. 10596.)

(Supreme Court of South Carolina. April 1, 1921.)

Intoxicating liquors ⇨ 13—State statutes not repealed by Eighteenth Amendment to federal Constitution.

The statutes of the state in regard to the manufacture, sale, and transportation of intoxicating liquors for beverage purposes were not repealed by the Eighteenth Amendment to the United States Constitution, whenever the enforcement of such legislation would aid in carrying into effect the provisions of the amendment.

Appeal from General Sessions Circuit Court of Barnwell County; Hayne F. Rice, Judge.

Bill Hartley was convicted of manufacturing and having possession of liquor unlawfully, and he appeals. Appeal dismissed.

A. H. Ninesteln, of Blackville, for appellant.

Solicitor R. L. Gunter, of Aiken, for the State.

GARY, C. J. The defendant was convicted on the charge of manufacturing and having possession of liquor unlawfully.

The question in the case is whether the statutes of this state, in regard to the manufacture, sale, and transportation of intoxicating liquors for beverage purposes, were repealed by the Eighteenth Amendment of the United States Constitution. The titles of the two statutes under which the defendant was found guilty are as follows:

"An act to regulate the shipment and transportation, carrying, storing and having in possession of alcohol, alcoholic liquors and beverages, and to provide penalties for the violation thereof." Laws 1917, p. 69.

"An act to suppress the evils of intemperance, to prohibit the manufacture, sale, use, consumption, having possession and storing of spirituous, malt, vinous, fermented, brewed, or alcoholic liquors and beverages; to regulate the purchase, use and possession thereof; to provide the punishment for violation of the law." Laws 1917, p. 169.

These statutes were enacted in 1917.

It is not necessary to set forth their provisions, as the question under consideration is, not whether there are certain provisions therein that render these statutes unconstitutional, on the ground that they are repugnant to the Eighteenth Amendment, but whether they were repealed by the said amendment, which is as follows:

Section 1: "After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory

subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

Section 2: "The Congress and the several states shall have concurrent power to enforce this article, by appropriate legislation."

This amendment was ratified on the 29th of January, 1919, and the defendant was convicted in May, 1920—more than one year after its ratification.

The second section of the amendment, providing that Congress and the several states shall have concurrent power to enforce it by appropriate legislation, cannot be made effective by the several states, unless they enact statutes making the manufacture, sale, and transportation of intoxicating liquors for beverage purposes an offense against the laws of the state. The amendment contemplates independent legislation, both on the part of Congress and the several states; and the constitutionality of a state statute must be determined alone, by a resort to the provisions of the amendment.

"We are of opinion that the word 'concurrent' in this connection, means a power continuously existing for efficacious ends, to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the state, even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation, operative throughout the extent of its territory. Legislation by the states need not be identical with that of Congress. * * * But the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the act of Congress. The concurrent power of the states may differ in means adopted, provided it is directed to the enforcement of the amendment. * * * State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in section 1 of the amendment by different definitions, and regulations and penalties from those contained in the Volstead Act * * * are valid. Existing laws of that character are not suspended or superseded by the act of Congress." *Commonwealth v. Nickerson*, 236 Mass. 281, 128 N. E. 273.

There is nothing in the amendment indicating an intention to repeal or supersede the legislation of the several states, whenever the enforcement of such legislation would aid in carrying into effect the provisions of the amendment. Let us suppose that when the amendment went into effect there was a statute of this state providing that the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, this state for beverage purposes, was prohibited, and that any person violating the provisions thereof would be punished as therein pro-

vided. The state would unquestionably have the power at this time under the amendment to enact such a statute. Why? Because its enforcement would aid in carrying into effect the provisions of the amendment. The fact that such an act may have been passed before the amendment went into effect would not be a reasonable ground for holding that it was repugnant to the amendment.

As hereinbefore stated, the only question now is whether the amendment repealed such existing legislation of the several states as was not repugnant to it.

Whether the statutes under which the defendant was convicted contained provisions that render them unconstitutional will be determined when that question properly arises.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

COTHRAN, J. I concur in this judgment. The second section of the Eighteenth Amendment evidently was adopted with this idea and purpose in view: It had been decided by the Supreme Court of the United States, particularly in cases involving interstate commerce transactions and liabilities connected therewith, that when Congress took over a certain field of operations, its jurisdiction was not only paramount but exclusive. It was accordingly apprehended that the effect of the prohibition amendment and congressional legislation appropriate thereto would have been the same upon prohibition legislation by the state, in the absence of a provision limiting the application of that principle. The purpose of the section therefore was, and in my opinion the effect is, to leave to the several states the legislative power to enact or enforce any law, not in conflict with section 1 of the amendment, intended and calculated to enforce the prohibition declared in this section. This would apply to enactments of this character in force at the time of the adoption of the amendment, as well as to those subsequently adopted by the several states. *Jones v. Hicks* (Ga.) 104 S. E. 771; *State v. Fore* (N. C.) 105 S. E. 334; *Ex parte Ramsey* (D. C.) 265 Fed. 953. If the amendment had not been adopted, Congress could not have acted at all, for the subject-matter was exclusively within the police power of the states; with the amendment unlimited, Congress alone could have acted; with the amendment limited as it is, both Congress and the several states may act in legislating for the purpose of enforcing the prohibition declared.

As the Chief Justice shows, there is no question in this case as to a conflict between the state statutes and the amendment, nor, I may add, between them and congressional legislation. Should there appear in a state

statute a conflict between it and the amendment, the statute would, of course, have to give way; should it appear between it and congressional legislation, the interesting question of the grant of "concurrent power" to Congress and the several states, by the amendment, so learnedly and entertainingly discussed by Justice McKenna, dissenting, in *State v. Palmer*, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946, will arise, the effect of which need not now be anticipated.

(115 S. C. 529)

STATE v. DIX et al.

SAME v. BOYNIION.

SAME v. GRAY.

(No. 10597.)

(Supreme Court of South Carolina. April 1, 1921.)

Appeal from General Sessions Circuit Court of Allendale County; W. C. Cothran, Special Judge, and Hayne F. Rice, Judge.

Cattie Dix and others were convicted of a violation of the prohibition laws, and appeal. Appeals dismissed.

James M. Patterson, of Allendale, for appellants.

Solicitor R. L. Gunter, of Aiken, for the State.

GARY, C. J. For the reasons stated in the case of the *State v. Bill Hartley*, 106 S. E. 766, in which the opinion has just been filed, the appeal in each of said cases is dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(116 S. C. 1)

HUNT v. HUNT et al. (No. 10602.)

(Supreme Court of South Carolina. April 11, 1921.)

1. Appeal and error \S 1024(6)—Preponderance of evidence necessary on complaint as to findings of fact by court ordering sale of land for minor.

On appeal from an order of the circuit court approving a proposed sale of land held under a will for an infant, a finding of fact by the court that the sum offered was a fair price for the property will not be disturbed unless complaining party satisfies the court by a preponderance of the evidence that the finding is erroneous.

2. Guardian and ward \S 114—Court could order sale of land held for infant under will.

The court did not err in ordering sale of property held for infant under will by guardian with directions not to deliver the same to the infant until she reached the age of 30 years pending an appeal from a decision of judge of probate as to the validity of the will, the proceeds of the property not to be delivered to the

ward until all rights of the respective parties under the will were finally adjusted.

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Bamberg County; Hayne F. Rice, Judge.

Action by Rheta Baring Hunt, administratrix, etc., against Florence Goodrich Hunt, J. A. Guerin, and another. From an adverse judgment, the last-named defendant appeals. Affirmed.

Francis F. Carroll, of Summerville, for appellant.

Miller, Huger, Wilbur & Miller and Paul M. McMillan, all of Charleston, and E. H. Henderson, of Bamberg, for respondents.

GARY, C. J. The record contains this statement of the facts: N. A. Hunt, late of Summerville, S. C., died intestate on the — day of January, 1918, seized and possessed among other property, of real estate in the town of Bamberg, hereinafter described, and leaving as his sole heir his son, A. Morton Hunt.

A. Morton Hunt administered on his father's estate, and he died at the city of Charleston on the 12th day of October, 1918, leaving as his sole heirs and distributees at law his widow, the plaintiff, Rheta Baring Hunt, and his daughter, Florence Goodrich Hunt, one of the defendants, a minor 18 years of age.

On the 12th of November, 1918, after the death of A. Morton Hunt, plaintiff, Rheta Baring Hunt, was appointed administratrix d. b. n. of the estate of the said N. A. Hunt deceased, by the probate court of Dorchester county, and on the 16th day of October, 1918, was by the probate court of Charleston county appointed guardian of the estate of the defendant Florence Goodrich Hunt.

A. Morton Hunt left a will dated the 29th day of January, 1918, which was admitted to probate in common form in the probate court of Charleston county on the — day of July, 1919, and on the — day of February, 1920, said will was admitted to probate in solemn form in the same probate court, but at the time of the decision of his honor, Judge Rice, an appeal was pending from some of its provisions. At the time of the commencement of this action the plaintiff had filed notice that she required said will to be proved in solemn form, but no proceedings had at that time been instituted to prove same in solemn form.

The above action was commenced by the plaintiff about the 10th day of October, 1919, by service of a summons and complaint, in which complaint plaintiff alleges, inter alia, in addition to the above facts in paragraph 6 of said complaint:

"That plaintiff has received an offer for the purchase of the property, hereinafter more

fully described, from the defendant John F. Folk, at and for the sum of \$20,000, payable \$2,000 in cash and the balance of \$18,000 in equal annual installments of \$2,000 each, with interest on deferred balance at the rate of 7 per cent. per annum, payable semiannually, the credit portion of the said purchase price to be represented by the bond of the purchaser, secured by a purchase-money first mortgage of the said premises, said mortgage to contain the usual clauses as to taxes, insurance, attorney's fees and receivership, purchaser to have possession, subject to tenants' rights, on September 1, 1919, paying interest on the purchase money from that date at 7 per cent. per annum until titles can be perfected, and in compliance with the terms of said offer the said defendant, John F. Folk, has paid to the attorneys for the plaintiff the cash portion of said purchase price, to wit, the sum of \$2,000."

And further in paragraph 7 said complaint alleges:

"The price offered by the said defendant John F. Folk for the said property is, in the opinion of plaintiff, a fair one and advantageous to all parties interested."

And lastly the plaintiff prays in her complaint:

"That a sale of the said property to the defendant John F. Folk be approved by this court, and that the master be authorized and directed to make and execute a proper conveyance of the said property to the said purchaser upon his complying with the terms of his contract, and that the proceeds of the sale, after deducting all costs and expenses connected therewith and with this action, shall be held by the master at interest until the determination of the testacy of the said A. Morton Hunt."

The property is described as follows: " * * * (A hotel building)." J. A. Guerin filed his answer, denying that \$20,000 was a fair and adequate price for said property, further alleging that under the will of A. Morton Hunt he was appointed and had qualified as executor of the said will, and was by said will appointed guardian of the said Florence G. Hunt, a minor, and was instructed by said will not to deliver to Florence Goodrich Hunt the property devised to her under said will until she should reach 30 years of age, and the plaintiff had no right to make said contract of sale alleged in this complaint, or to bring this action, the property involved being a part of the property devised under said will to Florence G. Hunt.

The defendant Florence G. Hunt, by her guardian ad litem, filed formal answer, alleging that she is a minor, a want of knowledge of the facts alleged in the complaint and submitting her right to the protection of the court. The defendant John F. Folk answered, admitting the truth of the allegations of the complaint, and joining in the prayer of the plaintiff.

On the 28th day of January, 1920, an order

was signed by the court of common pleas at Bamberg county to take the testimony and report his conclusions of law and facts, with leave to report any special matter.

The probate judge for Bamberg county, acting as master, held a conference and took the testimony on the 10th of March, 1920, and thereafter found and reported to the court that the sum of \$20,000 was a fair price for the property, and advantageous to all parties interested, and recommended that a sale of said property to the defendant John F. Folk for said amount be approved by the court as prayed for by plaintiff in her complaint and on the terms mentioned in the complaint.

J. A. Guerin filed exceptions to this report, but they were overruled by the circuit court, and the report confirmed; whereupon J. A. Guerin appealed to this court upon the following exceptions:

"(1) Because, appellant submits, the overwhelming preponderance of the evidence shows that at the time of the proposed sale of the property involved to John F. Folk for \$20,000 the said property was bringing in a net annual income of \$2,290 by way of rents, and was worth many more thousand dollars than \$20,000, the price offered for same by said John F. Folk, and that the said sum of \$20,000 is not an adequate price for said property, and therefore his honor Judge Rice erred, appellant submits, in finding that said sum of \$20,000 was an adequate price for said property, and that a sale of same for that price would be to the advantage of all parties interested, and in approving a sale of same for that price.

"(2) Because, inasmuch as in the will of A. Morton Hunt, a copy of which is alleged in the complaint and a copy is in the case, the testator devises the property involved to Florence G. Hunt, with instructions that it must not be delivered to her until she reaches 30 years of age. His honor Judge Rice should have held, appellant submits, that under the facts of the case the court should not approve or order a sale of said property, even though an appeal was pending from the decision of the probate judge as to the validity of certain provisions of the will, but should have allowed it to be kept intact until said Florence G. Hunt should reach 30 years of age."

[1] The first exception cannot be sustained, for the reason that the appellant's attorneys have failed to satisfy this court by the preponderance of evidence that the findings of fact by his honor the circuit judge were erroneous.

[2] The second exception must also be overruled, for the reason that the proceeds arising from the sale of the property are not to be delivered to Florence Goodrich Hunt until all the rights of the respective parties under the will have been finally adjusted.

Affirmed.

WATTS and COTHRAN, JJ., concur.

FRASER, J. (dissenting). It is admitted that no valid contract to sell has been made, no necessity shown, or that the infant's estate cannot make the necessary repairs. It is shown that there is an offer of \$24,000, and \$20,000 should not be accepted.

(115 S. C. 500)

MITCHUM v. SEABOARD AIR LINE RY. CO. (No. 10583.)

(Supreme Court of South Carolina. April 11, 1921.)

1. Trial \S 83(1)—Overruling objection to evidence not error when grounds not stated.

It was not error to overrule an objection to testimony where the grounds of objection were not stated.

2. Appeal and error \S 1050(1)—Admission of evidence relating to undisputed matter harmless.

In an action for damages from fire claimed to have been caused by sparks from a railroad engine, evidence that not long before the fire plaintiff saw a locomotive throw out sparks and set fire to the grass was harmless, as it only stated the undisputed fact that grass may be set on fire by sparks from an engine.

3. Railroads \S 484(3)—Origin of fire held for jury.

In an action for damages from fire claimed to have been caused by sparks from a railroad engine, where the testimony, though circumstantial tended to sustain plaintiff's allegations, the issues of fact were properly submitted to the jury.

Cotthran, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Berkeley County; W. H. Townsend, Judge.

Action by Sam Mitchum against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Buist & Buist and Octavus Cohen, all of Charleston, for appellant.

E. J. Dennis, of Moncks Corner, and Wolfe & Berry, of Orangeburg, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendant, whereby a fire was communicated from defendant's locomotive engine to plaintiff's dwelling, adjacent to defendant's right of way, which destroyed the dwelling and its contents.

The defendant denied the allegations of the complaint. The defendant made a motion for a nonsuit at the close of the plaintiff's testimony, which was refused; also a motion for the direction of a verdict at the

close of all the testimony, which was likewise refused.

The jury rendered a verdict in favor of the plaintiff, and the defendant appealed.

[1,2] The first question we will consider is whether there was error on the part of his honor the presiding judge in overruling the objection to the following testimony of the plaintiff:

"Not long before this fire I saw a locomotive throw out sparks and set fire to the grass on two occasions. One was a freight and the other a passenger train. This must have been about the first of April or the last of March. I was there and put the fire out. At one time the fire was about 25 feet from the house, and the other about 30 feet."

In the first place, the grounds of the objection are not stated; and, in the second place, the appellant has failed to show that the testimony was prejudicial. It only states an undisputed fact, that grass may be set on fire by sparks from a locomotive engine.

[3] The other exceptions assign error in the refusal to grant the nonsuit and to direct a verdict on the ground that the evidence did not warrant a reasonable inference that the fire was communicated by defendant's locomotive.

The testimony was circumstantial, but it tended to sustain the allegations of the complaint. Therefore the issues of fact were properly submitted to the jury.

Affirmed.

WATTS and FRASER, JJ., concur.

COTHRAN, J. (dissenting in part). I concur in the disposition of the question of evidence as to the other fires set by the engines of the defendant, upon the ground that the objection was not accompanied by a statement of the grounds thereof. Upon the merits of the question raised I prefer that the court should reaffirm the decision of this court in the case of McGill Bros. v. Railway Co., 87 S. C. 178, 69 S. E. 156.

Upon the main point of the appeal, alleged error in refusing motions for nonsuit and directed verdict, I dissent from the conclusions reached by the majority of the court, and will endeavor to make clear the reasons therefor.

The liability of a railroad company for the results of communicated fires is, under section 3226, vol. 1, Code of Laws 1912, absolute. No question of negligence or due care can arise. If it be established that the fire originated upon the right of way, in consequence of the acts of any authorized agent or employee of the company, or was communicated by its engines, the company is liable in damages for the subsequent injury. The statute is one of exceptional liability. It is only just, therefore, that one

who claims the benefit of such a statute must bring himself within its provisions.

There is no contention on the part of the plaintiff that his claim comes under the provisions of the first part of the section, that the fire originated upon the right of way, etc. His claim is under the second part, that the fire was communicated to his house by the locomotive engine of the defendant.

The burden of establishing this fact is upon him. He must sustain it by evidence, direct or circumstantial, not by conjecture. This court, however, is not the tribunal for the decision of that issue of fact. It is a court for the correction of errors of law. Its jurisdiction and consideration of matters of fact arise only when the evidence is susceptible of only one reasonable inference, or from a negative standpoint, when from the evidence a reasonable inference of the existence of the essential fact would not be drawn by any reasonable mind.

I shall consider the facts, as I should, with every reasonable intendment, most strongly in the plaintiff's favor.

The plaintiff's dwelling house fronted the railroad track on the west side. The distance from the center of the track to the point on the kitchen roof where the fire was located was at least 90 feet. The kitchen, in the rear of the house and furthest from the track, was a gable-end building, with a sharp roof, covered with new shingles. The fire was discovered about 11 o'clock a. m. The plaintiff was in the sitting room and was alarmed by the roaring of the flames. He found the kitchen roof ablaze from the outside. Two passenger trains had passed that morning, one about 10 and the other about 11 o'clock. In about five minutes after the north-bound train had passed at 11 o'clock he heard the roaring of the fire and supposed that it must have been this train that set fire, though he did not know for certain. There was no fire in the stove between 10 and 11 o'clock when he went into the kitchen to draw some tea. He did not build the fire and draw the tea because the wind was too high. There was at the time a very high wind blowing from the house toward the railroad, as the plaintiff himself admits. He admits also that he saw sparks from his burning house going across the field and setting fire on the other side. The church on the other side of the railroad from the house caught fire and was burnt, from sparks flying across the railroad from the burning house. When confronted by the anticipated testimony of witnesses for the defense, among whom was the plaintiff's niece by marriage, who was spending a few days at his house at the time of the fire, to the effect that he attributed the fire to the kitchen stove, he denied making such statements, but added: "If I did, I have forgotten it."

From the foregoing statement of facts, taken entirely from the plaintiff's testimony, I cannot see how any other inference can be drawn than that he has entirely failed to connect the fire with the defendant's engine. As circumstantial evidence, he shows that the kitchen was within 90 feet of the track; that a train passed about five minutes before the alarm; that there was no fire in the stove; that the fire originated on the kitchen roof. It seems incredible that sparks could pass over his house, covered with old shingles, and ignite the kitchen roof covered with new shingles; that in five minutes a spark could produce such a combustion as to alarm him in another part of the house by the roaring of the flames and gain such headway as to be irrepressible. Many of the ordinary indicia in suits for damages on account of communicated fires are conspicuously absent—the absence of spark arresters; drunken or incompetent engineers; use of excessive steam; unusually heavy trains; going up grade; violation of statute; excessive speed; want of repair or defect; stopping of engine; stirring up fire at dangerous places; dropping of coal; emission of sparks, etc.

The fact that upon other occasions plaintiff had seen fire set upon the right of way by sparks from engine is but speaking to an occurrence of known happening; but, assuming that it established the fact that every engine on defendant's line every day and at every point emitted sparks, the plaintiff is met with the insuperable physical impossibility of a spark making headway in the teeth of a gale. The undisputed effect of the wind upon the sparks rising from the plaintiff's burning house is strongly persuasive to my mind that its effect upon the sparks rising from defendant's engine, if there were any, of which there is no evidence, was the same, driving them away from the house instead of towards it.

I therefore think that the motion for nonsuit or directed verdict should have been granted, and dissent from the judgment rendered herein.

(116 S. C. 54)

MCCOWN-CLARKE CO. v. MULDROW.
(No. 10609.)

(Supreme Court of South Carolina. April 13, 1921.)

1. Sales §418(7)—Buyer not required to minimize damage by buying in the market when goods not obtainable.

A buyer, injured by the seller's failure to deliver, must minimize his loss by going into the market and purchasing other goods to supply his needs, but, when the season has passed and he cannot procure the needed goods, the rule does not apply.

2. Sales §418(2)—Evidence of difference in fertilized and unfertilized crops held admissible on question of damages for nondelivery.

When a buyer of fertilizer could not procure other fertilizer on the seller's failure to deliver, evidence as to the difference between the crop on which the fertilizer was to be used and fertilized crops on adjoining land of similar quality worked in the same way was admissible.

3. Appeal and error §221—Allowance of interest not reviewable when not raised in trial court.

Where no question was raised in the trial court as to the allowance of interest on the account sued on, such question cannot be considered in the Supreme Court.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Florence County; James E. Peurlifoy, Judge.

Action by the McCown-Clarke Company against A. W. Muldrow. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Whiting & Baker, of Florence, for appellant.

Arrowsmith, Muldrow, Bridges & Hicks, of Florence, for respondent.

FRASER, J. The facts in this case involved in this appeal are as follows: The plaintiff sold and delivered to the defendant a quantity of fertilizers. The fertilizers were to have been delivered in March for immediate use. The fertilizers were not delivered until June. The defendant, by answer, set up the failure to deliver in the contract time and damages caused by the delay. The defendant offered to show the difference between the crops made on adjoining land of similar quality, worked in the same way and with the same seasons, on which the fertilizers were used in March, and the yield on his land on which the delayed fertilizers were used. The trial judge excluded the testimony on the ground that the measure of damages was the difference between the contract price and the price at the time of delivery specified in the contract.

[1, 2] I. To this ruling exception was taken. The general rule is beyond question, but it does not apply to this case. It is well settled that when the reason of the rule fails the rule does not apply. One who suffers injury from the violation of his contract must minimize his loss by going into the market and purchasing other goods to supply his needs. When, however, the season has passed and injured party to the contract cannot procure the needed goods, the reason of the rule does not apply, and the rule is not applicable. The allegation is that the defendant could not procure the fertilizer when needed, and he could not minimize his loss.

The testimony offered eliminated the uncertainty usual in such cases, and should have been admitted. The exception that raises this question is sustained.

[3] II. The second question is as to the allowance of interest on the account. The record does not show that this question was raised in the trial court, and it cannot be considered.

The judgment is reversed, and a new trial ordered.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). I do not concur in the conclusion of a majority of the court in the disposition of this appeal, and think that the judgment of this court should be as indicated at the foot of this opinion.

This being an appeal from a judgment entered upon a verdict in favor of the plaintiff by direction of the circuit judge, the evidence, and all reasonable inferences therefrom, will be interpreted most strongly in favor of the defendant.

The following conclusions of fact may therefore, for the purposes of this appeal, under the above rule, be drawn from the evidence, it being understood that this is done, not at all as findings of fact, but for this appeal only: Prior to March 1, 1910, the plaintiff and the defendant contracted for the sale and purchase of certain fertilizers, to be delivered by the plaintiff during the month of March; the fertilizer was intended to be used by the defendant upon his farm in the planting of crops which required the application of the fertilizer at the time of planting; which facts were known to the plaintiff, and with reference to which the contract was entered into; the fertilizer was not delivered until June 6th, which was too late for the defendant to make use of it in the manner intended; the defendant testified (quoting from the case): "That, expecting the fertilizer to be delivered upon this order, and relying upon such promise of delivery, he failed to order sufficient other fertilizer until too late to procure delivery of such fertilizer elsewhere;" he planted a considerable part of his lands without properly fertilizing them, on account of the plaintiff's failure to make delivery as agreed.

The defendant offered no evidence as to the difference between the market price of the fertilizer at the appointed time of delivery and the contract price, but, by counterclaim and evidence tendered to support it, claimed that he had been damaged in the sum of \$500 by the breach of the plaintiff's contract; this evidence was in the form of testimony of witnesses to the effect that the crops made upon adjoining lands of similar quality, worked in the same way and with the same seasons, when the fertilizer was applied at planting time, were more abundant than the crops of the defendant under the circum-

stances; objection was sustained by the circuit judge to this testimony, and, there being no other offered evidence of damage, the circuit judge directed a verdict in favor of the plaintiff for the amount of their account with interest.

Two main questions are involved in this appeal: (1) Was there error in directing a verdict in favor of the plaintiff? (2) Should interest have been allowed upon the account?

The first question: The solution of this question depends upon the solution of a subsidiary one, as to the admissibility of certain testimony. The only defense that was set up to the plaintiff's cause of action was a counterclaim for damages alleged to have been sustained by the defendant on account of the plaintiff's breach of the contract to deliver the fertilizer during the month of March, by reason of which he was denied the intended purpose, known to the plaintiff, of applying the fertilizer at the time of planting his crop, which resulted in a serious loss of production. In order to establish this, the only element of damage to which the evidence offered by the defendant pertained, the defendant offered the testimony hereinbefore referred to.

I think that the testimony would have been admissible, if the defendant had properly laid the foundation for it by evidence of other facts essentially necessary, as I shall endeavor to show, to his claim for special damages of this particular nature.

If a buyer purchases goods for delivery at a particular time, for a particular use and not for resale, and the seller has knowledge of such facts, it will be presumed that the parties contracted with reference to those facts, and the special damage which may result to the buyer from the seller's nondelivery, or partial delivery, or delayed delivery, may, under certain circumstances, constitute a proper element of damages.

I assume the facts in this case to be that the defendant bought the fertilizer to be delivered in March; that he intended to use it on his farm by applying it at the time he planted his crops; that the plaintiff knew of and contracted with reference to this purpose; that the fertilizer was not delivered until June; and that the failure to apply the fertilizer at the time of planting resulted in a serious loss of production.

The seller is not responsible to the buyer in damages for this loss of production, unless it can reasonably be inferred that it was a consequence of his breach of the contract, which might or should have been anticipated.

The general rule for the measure of damages resulting from the breach of a contract of sale is the difference between the market value at the time and place of delivery and the contract price. Ordinarily, this risk is what the seller assumes, and which he is charged with having reasonably anticipated. If the buyer should regard this measure as

inadequate, and it must be admitted that many instances occur where it would be, and seeks to apply a measure more favorable to himself by resorting to proof of special damages, he must bring himself within the rules which entitle him to special damages; the burden is upon him, the presumption being that the general rule as stated applies.

Assuming, hypothetically, the position of the seller and contemplating the results which would naturally flow from his breach of this contract, results which he should reasonably have anticipated and with which only he is chargeable, I think that they might be thus summarized: I have agreed to deliver the fertilizer to Muldrow in March; I know that he is a farmer and is going to use the fertilizer in making a crop; I know that he intends to apply it at planting time; I know that if he does not do that a serious loss in production will result; if I do not deliver at the stipulated time, the price of fertilizer may be higher than he has agreed to pay me, and that I will have to make up the difference; but there is an open market for fertilizers, and there is no reason that I know of why, if I fail, he may not purchase elsewhere; there is every reason to suppose that, as a serious loss of production will result if he does not apply the fertilizer at planting time, he will not take that loss and will purchase elsewhere.

The evidence does not show that Muldrow ever complained to plaintiff of the delayed delivery, or that he was in any way induced by the statements or promises of the plaintiff to refrain from buying elsewhere; his failure to do so appears from the statement in the case to have been plainly his own voluntary act; "expecting the fertilizer to be delivered upon this order, and relying upon such promise of delivery, he failed to order sufficient other fertilizer until too late to procure delivery of such fertilizer elsewhere." It appears from this that he did order some fertilizer elsewhere, but failed to order enough. Should the plaintiff be charged with anticipating the fact that the defendant would fail to do what he had the right to expect him to do, and which the law required him to do, in order that the damage might be minimized?

The defendant's right to recover the special damages claimed depended absolutely upon his inability to purchase fertilizer elsewhere, or upon his prejudicial delay having been induced by the statements or promises of the plaintiff, of which there is not a particle of evidence. On the contrary, his statement quoted above shows that if he had moved earlier, or had bought a sufficient amount when he did buy, his loss would not have occurred.

The appellant quotes from 2 Sutherland, 2339:

"If a vendor in guano knows that the buyer has ordered it for use as a fertilizer, and fails to deliver a portion of the quantity ordered, and the latter is unable to procure it elsewhere, the seller is liable," etc.

That is the heart of the controversy. I think that this question is absolutely concluded by *Gadsden v. Fertilizer Co.*, 89 S. C. 483, 72 S. E. 15. That was an action for damages for breach of a contract.

"In substance, the complaint alleges: That on January 15, 1910, defendant sold plaintiff five tons of fertilizer at the price of \$144.60; that plaintiff paid \$68.69, part of the agreed price, and defendant agreed to deliver the fertilizer at Claremont, but failed, after demand, to do so; that, relying upon the defendant's performance of the contract, plaintiff prepared his land and made the other arrangements necessary to plant his crops of corn and cotton; but, by reason of defendant's breach of the contract, he was delayed in planting, and compelled to plant his crops without fertilization, to his damage \$250."

The defendant made default and the plaintiff undertook to prove his case to a jury, as the statute requires. He testified that he planted a crop; that he did not make more than half as much as he would have made if the defendant had furnished the fertilizer according to contract; that his damages amounted to \$250; and that he paid \$68.69 on the account. The circuit judge directed a verdict for the plaintiff for \$318.69. The defendant appealed from the judgment by default, and this court declared:

"The complaint in this case fails to state the facts necessary to entitle plaintiff to recover the special damages which were awarded by the verdict. In an action to recover damages for breach of contract, when the damages sought to be recovered are special, it is necessary to allege and prove that defendant had notice, at the time of making the contract, of the special circumstances from which such damages might reasonably be expected to result. *Towles v. R. Co.*, 88 S. C. 501, 65 S. E. 638. The complaint in this case contains no allegation, nor is there any evidence that defendant knew, when the contract was made, of the special use which plaintiff intended to make of the fertilizer, or of any scarcity of fertilizer which would prevent plaintiff from buying what he needed from other dealers, if defendant failed to furnish it. *Matheson v. Railway*, 79 S. C. 157, 60 S. E. 437."

In the case last cited the court held:

"There is no foundation for special damages. The evidence discloses nothing more than an ordinary shipment of fertilizer, with no notice to the carrier at the time it received the goods of any special use to which it was to be applied, or of such scarcity of fertilizer as to prevent the purchase of two tons of other guano by the plaintiff."

In both of those cases stress is laid upon the fact of absence of notice of the use to

which the fertilizer was to be applied, but, as I understand the decisions, they are based upon that as one of the essential elements; the other equally so being that it was a part of the plaintiff's case to show that he could not have supplied himself in open market with goods which the seller contracted to deliver. *Wilson v. Scarboro*, 169 N. C. 654, 86 S. E. 611; *Standard v. Weeks*, 6 Ala. App. 161, 60 South. 508; *Banks v. Warner*, 85 Conn. 613, 84 Atl. 325; *Martin v. Bunker*, 167 Mo. App. 381, 151 S. W. 984; *Smith v. Curry*, 148 Ky. 166, 146 S. W. 434.

In 24 R. C. L. 77, the following is a quotation from the case of *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52, strongly relied upon by the appellant:

"Thus in an action for breach of a contract for the sale of guano, which the seller knew was intended for use by the buyer in raising a crop on his plantation, only one-half of the stipulated quantity being delivered, and it being then too late to procure it elsewhere, the measure of damages to the buyer was held to be the difference in value between the crop raised on the land on which the guano was used and that raised on the adjoining land of the same quality and cultivated in the same manner on which the guano was used."

At page 85 of the same volume (24 R. C. L.), referring to the duty of minimizing damages, is the following:

"The general rule that a party injured by breach of contract is bound to protect himself, if he can do so with reasonable exertion, or at trifling expense, and cannot recover from the delinquent party damages which he could, with reasonable effort, have avoided, is applicable in actions by the buyer for the seller's breach with respect to delivery, and this may require that the buyer supply himself by purchases in the general market with the subject-matter of the sale. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks, of an equal quality, and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen and the amount of rent which might be obtained for the house, if it had been built. And though the same kind of article cannot be obtained in the market, if a reasonable substitute may be obtained, it is the duty of the buyer to do so and thus minimize his special damages."

A fairer, more just rule I cannot imagine. Take this as an illustrative case: A cotton mill contracts for cotton with which to op-

erate its mill; it is deliverable at a certain time; the seller knows that if the mill cannot get cotton it cannot run; he is notified by the mill that unless the cotton be delivered on time the mill will shut down; he contracts with reference to that notice; he fails in delivering and the mill shuts down for 30 days and loses heavily; it appears, however, that the cotton market was flush and that the mill could have gotten immediately upon his default all the cotton needed. Would it be just to countenance the breach of the mill's duty to minimize, annihilate, the damages by going upon the market and procuring the necessary cotton?

I therefore conclude that the defendant utterly failed to lay the foundation for proof of special damages, and that the proffered testimony was properly rejected.

The second question: I do not think that there is the slightest ground for the collection of interest upon the open account sued upon. The demand had not been liquidated, there was no formal account stated, and, if the effort be made to construe it as an account rendered and technically an account stated, this theory would be exploded by the admission upon the trial that the defendant was entitled to a credit upon the account sued on. *Wakefield v. Spoon*, 100 S. C. 100, 84 S. E. 418, appears to me conclusive of the question.

The opinion declares that the question of the allowance of interest was not raised in the trial court, and cannot therefore be considered by this court. I do not agree to this proposition. The plaintiff moved for a directed verdict; the defendant resisted the motion; the circuit judge directed a verdict for the amount of the account with interest. It must be assumed that the plaintiff moved for what he was allowed, and that the defendant, in resisting the motion, resisted all that was in the motion. I do not understand that the case must show that the appellant objected, either in statement or argument, to the conclusion of the circuit judge, but think that he may appeal from it and reverse it, if he can, in whole or in part.

My conclusion, after a most careful consideration of this appeal, is that the judgment below should be modified by striking out the item of interest, \$227.02, and allowing the plaintiff to enter up judgment against the defendant for \$380.05, with interest at 7 per cent. from the date of the verdict. The defendant, having thus gained a substantial benefit by his appeal, would be entitled to the costs and disbursements of appeal.

(115 S. C. 47)

PINSON v. BOWLES et al. (No. 10608.)

(Supreme Court of South Carolina. April 18, 1921.)

1. Trial §25(16) — Right to open and close waived, where not claimed.

Though under the pleadings defendants were entitled to open and close, yet where the right was not demanded until after plaintiff had begun its opening, defendants cannot complain.

2. Appeal and error §1046(3)—Where after denying right to open and close, court offered defendants right to reply to plaintiff's argument, error was cured.

Though under the pleadings defendants were entitled to open and close, and that right was denied them, yet where the court offered to allow them to reply to plaintiff's argument, the error, if any, was cured.

3. Trial §295(1) — Charge not objectionable where as a whole it was correct.

Appellants cannot complain of the charge, where they were not prejudiced, and the charge as a whole was correct and applicable to the evidence.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Greenwood County; T. S. Sease, Judge.

Action by E. L. Pinson against M. G. Bowles and another. From judgment for plaintiff, defendants appeal. Affirmed.

Grier, Park & Nicholson, of Greenwood, for appellants.

Tillman & Mays, of Greenwood, for respondent.

WATTS, J. This is an action on a note. Defense, failure of consideration. Cause tried before Judge Sease and a jury at the April term of court, 1920, for Greenwood county, and resulted in a verdict in favor of plaintiff for amount sued for.

Exceptions, six in number, allege error on the part of his honor.

[1, 2] Exception 1 alleges error on the part of his honor in not allowing defendant to open and reply. This exception is overruled. The defendant was not prejudiced by such ruling, and at the time of the ruling no suggestion or intimation was given to the court that the defendant would be prejudiced by such ruling, and by standing by and permitting the plaintiff to offer testimony without claiming the right at the proper time the defendant waived it, but later his honor gave the defendant the right to reply in argument, if they desired it. This certainly cured the error, if any.

[3] Exceptions 2, 3, 4, and 5 allege error in his honor's charge. Taking the charge as a whole, the defendants were not prejudiced, and the charge as a whole was correct, ap-

plicable to the facts testified to, and the law of the case.

Exception 6 alleges error in allowing Ellis to testify as to certain facts. This was not prejudicial; the evidence was competent to show the situation at that time.

All exceptions are overruled, and judgment affirmed.

GARY, C. J., and FRASER, J., concur.

COOTHRAN, J. (dissenting). It is my conviction that the judgment herein should be reversed, and not affirmed, as a majority of this court has concluded.

The action is upon a note signed by the defendant M. G. Bowles and Mrs. M. E. Bowles, dated June 7, 1918, payable on demand to the plaintiff, E. L. Pinson, or order for \$255, with interest at 8 per cent. per annum compounded. The answer admits the plaintiff's case upon the pleadings, and sets up an affirmative defense of failure of consideration.

Under the well-established rule in *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305, *Beckham v. Railroad Co.*, 50 S. C. 25, 27 S. E. 611, and *Thompson v. Insurance Co.*, 63 S. C. 291, 41 S. E. 464, the defendants were clearly entitled to the opening and reply, both in testimony and argument.

The leading opinion sustains the respondent's position that the defendants, by not making reasonable demand, have waived their right to their privilege, and that in any event the error, if any, was corrected by the circuit judge, after the plaintiff's counsel had made the closing argument to the jury, extending to defendants' counsel the privilege of replying.

I do not think that either position should have been sustained. The record shows that the plaintiff was sworn as a witness, and testified that he lived at Coronaca, was in the tailoring business, and knew the defendants. That was all. Interesting facts, perhaps, but entirely unessential. At this point the defendant's counsel urged his right under the pleadings to open and reply both in testimony and in argument. The circuit judge ruled that the plaintiff had that privilege. No objection appears to have come from the plaintiff's counsel that the claim came too late. There is no time fixed by the rule for asserting the right to open and reply, but in reasonable justice to the opposing side it should not be allowed where the delay in asserting it may have put him to a disadvantage. I imagine that if the right should be asserted after the first witness may have been sworn and before he gives any testimony at all, the proponent of such witness could not complain, and the claim would be in time. The same result should follow if the witness has given no testimony pertinent to the case.

In the case of *Barnett v. Gottlieb*, 98 S. C. 180, 82 S. E. 406, the defendant's counsel was allowed the opening and reply in the argument, when under the rule the plaintiff's counsel had that right. The court says:

"It is true that the record fails to disclose that the plaintiff claimed his right, but it was the duty of the court to enforce the rules [rule 59, circuit court], and the burden is on the respondent to show waiver of this privilege on the part of the appellant, and no attempt is made to do this."

In view of the failure of the plaintiff's counsel in the case at bar to raise objection to the timeliness of the claim, or to show any prejudicial effect upon his client's rights, at that stage, to allow it, and of the evident discussion and decision of the question upon its merits, I do not think that the defendant can be held to have waived his right. In the *Barnett Case* the court reiterates:

"It was his [the circuit judge's] duty to enforce the rule as to the plaintiff's right to open and close. * * * He had no right to suspend or change rule 59 of the circuit court."

I think that it is impossible to conclude that the offer of the circuit judge, when court convened the next morning, the arguments for plaintiff and for defendant having been concluded the afternoon before, to allow the defendant's counsel to reply in argument, cured the error in allowing the plaintiff to open and reply in the testimony. It is universally conceded that to open and reply is a right, and not merely a privilege, and that an improper denial of the right is ground for reversal. But waiving for the moment this ground of appeal, and coming to the points which more nearly affect the merits of the controversy, the conceded facts, as I gather them are as follows: It appears that prior to June 7, 1918, the plaintiff Pinson, had made a contract with the Duplex Chair Company of Chicago, for the purchase of 300 chairs at \$8.50 each. *f. o. b.* Chicago, and had paid \$510 on account thereof. He expected to sell the chairs at \$22.50 each, and realize a profit of \$4,200, less freight and expenses. On June 7, 1918, he agreed to let the defendant M. G. Bowles in upon this roseate dream, and they entered into a written contract. The contract recites the above-stated facts, and provides that in consideration of the payment by Bowles of \$255 of the \$510 which had been paid by Pinson on the chair contract, Bowles was to receive one-fourth of the net profits of the sales of the chairs and Pinson three-fourths, Bowles bearing his proportionate share of the freight and cost of sale. Accordingly Bowles executed the note sued upon, dated June 7, 1918, payable on demand, for \$255, with 8 per cent. compound interest, and his wife signed it with him.

The contract does not specifically state who was to sell the chairs, or within what time they were to be sold. The testimony

of both the plaintiff and the defendant Bowles, however, leaves no room for doubt that the chairs were to be sold by Pinson. Bowles further testified that it was also a part of their agreement that Pinson would retain his half interest in the contract. Pinson denies this, and in admitting that he was expected to sell the chairs, qualified it with the limitation, "if he could." Whether in his "desire to associate the said M. G. Bowles in the sale of said chairs" (see contract), a scheme which in its hopes and results suggests the vision of a Mulberry Sellers, he so limited the attractions to Bowles, is a matter that the jury may well have considered.

Notwithstanding the written contract with Bowles and his agreement to sell the chairs, on the very next day, June 8, 1918, Pinson concluded a contract with one Graham Smith, in almost the identical terms of his contract with Bowles, and relating to the same Chicago chair contract, except that in the Smith contract, Pinson specifically obligated himself to sell the chairs, and to spend at least 12 months, at his own expense, in doing so.

It is significant that in the Smith contract, which was executed the day after the Bowles contract, Pinson allowed Smith one-fourth of the net profits, and reserved three-fourths for himself. Having already allowed Bowles one-fourth, and by the Smith contract allowing him one-fourth, there necessarily remained for Pinson only one-half; which is entirely consistent with Smith's statement that he did not know that Bowles had acquired an interest, and with the conviction in my mind that Pinson did not intend that he should know.

It is impossible for me to determine, even if called upon to do so, the interests which Bowles and Smith respectively acquired in the Chicago contract. The terms of their respective contracts afford no definite solution, and the conflicting testimony of Bowles, Smith, and Pinson makes it more obscure. According to Bowles, he bought a half interest; according to Smith he bought a half interest; according to Pinson he sold a fourth interest to each of them, retaining a half interest for himself. A possible and plausible theory is that Bowles bought a half interest, Pinson retaining the other half, and taking three-fourths of the profits for his services in selling the chairs against Bowles' one-fourth; and that the same trade was made with Smith, leaving Pinson where he evidently desired to be, completely out of the then questionable venture, so far as obligations were concerned, getting back all he had put in it, and retaining an interest to the extent of one-half of the profits.

The testimony is silent as to what has become of the Chicago contract, except that Pinson had shipped to him four of the 300 chairs contracted for, sold them for about \$10 apiece, instead of \$24.50, and pocketed

that small dust of the balance. He testified that he went to Union and made an honest effort to sell the chairs, but could not do so.

I think that the second exception should be sustained. It is a question of contract, not of injury to Bowles. If Pinson, as a part of his contract with Bowles, agreed to retain the remaining interest, and did not do so, but disposed of it to Smith, he has broken his contract, and is not entitled to recover anything upon it, regardless of whether the breach injured Bowles or not. The charge imposed the burden upon Bowles to show injury to himself by reason of the sale to Smith, a matter entirely foreign to the issue of compliance with the contract. According to Bowles' contention, the sole inducement of the contract on his part was the retention by Pinson of his interest, and his undertaking to dispose of the chairs. He had the right to impose the personal element as a condition, and if Pinson agreed to it he cannot complain and now seek a compliance by Bowles of his stipulations when he has violated his.

I think also that the second of the exceptions numbered 2, on page 23 of the case, should be sustained. There was nothing in the contract, or in the evidence, or in the contention of counsel for the defendant, that would suggest the idea of time being of the essence of the contract. Bowles' testimony was to the effect that it was a part of the contract that Pinson should sell the chairs. If he so engaged, it became a condition upon his recovering upon the contract, unless his performance was prevented by the act of the defendants or by other causes which would excuse him. If he undertook to sell something that could not be sold, that was his misfortune. 3 Elliott on Contracts, § 1891.

(115 S. C. 530)

BOYLESTON v. SEABOARD AIR LINE RY. CO. et al. (No. 10598.)

(Supreme Court of South Carolina. April 11, 1921.)

1. Appeal and error \S 736 — Exceptions should not contain two questions.

An exception should not contain two questions.

2. Appeal and error \S 1001(1) — Verdict supported by evidence not disturbed.

A verdict of a jury finding that an easement had been lost by nonuser which is supported by evidence will not be disturbed.

3. Railroads \S 82(6) — Easement lost will not be protected by injunction.

Where a railroad company by nonuser had lost its easement of right of way, it has no rights to be protected and enforced by the equitable remedy of injunction.

Appeal from Common Pleas Circuit Court of Orangeburg County; H. F. Rice, Judge.

Action by W. C. Boyleston against the Seaboard Air Line Railway Company and others. From judgment for plaintiff, defendants appeal. Affirmed.

Moss & Lide, of Orangeburg, and Lyles & Lyles, of Columbia, for appellants.

T. M. Raysor and Wolfe & Berry, all of Orangeburg, and E. B. Friday, of North, for respondent.

FRASER, J. Levi A. Gleaton owned a tract of land near the present town of North, in Orangeburg county. He conveyed a strip of land to South Bound Railroad 50 feet wide (25 feet on either side of the center of its track) across his land. In addition thereto his deed contained the following:

"And for value received I also grant, bargain, sell and convey to the South Bound Railroad Company, its successors and assigns, one-half ($\frac{1}{2}$) acre of my said lands, that the company may select for a depot, also an additional strip or piece of land 75 feet wide on either side of the above-named right of way, and running the full length of said right of way, for the purpose of building side tracks and depot yards on the same. If the above-mentioned one-half acre and the additional 75-foot strips are not used for the purposes mentioned, they do not vest in the said railroad company."

This deed was executed in 1891. Through successive conveyances 16 acres of the land of Levi A. Gleaton came to the plaintiff, Boyleston, and the rights of the railroad to the Seaboard Air Line Railway Company. The record shows that the successive owners of this 16-acre tract made improvements thereon, consisting of houses, fences, etc., within the 100 feet from the center of the railroad. The railroad did not locate its station on the Gleaton land, but some distance away, how far away is not clear. About 1902 the employees of the railroad undertook to put up some telegraph poles on this land, but on complaint of the then owner to the railroad authorities the poles were removed. In February, 1918, the defendant constructed a spur track on this land then owned by plaintiff, who has since sold the land to another. This action was brought for damages for trespass and to enjoin the further use of the land. The defendant undertook to justify the taking of the land under its deed from Gleaton. The plaintiff claimed that the deed never authorized the taking, but, if it had done so, the defendant had abandoned its right, or had lost it by the adverse possession of Dr. McElveen, one of the intermediate holders.

When the case was called for trial, on motion of the defendant and over the protest of the plaintiff, the trial judge submitted to the jury questions to be answered by them. One

set of questions was as to the ownership of the land at the time the action was commenced, and the other as to the amount of damages, if any. The jury found no damages. In order to avoid any uncertainty, his honor submitted to the jury, without objection, another question, to wit:

"Has the railway company, by abandonment or by adverse possession, lost its right or easement to use the 75-foot strip for side tracks or for railroad purposes?"

To this question the jury answered "Yes." The defendant moved, notwithstanding this finding, for an injunction restraining the plaintiff from interfering with the construction and operation of tracks on the land. His honor refused the motion and in the order confirmed the findings of fact by the jury. From that order the defendant appealed, with one exception, to wit:

"Because his honor the presiding judge having charged the jury as follows, to wit: You have heard all the facts in the case, and it is for you to say from all the facts and circumstances whether or not the railroad did abandon their easement. I want to say this to you, I want to keep the case as straight as I can before you, it is on the plaintiff in the case to show his right. The deed does convey the easement to the railroad company, and when the plaintiff comes in and claims against this easement, it is incumbent on him to prove, to show, that the railroad company had lost its easement by adverse possession or abandonment. 'Dr. Boyleston has admitted that he does not longer own the land. So far as the possession is concerned he is out of court. He admits that he has sold it and has conveyed it to other people. That being so, the question you will decide is the question of damage. In order for you to determine that you have to determine whether at the beginning of this action he was in possession of the property. In order to make it as plain as I can I have submitted some inquiries for you to pass on. I had better first take up the requests of the defendant'—and having submitted to the jury the questions whether the plaintiff was damaged by extending the spur track over the lands in question, and the jury having found in response thereto that the plaintiff had suffered no such damage, but in response to the third query submitted, 'Was the plaintiff entitled to recover against the railroad company the land in dispute at the time of the commencement of this action?' and the jury having found in response thereto 'Yes,' the case became entirely one on the equity side of the court upon the affirmative demand in the defendant's answer for a permanent injunction against the plaintiff and those claiming under him, restraining him and them from interference with the defendant railway company and those claiming under it in the use and occupation of the spur track in question, or from building other spur tracks upon the land in question within 100 feet from the center of its main line, and his honor should have held that the verdict of the jury was a mere expres-

sion of opinion as to what were the rights of the parties at the time of the bringing of the action, and should have held that there was no evidence to show that the railroad company had lost by abandonment or by the statute of limitations the right conferred upon it by the Gleaton deed to build the spur track in question when it should become necessary or convenient for it to do so, for the purposes specified in the Gleaton deed, and should have decreed a permanent injunction for the said railway company."

[1] It is very manifest that this exception, in violation of the rule, contains two questions, to wit: Was there any evidence of abandonment? and should the injunction have been granted, notwithstanding the verdict? The court will not enforce the rule in this case and consider them *ex gratia*.

[2] I. The record does not show a motion for nonsuit or a directed verdict, but, even if they had been made, they could not have prevailed, as there was abundant evidence to sustain the finding.

[3] II. When the jury found that the right of the defendant was gone, and that finding was affirmed by the trial judge, the basis of the equity issue (if there was an equity issue) was out of the case. It needs no authority to show that an injunction must be based on some existing right. The court cannot, by injunction or otherwise, protect an easement that does not exist.

The judgment appealed from is affirmed.

GARY, C. J., and WATTS, and COTHRAN, JJ., concur.

COTHRAN, J. I concur on the ground that the issues of fact, the foundation of the defendant's claim to equitable relief, having been adversely decided by the jury, and not set aside by the presiding judge, this court is without jurisdiction to review such findings. Constitution, art. 5, § 4; Code, § 11c.

(116 S. C. 29)

**CITY OF SUMTER v. UNITED STATES
FIDELITY & GUARANTY CO. et al.**
(No. 10604.)

(Supreme Court of South Carolina. April 13, 1921.)

1. Limitation of actions — **§ 14**—Provision in bond limiting actions to less than statutory period is void.

Under Code Civ. Proc. 1912, § 144, prohibiting a provision in any contract barring suit on a cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, an action brought against a surety company on a bond within the period of limitations cannot be dismissed, though it was brought after the date stated in the bond as the latest date on which suit thereunder could be instituted.

2. Venue ~~¶~~22(3)—Individual defendant sued with corporate surety held entitled to change of venue.

In a suit on a bond brought against an individual defendant and a nonresident corporate surety, the action being dismissed as to the surety company, the individual defendant is entitled to have the venue changed to the county of his residence.

Watts, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Sumter County; H. F. Rice, Judge.

Action by the City of Sumter against the United States Fidelity & Guaranty Company and George W. Waring. From an order denying the motion of the United States Fidelity & Guaranty Company for dismissal of the action against it, and denying the motion of defendant George W. Waring for change of venue, the defendants appeal. Order denying dismissal affirmed; order refusing change of venue reversed.

Wingate Waring, of Columbia, for appellants.

Epps & Levy, of Sumter, for respondent.

WATTS, J. This is an appeal from orders of his honor Judge Rice overruling two motions, the first being made by the United States Fidelity & Guaranty Company to dismiss the complaint as to it, and the second being by Geo. W. Waring for a change of venue from Sumter county to Richland county, the suit being on a surety bond furnished by Waring to plaintiff.

Waring is principal and defendant company is surety. The plaintiff claims breach of condition of the bond, and asks damages for a specified sum.

There are five exceptions. The first and second exceptions insist that his honor was in error in overruling the motion of defendant company, because it appeared from the bond sued on that it was expressly agreed that after a certain time no action should be, and that the time agreed on and provided was that after February 1, 1917, no action should be, against the surety company, and that no action was commenced until September 24, 1919, or more than two years after the date agreed on by the parties to the contract, after which it was specifically agreed by the plaintiff that the defendant company could not be sued thereon. The complaint alleges that the contract entered into between plaintiff and defendant Waring was July 12, 1911. The bond contained this clause:

"That in no event shall the surety be liable for a greater sum than the penalty of this

bond, or subject to any suit, action, or other proceeding thereon that is instituted later than the 1st day of February, A. D. 1917."

The bond was dated November 27, 1911. Under the clause the surety company was released from all liability unless suit was instituted by February 1, 1917. As action was not brought within the time provided for, the contract, as to the liability of the surety company, is at an end. The parties themselves agreed on a time limit less than the statutory period, and this they had the right to do, and must be bound thereby.

The contract entered into was reasonable and founded upon a good consideration. The surety company has a right to protect itself and prescribe a reasonable limit to its liability as to time, and, if the other side accepts this, both parties are bound to adhere to the contract as made, and his honor was in error in not granting motion of surety company.

I see no reason why parties should not contract as they did, but, even if they did not, suit was brought in six years after bond was made, and in any view of the case plaintiff cannot recover as to surety company.

It therefore follows that, as the complaint should be dismissed as to the surety company, and the sole defendant left in the cause is Geo. W. Waring, and he lives in Richland county, his motion to change the venue to Richland county from Sumter county will have to be granted.

Orders appealed from are reversed.

GARY, C. J. (concurring and dissenting).
[1] Section 144 of the Code is as follows:

"No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of said contract if not brought within a period less than the time prescribed by the statute of limitation, for similar causes of action, shall bar such action, but the same may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action."

This action was brought within the time prescribed by the statute of limitations, in reference to similar causes of action, to wit, six years. Therefore it was not barred.

[2] I, however, concur in the opinion of Mr. Justice WATTS that the venue should be changed to Richland county.

FRASER and COTHRAN, JJ., concur.

(115 S. C. 489)

CALHOUN v. SOUTHERN RY. CO. et al.
(No. 10503.)

(Supreme Court of South Carolina. Oct. 11, 1920.)

1. Railroads ¶5½, New, vol. 6A Key-No. Series—Corporation not suable for injuries occasioned during federal control.

During the time a railroad was operated by the federal government for its own purposes, and not for the benefit of the corporation, though under a contract to pay the corporation therefor, the corporation is not liable for injuries to a passenger occasioned by negligence of the government's servants operating its trains.

2. Appeal and error ¶854(2)—Wrong reason for right decision does not require reversal.

That the trial judge assigned the wrong reason for an order is not reversible error if the order was right.

3. Railroads ¶5½, New, vol. 6A Key-No. Series—Director General properly substituted as defendant.

Where the cause of action for the death of a passenger arose and the action was begun while the railroad was operated by the federal government, but while the latter had authorized actions to be maintained against the corporation, the corporation could have the suit against it dismissed only by proper proceedings to have the Director General of Railroads substituted as defendant under the order made after the institution of the suit.

4. Railroads ¶5½, New, vol. 6A Key-No. Series—Court had jurisdiction, though injuries were caused by servants of federal Director General.

A court is not deprived of jurisdiction of an action against a railroad corporation by the fact that the evidence showed that the injuries were caused by the servants of the Director General of Railroads, and not by the defendant corporation.

5. Railroads ¶5½, New, vol. 6A Key-No. Series—Judgment as against Director General allowable.

A railroad company sued for the death of a passenger is not entitled to a nonsuit because the evidence showed conclusively that the negligence causing the death was that of the agents of the Director General of Railroads, and not of the defendant, where suit was properly begun against the railroad company under the law then existing, and the Director General had not been properly substituted as defendant, but a judgment can be entered which would not affect the defendant corporation, but would operate as one against the Director General.

6. Railroads ¶5½, New, vol. 6A Key-No. Series—Punitive damages not recoverable against government.

A judgment against a railway company for death of a passenger occasioned by the negligence of the servants of the Director General of Railroads is in effect against the government, and punitive damages cannot be recovered against the government.

7. Appeal and error ¶1173(1)—Punitive damages allowed against government and individuals must be set aside as to both.

In an action against a railroad company and its employees for the death of a passenger, where the judgment for punitive damages as against the railroad company was in effect a judgment against the government, and therefore invalid, the judgment for punitive damages must be set aside also against the other defendants.

Appeal from Common Pleas Circuit Court of Sumter County; W. H. Townsend, Judge.

Action by J. A. Calhoun, as administrator of the estate of J. A. Calhoun, Jr., against the Southern Railway Company, J. C. Meredith, and others. Judgment for the plaintiff, and the named defendants appeal. Affirmed as to actual damages, and reversed as to punitive damages, and new trial awarded as to such damages unless plaintiff shall remit all punitive damages.

Frank G. Tompkins, of Columbia, and Lee & Moise, of Sumter, for appellants.

L. D. Jennings, A. S. Harby, and John H. Clifton, all of Sumter, for respondent.

FRASER, J. [1] This is an action for damages for death by the wrongful act. The deceased was a passenger on train No. 18, on the 25th of February, 1918. Train No. 18 was followed by train No. 42. Train No. 18 stopped to fix the air brakes, and the conductor sent a brakeman back to stop train No. 42. The brakeman did not put out the required signals, and train No. 42 ran into train No. 18 and killed the deceased, J. A. Calhoun, Jr. On the date of the tragedy the Southern Railway was operated under government control. On the day of the accident and at the commencement of this action, the government had constituted the railroads its agents to defend such actions as this. See *Grant v. Director General of Railroads*, 114 S. C. 89, 102 S. E. 854. The railroads were not operating their roads. The government had taken complete possession and were operating them, not for the benefit of the corporations, but for the public good. The railroad companies did not resist. It was useless to do so. They simply submitted to the inevitable. It is true there was a contract between the government and the railroad companies, but the possession and control was not by virtue of the contract, but by the power of the government. This change produced much uncertainty and confusion. It took some time to adjust matters. The government at first directed suits to be brought against the companies. This was merely for convenience. In times of invasion the enemy governments take charge of railroads in the invaded country and operate them. It is manifest that a company whose

property was in the hands of an enemy cannot be held responsible for damages caused by the enemy. The fact that the railroads were in the hands of, and were being operated by our own government, does not change the legal status. The possession, operation, and control was as completely beyond corporate control in the one case as in the other.

After a time, between the commencement of this action and the trial of the cause, the government directed new suits to be brought directly against the Director General, and not against the corporations, and added that:

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

[2] When this case was called for trial, the defendant Southern Railway moved to substitute the Director General for itself. The substitution was refused, on the ground:

[3] (1) That, notwithstanding the federal control, the Southern Railway was still liable. This was error. The fact that his honor assigned the wrong reason for his order does not make it reversible error. The Southern Railway had the right to have the case dismissed as to itself and the Director General substituted. This did not give a retroactive effect to the order. The action was properly commenced. The order allowed the defendant the right to be dismissed. That referred to the future conduct of the case. The substitution must be had by due process, as set forth in *Grant v. Director General*. There was no showing that the Director General could have been made a party at the time of the hearing. There was no showing that proper proceedings had been taken to substitute the Director General. The government order did not allow a simple dismissal of the defendant corporation, but a substitution of one for the other. The government could have refused to be sued. It had the right to provide the method to be pursued, and did provide a substitution, and the record does not show that the proper steps had been taken. Unless the Southern Railway took the proper steps to have itself dismissed, the dismissal could not have been ordered.

[4] (2) This appellant appeals because the court had (it is claimed) no jurisdiction, in that the record shows it is not responsible for the death, in that it was not operating its road. That did not affect the jurisdiction. If it did, then a verdict for defendant would in all cases deprive the court of jurisdiction,

and deprive the defendant in future litigation of the plea of *res adjudicata*.

[5] (3) The defendant moved for a nonsuit on the ground that the record shows conclusively that the negligence was the negligence of the agents and servants of the Director General, and not of this defendant. That was true, but we have seen the judgment would not affect the defendant company individually, but would operate as a judgment against the Director General. Suits in that form had been authorized, and the substitution had not been legally made.

[6.] (4) As to punitive damages: We have held that punitive damages are not recoverable against the government. The judgment against the railway company is in effect a judgment against the government; therefore, in so far as it awards punitive damages against the company, it cannot be sustained. And it cannot be sustained against the other defendants, on the principle decided in *Webber v. Jonesville*, 94 S. C. 189, 77 S. E. 857. But plaintiff has the right to pursue the other defendants for such damages. Therefore there must be a new trial as to punitive damages, if plaintiff be advised to pursue *Locklair* and *Meredith* for such damages.

The judgment of this court is that the judgment of the circuit court as to actual damages be affirmed, and that it be reversed as to punitive damages, and a new trial be had as to punitive damages, unless plaintiff shall remit on the record all punitive damages recovered within 20 days after the filing of the remittitur in the circuit court, in which event the judgment will stand affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(115 S. C. 536)

STATE v. ENGLISH. (No. 10601.)

(Supreme Court of South Carolina. April 11, 1921.)

1. Criminal law \S 720(9)—Exception to argument of solicitor held not to avail defendant.

In a prosecution for murder resulting in conviction of manslaughter, defendant's exceptions based on the solicitor's argument to the jury that a report in the community, started by defendant, that deceased had been in defendant's watermelon patch at some time prior to the immediate difficulty operated to deprive defendant of the right of self-defense, held not availing to defendant, because assuming the fact that the accusation of deceased by defendant was without intention or expectation of provoking a difficulty; such issue was to be determined by the jury, and not by the court.

2. Homolde 309(1)—Instruction giving example of manslaughter not misleading.

In a prosecution for murder resulting in a conviction of manslaughter, instruction giving the jury as an example of manslaughter a killing under provocation of an assault, *held* not erroneous, there being no reasonable supposition that the allegations in any manner misled the jury.

3. Homolde 112(2)—Instruction that self-defense not available to person who provokes difficulty by opprobrious language not erroneous.

In a prosecution for murder resulting in conviction of manslaughter, instruction that the true rule is that self-defense is not available to a person who uses language so opprobrious as to be calculated to bring on a difficulty, and which does actually contribute to the bringing on of a physical encounter, etc., *held* not erroneous.

Cothran, J., dissenting.

Appeal from General Sessions Circuit Court of Fairfield County; T. S. Sease, Judge.

Will English was convicted of manslaughter, and he appeals. Appeal dismissed.

Defendant's exceptions follow:

(1) That his honor erred in permitting the solicitor, over the twice-repeated objections of defendant's counsel, to argue to the jury that the defendant had started a report in the community that the deceased had been in defendant's watermelon patch; that, by starting such a report, he was at fault in bringing on the difficulty, and could not claim the protection of the law of self-defense—the error being: (a) That such a statement by defendant, made some time prior to the immediate difficulty, without any intention or expectation of provoking a difficulty, could not operate to deprive him of the right of self-defense, and such argument was therefore improper, and highly prejudicial to the defendant; (b) that under such a construction of the law, and ruling by his honor upon defendant's objection to such argument, the jury would have been compelled to find the defendant guilty, even though they believed that he had established a clear case of self-defense in so far as the immediate difficulty was concerned.

(2) That his honor erred in charging the jury as follows: "Now, to give you an example of what manslaughter is, it might be well to give you an example of what murder is, contrasting the two. If a person assaults you, not necessarily battery, if he strikes at you within striking distance, or whether he is within striking distance or not, and you then and there, by reason of the sudden heat and passion, resist the assault, strike, and kill him, that would be manslaughter"—the error being that such charge tended to lead the jury to believe that one has no right to resist, under any circumstances, an unprovoked assault upon himself.

(3) That his honor erred in charging the jury as follows: "I charge you, gentlemen, that the true rule is that self-defense is not avail-

able to a person who uses such language, so opprobrious as is calculated to bring on a difficulty and which does actually contribute to the bringing on of a physical encounter. The general doctrine that mere words will not justify blows is involved in that rule. The true rule is that self-defense is not available to a person who uses language so opprobrious as is calculated to bring on a difficulty, and which really does contribute to a physical encounter"—the error being: (a) That such charge was not warranted by the testimony; (b) that such charge could only have been intended by his honor to answer the objections urged by defendant's counsel to the argument of the solicitor pointed out in the first exception, there being no other testimony in the case to which such charge was applicable, and that thereby the defendant was deprived of the right of self-defense; (c) that under such a construction of the law, one who has made any remark reflecting upon another, without any intention that such remark should be repeated, would have no right to defend himself against an otherwise unprovoked assault subsequently made upon him.

McDonald & McDonald, of Winnsboro, for appellant.

J. K. Henry, Sol., of Chester, for the State.

GARY, C. J. The defendant was tried on an indictment, charging him with the murder of Roland Shelton. He admitted the killing, but pleaded self-defense. The jury found him guilty of manslaughter, and he appealed from the sentence imposed on him. The record contains this statement:

"It appears from the testimony that the deceased, in company with his father, a brother, and two friends, were sitting down near the public road on the plantation of T. W. Traylor, in Fairfield county, and near by was a well, which was used by the tenants on the plantation. Will English, a tenant on the place, came down to the well with two of his little children and drew them a bucket of water, and then started on down the road in the direction of the farm, which he was cultivating. He was carrying a shotgun, which he stated was for the purpose of shooting crows. His route led him by the party, of which the deceased was a member, and when opposite them he exchanged greetings with them. Brice Shelton, a brother of the deceased, then said to English that he had heard that English had accused him of going into his watermelon patch. The defendant denied this, and Brice Shelton told him that if he had not made such an accusation that it was all right. Then Roland Shelton, the deceased, took up the conversation, and there is a conflict in the testimony as to just what passed, but this started the dispute which led up to the killing. The testimony in this connection is set out in the record."

Turning to the testimony we find that Brice Shelton, brother of the deceased, thus testified:

"Ed Stevenson, Bub, Virgil Jones, and Roland and myself, were sitting down on a pile of

logs in front of our door, and we were laughing and talking. Will English come up with his gun, and I says to him, I hear he had me accused of going into his watermelon patch; he said no, he didn't say it, and I said if he didn't say it, it was all right. My brother, Roland, asked him, 'I hear you got me accused of going in there.' Will, he walks off a few steps, and he turned around and said: 'Yes, damn you, I said it and I stick to what I said.' Then Will and Bub started toward one another."

The record also contains this statement:

"During the course of the solicitor's argument to the jury, he argued that the defendant had circulated the report in that community that the deceased had been in defendant's watermelon patch, and therefore the defendant was at fault in bringing on the difficulty. Defendant's counsel, in the midst of the solicitor's argument, objected to such argument, upon the ground that this provocation was too remote, that the defendant was not thereby deprived of the right of self-defense and after listening to arguments by counsel on both sides, the presiding judge overruled the defendant's objection. The solicitor then argued to the jury that the defendant had circulated a report in the community that the deceased had been in his watermelon patch, and that when the deceased had asked him about it, he at first denied it, and had then repeated the accusation to his face with curses. The argument was that one who charged another with being a thief, and repeated it to his face in the manner described in the testimony, could not claim to be without fault. Defendant's counsel also objected to this argument, but their objection was also overruled."

[1] The defendant appealed upon exceptions which will be reported. Neither subdivision (a) nor (b) of the first exception can be sustained, as the appellant assumes the fact that the accusation of the deceased by the defendant was without any intention or expectation of provoking a difficulty. Such issue was to be determined by the jury, and not by the court.

[2] The second exception must be overruled, as it can not be reasonably supposed that the illustration in any manner whatsoever misled the jury.

[3] The third exception cannot be sustained, as the charge of his honor the presiding judge is sustained by the cases of *State v. Rowell*, 75 S. C. 494, 56 S. E. 23, and *State v. Lee*, 85 S. C. 101, 67 S. E. 141, 137 Am. St. Rep. 869, and was applicable to the facts of this case.

Appeal dismissed.

WATTS and FRASER, JJ., concur.

COTHRAN, J. (dissenting). I think that there was serious prejudicial error in the rulings and charge of the circuit judge in this case, and that there should be a new trial.

The circumstances of the homicide, from the state's point of view, were as follows:

The defendant, English, and the deceased, Shelton, were tenants upon the same tract of land, having separate farms, the deceased, a young man, working with his father; some one had invaded the defendant's watermelon patch, and he had told others that Shelton was the marauder; on the day of the homicide the deceased, with his father, brother, and two friends were sitting upon a pile of logs near the public road, talking; near the road also was a well which was customarily used by the tenants; English came down the road with his children to the well, and drew water for them; he was carrying a shotgun upon his shoulder; after he had drawn the water he went over to where the party were sitting on the logs, and addressed them pleasantly, remarking on the weather; the brother of the deceased asked English if he had accused him of the depredation referred to; he denied it, and the brother expressed his satisfaction with the denial; the deceased then made the same inquiry as to himself; English at first denied that also, but later admitted the accusation, and repeated it; hot words passed between them, and they started towards each other; Shelton made some kind of a motion with his hand in front of English's face, laughing towards the others who were still seated upon the log; English struck at Shelton with the butt of his gun; Shelton dodged the blow, and threw a rock at English, striking him on the head; English reversed his gun, put the butt up to his shoulder, and fired, while Shelton had turned.

The defendant pleaded self-defense.

It appears that the solicitor, in his argument to the jury, contended that as the defendant had upon another occasion, or other occasions, circulated a report that the deceased had been in his watermelon patch, he was not on that account free from fault in bringing about the difficulty which terminated fatally, and was not, therefore, entitled to rely upon his plea of self-defense in the circumstances immediately attending the homicide. The defendant's counsel objected to that line of argument on the ground that the provocation was too remote; the circuit judge heard argument upon the objection, and in the presence of the jury overruled the objection.

The appellant contends that the overruling of the objection amounted to an approval of the position taken by the solicitor, and, having been made after argument, in the presence of the jury, had quite the effect of a distinct charge to the jury upon that point. I do not think so, necessarily. The ruling of the circuit judge is not given, and possibly the ground taken by him for overruling the objection was that it involved the deci-

sion by him of a question of fact; "that the provocation was too remote," which would have been correct. If the objection had been based upon the entire absence of any evidence to connect the circulation of the report in an intentional way on the part of the defendant with the actual altercation, I think the objection would have been timely.

In my opinion, there was not a particle of testimony tending to show, either before the altercation or at the time of its occurrence, that the watermelon episode had any such causative force in precipitating the difficulty as would debar the defendant of his plea of self-defense; and that the injection of the principle of "provoking the difficulty" into the case was entirely irrelevant, and seriously prejudiced the rights of the defendant. That it was causative in a sense, there can be little doubt; it was what made the young man mad, what made him begin the difficulty with the defendant, after the latter had turned to leave the gathering which he had approached in perfect good humor; but there is absolutely nothing to show that the defendant said or did anything prior thereto, or at the time, that was intended, or even calculated, to provoke the deceased to attack him.

Reviewing his conduct prior to the day of the encounter, all that we find is that his property had been stolen and that he laid the theft upon the deceased by circulating a report to that effect. Surely a man whose property has been stolen has the right to express his suspicion, or his conviction, as to the identity of the thief, without being charged with the intention of provoking the thief to attack him, and thus, under a deceptive plea of self-defense, afford him an opportunity of killing him. If the suspicions be well grounded, he certainly has the right to express them; if they be groundless, the sneak is not expecting, certainly not intending, an attack.

In the immediate circumstances of the altercation, the defendant is not shown to have been in any way the aggressor; the deceased was angered by the report, and called upon the defendant for a repudiation of it. If the defendant had made the accusation, and believed it to be true, he was not called upon, in order to avoid an imminent attack by Shelton, to deny or recant his accusations; and I do not think that under such circumstances his refusal to deny, and his reaffirmation of the charge, is any evidence of such provocation of the difficulty as should rob him of his right to defend himself from a murderous attack.

I think that the Rowell Case, 75 S. C. 494, 56 S. E. 23, has been given a much wider application than it warrants, though perhaps justified by the apparently unlimited declaration of the law contained in that decision.

As that decision has been construed and applied, there is little difference between it and the charge of the circuit judge which it reversed.

I do not subscribe to the law that any opprobrious epithet calculated to provoke a personal encounter, regardless of the intention of the party applying it, will rob him of the right to defend himself against a murderous attack. The circulation of the most outrageous, mendacious, and slanderous reports against another, will not justify such other in murderously assaulting the slanderer in resentment. Such an assault, resulting fatally, would constitute murder. Against it the slanderer would be permitted to defend himself, to the extent of slaying, if necessary, even though it should appear that the slander was the provocation of the attack. It would be illogical in the extreme to hold that one could not defend himself against an attack which, resulting in his own death, would constitute murder in his assailant.

Even where the insult is applied in the immediate circumstances of the affray, a similar glaring inconsistency appears, which, to my mind, demands a restricted application of the doctrine of "provoking the difficulty" as declared in the Rowell Case. "No words, however opprobrious, will justify an assault," is a doctrine as to which there can be no dispute. If, therefore, the insulted party should resent the insult by slaying the other, it would be murder in him. His attack would be a murderous attack; and to hold that by the simple application of an opprobrious epithet, reasonably calculated to provoke a personal encounter, the party cannot defend himself against an attack which, resulting in his own death, would be murder in the assailant, strikes me as illogical to a degree.

A modified, and perfectly reasonable and consistent statement of the principle, in my opinion, is this:

"If it is an assault, or the menace of one by an overt act, or the provocation of a difficulty with intent to inflict death or great bodily harm in the event it is resisted, made of malice, to bring about that result and enable the provoking party to wreak his vengeance on the assailant, that is an 'aggression' or 'fault,' and a 'provoking of the difficulty,' within the legal sense and meaning of the terms. If the 'combat is provoked,' or 'the occasion to kill is produced,' * * * on this account, with this intent, and for this purpose, the defendant cannot reply upon the plea of self-defense." *Foutch v. State*, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687.

This is exactly in line with the charge of Judge Watts (now Associate Justice) in the case of *State v. Cobb*, 65 S. C. 324, 43 S. E. 654, 95 Am. St. Rep. 801:

"If a man makes preparation * * * that way to go and raise a row with the other, with the intention of killing the other if the other resents the insult or strikes him, and he kills him, that is murder."

In *State v. Summer*, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, the circuit judge had charged the jury:

"The law would say you cannot place your enemy, antagonist, or fellow-being, can't surround him, with such circumstances which you know he would resent, and then mention it to him, bring it up to him to make him fight, just to get to kill him under circumstances which might appear to be sudden and unexpected; the law says that you cannot do that." * * * If although the fight might be sudden, yet if it appears there was a predetermination on the part of the slayer to bring it about, then if he kills, it is murder and not manslaughter."

This court declared "the language of the charge set forth sound, wholesome law."

In *State v. Gibbs*, 113 S. C. 256, 102 S. E. 333, this court held that prior difficulties between the parties (without reference to who was at fault in those difficulties) did not deprive the defendant of the right of self-defense. The court must have had in mind difficulties in which the defendant was at fault, for if he was not, the matter was not worthy of consideration and would not have been suggested. If this be true in reference to difficulties in which the defendant was at fault, it is an easy step to the circulation of reports as to which he may have been entirely correct. Certainly a prior difficulty in which the defendant was at fault is more calculated to provoke a second difficulty than the circulation of a report in which he was not at fault is to provoke an initial difficulty.

The beauty, to my mind, of this modified doctrine, is its absolute consistency from the standpoint of the result to either party. If the insulting party, under the supposed conditions, should slay the other, he would be guilty of murder; if the insulted party should slay him, he would not be met with the rule that no words will justify an assault, for he would be resisting a murderous assault; he would not be simply resenting an insult by words, but would be defending himself against an attack which, if consummated fatally, would be murder in the other.

"One who insults another by opprobrious words may be bound to anticipate that the person insulted will resent the insult to the extent the law allows, but he is not bound to anticipate that the latter will go to the extent of attempting to take his life; and if such an attack is made, upon no greater provocation than this, and the person thus assaulted kills his assailant, under a reasonable belief that it is necessary to do so in order to save his own life, it is not murder nor manslaughter. If, however, a person provokes an assault by the use

of gross insults and obloquy, with the hope and intent that the words will cause the deceased to make an assault upon him, he cannot plead self-defense in justification of the killing." 24 A. & E. 268.

"And it may be stated generally that any act in violation of law, and reasonably calculated to produce the occasion for a killing, amounts to bringing on the difficulty, and bars the right of the actor to plead self-defense." Wharton on Hom. (3d Ed.) § 323.

"The plea of justification in self-defense cannot avail in any case where it appears that the difficulty was sought for and induced by the act of the [defendant] in order to afford him a pretence for wreaking his malice." *State v. Starr*, 38 Mo. 270; *State v. Parker*, 96 Mo. 382, 9 S. W. 728.

"To bar a person's right to use a deadly weapon in self-defense, he must have been the originator of the difficulty, must have entered it armed, and must have brought it on intending, if necessary, to use his weapon to overcome his adversary." *Hunt v. State*, 72 Miss. 413, 16 South. 753.

"Where a person provokes an assault upon himself, for the purpose of securing a pretext for killing his assailant, the assault will furnish no excuse for the killing." *State v. Cross*, 68 Iowa, 180, 26 N. W. 62.

"Where, on the trial of an indictment for murder, the fact of killing with a deadly weapon was established, a charge to the jury that, if they believed that the defendant sought a quarrel with the deceased in order that he might take advantage of it to kill him, then no danger to himself, thus brought on, would excuse the killing, was held correct." *Murphy v. State*, 37 Ala. 142.

"Although the slayer provoked the combat or produced the occasion, yet, if it was done without any felonious intent, the party may avail himself of the plea of self-defense." *Hash v. Commonwealth*, 88 Va. 172, 13 S. E. 398.

"One who provoked an assault by the use of gross insult and obloquy, with the belief and intention that the words would cause deceased to make the assault, cannot plead self-defense." *Hays v. Territory*, 7 Okl. 15, 54 Pac. 300.

"If he provokes or begins the difficulty with the purpose of taking advantage of the deceased and taking his life, or doing him great bodily harm, then he cannot justify the killing on the ground of self-defense, however imminent the peril became, and the killing is murder in the first degree." *State v. Hopper*, 142 Mo. 478, 44 S. W. 272.

"The plea of justification in self-defense cannot avail in any case where it appears that the difficulty was sought for and induced by the act of the [defendant] in order to afford him a pretense for wreaking his malice." *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31.

"Where an assault is brought on a person by his own procurement, or under an appearance of hostility which he himself creates with a view of having his adversary act on it, and he does so act and is killed, the plea of self-defense is unavailing." *People v. Glover*, 141 Cal. 233, 74 Pac. 745; *State v. Sharp*, 183 Mo. 715, 82 S. W. 134; *People v. Filippelli*, 173 N. Y. 509, 66 N. E. 402.

"If one provokes a difficulty in order to be ready prepared to kill another, or inflict serious bodily harm upon him, he cannot justify such killing on the ground of self-defense, although it may subsequently be necessary for him to kill his adversary in order to save his own life." *Young v. State*, 53 Tex. Cr. R. 416, 110 S. W. 445, 126 Am. St. Rep. 792.

To hold that the circulation of a report accusing another of larceny, would without regard to its truth or falsity, constitute a provocation of the difficulty, would result in this: Any person whose property has been stolen would give expression to his suspicions or conviction as to the identity of the thief, at the risk of being called to account for his words, and upon attack therefor, of being deprived of the right to defend himself from a murderous attack. In other words, he who has given expression to such conviction, under the law as thus expounded, subjects himself, without hope of reprieve, to capital punishment at the hands of the thief. The fact that the thief may be executed will be small consolation to him. If the facts would justify the report, the law makes it the duty of the injured party to cry aloud; it provides the machinery to be set in motion by him for the punishment of the thief. Even if the report be false, it should be made to appear that it was circulated for the purpose or with the reasonable expectation of bringing about a difficulty. In such cases the calumny is usually the work of the skulking coyote.

"The right to defend one's self from a public horsewhipping is not defeated by the circulation of slanders about relatives of the assailant." *State v. Bartlett*, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756.

"Nor is the right to defend one's self against an attack by another defeated by the circulation of slander about relatives of the assailant, or by the publication and circulation of a libel concerning him." *Wharton*, § 326.

Wharton declares:

"Nor is it necessary that the means used should have been such as were reasonably calculated to provoke a difficulty if the accused intended to provoke a difficulty, and used such means as he thought would provoke it, and they did provoke it, it is all that is necessary." Section 323.

I may say, too, that the unrestricted application of the doctrine announced in the Rowell Case ignores the well-recognized distinction between a perfect and an imperfect self-defense. The former appears when all of the well-known elements of self-defense have been established; the latter, when the defendant has been at fault in bringing on the difficulty, though not with the intention of creating the opportunity to take the other's life or inflicting serious bodily harm.

(88 W. Va. 361)

HUBBARD v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.
(No. 4170.)

(Supreme Court of Appeals of West Virginia.
April 5, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1037—Refusal to remand to rules for process on amended declaration not error, where damages less than in original declaration found.

A case, after being remanded from this court for a new trial, was sent to rules on plaintiff's motion and an amended declaration filed at August rules, which increased the ad damnum only, but on which amended declaration no process was issued; at the following October term defendant appeared and moved to remand the case to rules for process on the amended declaration, which motion the court overruled, and gave the defendant a rule to plead, and thereupon a demurrer to the amended declaration was interposed, and a motion made to strike certain items from the bill of particulars. The demurrer was overruled, and the motion denied. At the following January term the issues were made up and the case tried by a jury, which found for the plaintiff in an amount less than the damages laid in the original declaration. *Held*: It was not reversible error to refuse the motion to remand the case to rules for process on the amended declaration.

2. Insurance \S 179½—Other policies held admissible on construction of loan agreement in policy.

Where a life insurance policy has been issued with an agreement therein to loan a certain sum to the insured at a fixed rate of interest for a stipulated time, with the policy assigned to the insurer as collateral, and with the provision that upon payment of the interest on the loan, and payment of the premiums on the policy as each becomes due and payable, then the borrower has the option to continue the loan from year to year until maturity of the loan; and the insurer refuses to make such loan otherwise than upon a stipulation waiving notice of intention to cancel the policy upon failure to repay the loan on the date when due, and giving the insurer the right to apply the cash surrender value of such cancellation to the payment of the loan and interest; and the policy holder will not agree to such stipulation unless there is a clause therein to the effect that he shall have at least 30 days' notice of intention to cancel the policy for default in payment of the loan on the day when due, and litigation arises as to the proper construction of the loan agreement of the policy—the policies subsequently issued by the insurer, both before and after said litigation has begun, which define the conditions upon which it will make loans to its policy holders, and which provide for a notice of 30 days of intention to cancel the policy upon failure to pay the loan when due, are admissible in evidence as tending to prove the reasonableness and practicability of the policy holder's construction of the loan agreement in the policy upon which the suit is instituted.

3. New trial \S 41(2)—Verdict will not be disturbed for improper evidence where jury has disregarded it.

If immaterial or improper evidence has gone to the jury in the progress of the trial, and the court fully instructs the jury that its verdict can be predicated only on a theory which is sustained by proper, relevant, and material evidence, and the verdict is responsive to the court's instructions, and it is clear that the jury has disregarded the immaterial or improper evidence, the verdict should not be disturbed for that reason.

4. Appeal and error \S 1072—Setting aside verdict for improper evidence which is not prejudicial reversible error.

Where improper or immaterial evidence is admitted and it clearly appears from the whole case, including the court's instructions to the jury, that it could not have produced a different result, and had it been excluded the result would have been the same, it will be reversible error to set aside the verdict on that ground alone.

Error to Circuit Court, Ohio County.

Action by William P. Hubbard against the Equitable Life Assurance Society of the United States. Verdict for plaintiff was set aside, a new trial granted, and plaintiff brings error. Reversed and rendered.

See, also, 95 S. E. 811.

J. Bernard Handlan and G. Alan Garden, both of Wheeling, for plaintiff in error.

Frank W. Nesbitt, of Wheeling, for defendant in error.

LIVELY, J. This case was before this court on error in January, 1918, and is reported in 81 W. Va. 663, 95 S. E. 811, 4 A. L. R. 886. A terse statement of the controversy is there given. It is unnecessary to make a repetition here. A construction of the loan clause in the policy was the main contention on the first trial and in this court. The judgment was reversed and the case remanded because of improper evidence given to the jury. This court decided that the insured, upon being refused a loan, as provided in the loan clause of the policy, upon proper terms, and who then obtained loans elsewhere, upon collateral security of his own, at a higher rate of interest than that set out in the policy, but at the lowest rate obtainable, was entitled to recover the excess of the interest so paid by him over that provided for in the loan clause of the policy, and the reasonable value of his services in securing the loan; but was not entitled to compensation for the use of his securities, used as collateral. Much of the same evidence used at the first trial was necessarily introduced at the last trial, and the main controversy now centers about the admissibility of the evidence submitted to the jury relating to the value of the services of the plaintiff in error in securing a loan of \$17,680 from various

sources, which sum was the amount he was entitled to borrow from defendant under the loan clause in the policies, at 5 per cent. for a period of years, under certain conditions, with assignment of the policies as collateral. A verdict of \$1,822.83 was rendered, January 14, 1919, in favor of the plaintiff, and, on motion of defendant, the court being of the opinion that improper evidence had been introduced, set aside the verdict and granted a new trial, and the plaintiff obtained this writ of error and supersedeas.

[1] At the inception we are confronted with a question of pleading and practice. Upon remand of the case by this court, plaintiff, without notice to defendant and in its absence, successfully moved the circuit court to remand the case to rules, and at August rules, 1918, an amended declaration was filed in the clerk's office on which no process issued. On October 12, 1918, defendant appeared specially and moved the court to again remand the case to rules, because of want of notice, and want of process on the amended declaration. The motion was denied and overruled and exception taken. The defendant in error assigns this ruling of the court as cross-error. The amended declaration only increased the ad damnum. It did not change the form of the action nor the subject-matter of the controversy, and could have been permitted by the court at bar. We can see no injury or prejudice to the defendant by this amendment thus accomplished. It was not taken by surprise. The case was not tried until January 13, 1919, when the verdict returned was for less than the amount laid in the original declaration and writ. Wherein has the defendant been injured? *Dabneys v. Knapp*, 2 Grat. (Va.) 354.

The controlling question in this record is upon the admissibility of the plaintiff's evidence introduced to show the value of his services in obtaining loans from sources other than the insurance company. What was the value of his services? It is clear that the excess interest (1 per cent.) which plaintiff paid on the amount of loans to which he was entitled, to wit, \$17,680, and which loans he obtained from various sources, amounted to \$595.23 at the time suit was begun. On this sum he was entitled to interest at 6 per cent. until the date of judgment, which would add thereto \$202.52, making in all \$803.75. The verdict was for \$1,822.43, leaving the sum of \$1,019.08 to be accounted for as the value of the services of the plaintiff. Our former decision was that plaintiff could not recover for the use of his own securities used by him as collateral in securing the various loans from the banks. Is there sufficient legal evidence to prove that plaintiff's services, time, and expense in procuring and continuing these various loans were worth \$1,019.08? That is the vital question. Wit-

ness Tucker testified that the fair compensation of a person in obtaining a loan of \$17,680 on good collateral security such as Pennsylvania Railroad stock, Wheeling Steel & Iron Company stock, and other good stock (all being the stock actually pledged by plaintiff) for a year with the privilege of extending the loan at the end of the year, for another year, at the option of the borrower, and at the end of the second year for another year, and so on, for three years more, obtaining the amount in as many as 40 different loans, and looking after 12 renewals, requiring 2 trips to Washington, Pa., the entire transaction covering a period from March, 1911, to January, 1915, would be 5 per cent. of the loan; and witness Mathison said such service ought to be worth \$700 or \$800. The plaintiff valued such services at \$1,000. On the former trial he estimated his services, time, and expenses as worth \$500, under the assumption that it had taken 80 transactions, but which he afterwards found to be 40 transactions. In comparing his services with that charged by brokers for like services, under like conditions, he finds that the estimate given in this former evidence, not based on a percentage, was too small. The loan clause in the policies provided that after the policies were three years old the holder at his request would be loaned certain specified sums at 5 per cent., renewable each year for five years, with the policies as collateral security. The defendant failed to comply with this loan contract, and the plaintiff procured loans elsewhere, amounting to \$17,680, at 6 per cent., using his own collateral as indicated in the hypothetical questions propounded to witnesses Tucker and Mathison. Upon a calculation of the interest on the average of the value of the services in securing these loans as fixed by these witnesses, and adding thereto the undisputed sum of \$808.75, the result will be a few dollars in excess of the verdict. The evidence of these three witnesses is not contradicted. So, if all of the evidence tending to fix a value for the use of the collateral owned by him and pledged to secure these loans be eliminated, there is sufficient evidence to sustain the verdict.

Instruction No. 2, offered by the defendant and given, took out of the case any consideration of the use of such securities as an item of damage to the plaintiff. The learned trial judge was of the opinion that inasmuch as evidence had gone to the jury, over the objection and exception of the defendant, as to what would be the value of services in procuring loans on the insurance policies, on the terms set out in the loan clause, and for the time in which the policies had to run, the defendant was prejudiced thereby, because the plaintiff did not render such service, and the verdict was set aside and a new trial awarded for this reason. And yet instruc-

tion No. 7 given for the defendant told the jury that in computing the value of plaintiff's services in procuring the loan, the basis thereof must be the value of his services in procuring the loan on the collateral actually used, and not the value of such services as he would have rendered if he had procured the loan on the insurance policies. This instruction practically told the jury to disregard this evidence which had gone in, and which the court after verdict considered to be error. There was a persistent effort on behalf of the plaintiff to get before the jury evidence on which it could base an item of compensation to him for the use of his securities pledged as collateral in securing these loans, although this court had said that no recovery could be had for the use of such collateral securities; and the court, likewise, in order to remove any impression which such attempt might have had, instructed the jury that no compensation could be allowed for the use of such securities, in defendant's instruction No. 2.

[3, 4] It is clearly the duty of the court to instruct the jury to disregard evidence improperly admitted. *Moore v. Harper*, 42 W. Va. 39, 24 S. E. 633; *Alderson v. Miller*, 15 Grat. (Va.) 279; *Brooks v. Calloway*, 12 Leigh, 466. The introduction of improper evidence in jury trials frequently occurs, and the court, upon perceiving it, will instantly instruct the jury to disregard it. A formal written instruction would be as effective. The instruction to disregard purges the error. A jury must be presumed to possess some discrimination and recollection. A close inspection and study of the evidence given by witnesses Holloway, Mathison, and Marshall will disclose that they did not express any satisfactory opinion on the value of services in securing a loan on the terms set out in the loan clause, with the policies pledged as collateral security therefor. The general tenor of their evidence was to the effect that it would be difficult to negotiate such loans with the life policies as collateral. Plaintiff's theory for introducing this evidence is that it was for the purpose of showing that he did not use these policies in obtaining the loans because of the difficulty in getting the banks to make loans thereon, and the possible higher rate he would have to pay because of the unusual and unsatisfactory security offered; and that he took the better, quicker, and cheaper way of using his own well-known and acceptable stocks. In this way he minimized the damages. It is unnecessary to determine whether this evidence was proper or not, or on what theory, if any, its introduction was justified, as the jury was instructed to disregard it in considering their verdict. We are inclined to hold that this evidence was proper for the purpose of showing why plaintiff could not pledge the policies. From this record we

cannot see that defendant was prejudiced by this alleged improper evidence. *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582.

We can see no error in the court's action in refusing to strike out that clause of Local Manager Sweeney's letter of April 8, 1911, to the defendant, which letter informed it that plaintiff criticized the loan agreement based on the policy and would not sign it as prepared, and which clause stated that the loan agreement "had been a great deal complained of and criticized on the part of certain policy holders." This court had already held that the loan agreement insisted on by the defendant was a departure from the policy contract. The reasonableness of the loan agreement was involved, and this evidence of complaint from policy holders only accentuated what had been judicially settled, and could not prejudice defendant's case. Nor can we see injury to the defendant in submitting to the jury excerpts from the subsequent annual reports of the defendant to its policy holders relative to the value and desirability of its liberal policy contracts. Defendant's counsel insists that this evidence was designated to secure punitive damages, on what hypothesis we fail to perceive, but if such evidence could, under any theory, be construed to have that effect, instruction No. 3 given for the defendant told the jury that punitive damages could not be given; and its instruction No. 1 limited the recovery to excess interest paid by plaintiff and reasonable compensation for his time, services, and expenses in procuring the loans, together with interest on these amounts. We do not perceive any punitive damages in the verdict.

[2] After this suit was begun on the policies issued in 1901, a policy was issued on November 26, 1915, to plaintiff which contained a loan provision similar to that contended for by plaintiff, to wit, that upon default the policy holder should have thirty days' notice before forfeiture was declared. This policy was properly put in evidence to prove the reasonableness of plaintiff's contention as to his construction of the 1901 policy contract. The later policy admitted, almost in terms, that plaintiff's construction of the contract sued on was reasonable and practicable.

Defendant insists that the court erred in admitting evidence as to the value of plaintiff's services in obtaining forty different loans, when he testified that he could have borrowed the entire amount at one time on his name and first-class collateral used; that it was plaintiff's duty to minimize the damage caused by the breach in this way. Plaintiff during this time needed much more money than that provided for in the policies, varying from a few thousand dollars up to \$100,000. The average of his borrowing during the period was \$50,000 or \$60,000. He borrowed the money as his necessities required. At one time he borrowed the money

for a period at 5 per cent., saving the excess interest to defendant for approximately six months. It must be kept in mind that defendant's contract was to loan a stipulated amount, \$17,600, to plaintiff at 5 per cent. for one year with the option to plaintiff to renew at the end of the year, and to continue to renew at his like option for five years, a most advantageous contract to plaintiff; should interest rates go beyond 5 per cent. his contract rate remained, and should the rate become less than 5 per cent. he could exercise his option and discontinue his loan. It would be difficult to obtain that amount of money in a lump sum under such a contract, especially with the policies as collateral. Some of the brokers say that they would not undertake to negotiate such a loan, deeming it practically impossible to do so. We do not think that plaintiff, being required to go into banks for this money on short-time loans secured by his own collateral, would be required to borrow in a lump sum, whether he then needed all the money or not, in order to minimize the defendant's damages. He was borrowing various sums from various sources during that time to meet his varying necessities, totaling possibly 100 transactions. A person usually borrows money as and when he needs it. The plaintiff would not be required to depart from his usual ordinary and prudent methods in order to minimize defendant's damages. Therefore defendant's instruction No. 6, which told the jury that if they believed the plaintiff could have procured the \$17,680 loan in one transaction, then it was his duty so to do, and the basis of his recovery for time, service, and expense should be computed on the one transaction, was properly refused.

It is insisted that plaintiff is not entitled to recover more than the excess interest he was compelled to pay. This contention was considered and passed upon on the former writ of error, and will not be considered again. We then held that the reasonable value of plaintiff's services in procuring the loans elsewhere was a proper item of damage. *Hubbard v. Assurance Society*, 81 W. Va. 663, 95 S. E. 811, 4 A. L. R. 386. Defendant's instruction No. 5, given, told the jury that plaintiff's compensation for time, labor, and expense in obtaining the loans from others to take the place of the sum contracted to be loaned by it, should be limited to that which was reasonably necessary, thus negating its own contention now made that excess interest was the only item of recovery.

Much argument and citation of authorities is contained in the brief for plaintiff on the proposition that he should be compensated for the use of his collateral used to take the place of the insurance policies; and much argument and citation is found in the brief for plaintiff to sustain its contention that plaintiff's recovery should be limited to the

excess interest paid, and no account whatever taken of his time, expense, and services in obtaining the loans. These respective contentions were decided when this case was formerly before this court, and that decision now governs.

As above stated, the controlling question presented by this record is the value of plaintiff's time, services, and expenses in obtaining these loans. The uncontradicted testimony of plaintiff and witnesses Tucker and Mathison is sufficient to warrant a verdict in excess of that returned, taking into consideration the agreed item of interest paid. Even if the evidence of the other brokers on this question could be considered as improper, or confusing (although the jury was practically instructed to disregard it), and had been stricken out, we fail to perceive that a different verdict could have been rendered. Wherein will a new trial avail the defendant? It would only prolong the litigation and entail more costs. *Taylor v. B. & O. Ry. Co.*, 33 W. Va. 39, 10 S. E. 29; *Insurance Co. v. Trear*, 29 Grat. (Va.) 255.

We reverse the judgment of the circuit court which sets aside the verdict, reinstate the same, and render judgment thereon.

Reversed, judgment here.

(151 Ga. 349)

O'REAR v. STATE. (No. 2309.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

1. Homicide §309(5)—Defendant not entitled to instruction as to manslaughter where evidence tended to show murder or justifiable homicide.

In a homicide case, where the evidence relied on by the state for a conviction tended to show that accused committed murder, and the statement of the accused and the evidence introduced in his behalf tended to sustain the defense of justifiable homicide, the law of voluntary manslaughter was not involved, and court did not err in failing to instruct the jury in regard thereto.

2. Criminal law §824(3)—Evidence held not to require charge on voluntary manslaughter without request.

In a homicide case, where defendant was convicted of murder, evidence held not to show that deceased and defendant mutually engaged in a mortal combat, so as to require the judge, without request, to give in charge to the jury the law of voluntary manslaughter as related to the doctrine of mutual combat.

3. Homicide §250—Evidence held to sustain conviction of murder.

In a homicide case, evidence held sufficient to sustain a verdict of murder.

Fish, C. J., and Atkinson, J., dissenting.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Add O'Rear was convicted of murder, and he brings error. Affirmed.

Neb Dunn, sworn for the state, testified:

When I walked up there Add was cursing, and he said, "If you don't like what I do why don't you do something?" Add kept cursing and calling him sons of bitches, and after a while he pulled his pistol out of his side breeches pocket and pulled his pistol out and cocked it that way (witness indicating). I spoke to him, I said, "Add, don't do that, you will get in trouble;" he said, "God damn you, I will attend to my own business." About that time, "bump," and when he shot the second time I run. Add was talking to Walter all the time, cursing him for sons of bitches and everything. * * * Add shot two times. Walter did not have nothing in his hands. Add said if Walter did not like, if Walter disliked what he did, why didn't he do something. I didn't hear Walter say anything out of the way to him. I ran; yes, sir; just as I turned to run, he made the second shot. I heard other shots after that. * * *

Clarke Pete, sworn for the state, testified:

When I got down there I heard them talking and went around there to see who it was, and Add was cursing Walter and Walter told him he didn't come there for no fuss and didn't want no fuss, and Add kept on cursing him and pulled out his pistol and shot, and I broke and run then. I didn't see anything in Walter's hand. I could see his hand. He was standing just this way, leaning, with his hand down side of him. He didn't make any movement with his hand. I was looking right at him. If he cursed Add I didn't hear him. Walter didn't look mad; he didn't seem to be mad. I was looking right at Add when he pulled his pistol. He cursed Walter for a God damn son of a bitch and pulled his pistol on him. He shot Walter with a pistol. I heard the firing after I left. I didn't see no more. After it was all over I come back there. When I come back Add had gone then. Walter was there at the buggy between the wheels, trying to get in the buggy and couldn't. They finally got Walter into the buggy. I do not know what become of him. After the first shot and I run the shooting began right on, one shot after another. I run and then one shot followed another.

John Alexander, sworn for the state, testified:

I did not see the shooting. I was there a piece from Felix's wagon shelter when the shooting took place. I was right at Walter Jarrell, right at the buggy shelter. I was there when he walked up. Add was there when Walter got there. Walter walked up and walked around that way, and I heard Add say, "Keep your God damn mouth out and run your business," and run his hand in here, and Walter walked around and slapped his foot on the buggy step. Add was on the right side of the buggy and Walter said, "I have not said a word

to you," and he said, "I say, keep your God damn mouth out;" and I walked away and the shooting started, and I didn't look back any more. When I got about as far as that post there away the shooting had not started; then Walter didn't have a God Almighty's thing in his hand; he had his hand on his hip here this way. Walter did not make any movement to go into his pocket. If Walter was mad I couldn't tell it; he didn't look that way. Add commenced cursing him; yes, sir. I didn't see anybody with a pistol but Add. * * * There was more than one shot; yes, sir. I did not stop to count the shots. * * *

Horace Swain, sworn for the defendant, testified:

I was coming from out of the woods and come by the end of the shelter, and just as I got against the shelter they shot, and when I looked under the shelter they both shooting. I do not know who shot first. They shot about the time I got there. I looked under there and they were both shooting, Add and Walter. I kept on going.

Henry Young, sworn for the defendant, testified:

I went down there after the shooting. I did not see them put Walter in the buggy; he was already in the buggy when I got there. I saw some man, a stranger to me, trying to get his supporter from around his leg, and his leg was swollen so it had got tight. I told him to take his knife and cut it off, and I took my knife and cut it off, and when I cut it off this man reached in his pocket and got the pistol. He reached in Walter's pocket and got the pistol. I saw him get the pistol out of Walter's pocket and put it in his pocket.

Joe Holden, sworn for the defendant, testified:

I didn't notice when the first shot was fired; I wasn't paying no attention; I was right below there. * * * When the first shot fired I had my back turned, and then I turned and looked up toward the shelter, and it look like Add was fighting smoke or dust or something, with both of his hands. Then I saw him get his gun out of his pocket and he started to shooting. When I heard the first shot I looked up at the shelter. When the first shot fired I looked and saw Add fighting smoke out of his face. Then I saw Add come out from under the shelter and come out to the road and he met us. I did not see Walter do any shooting. I could see where he was after I looked around. After Add shot I moved.

Dyke Walker, sworn for the defendant, testified:

At the time Walter got shot I was sitting out in the buggy not far from there. I heard the noise; I wasn't paying them no attention until I heard the noise. I saw Walter with a pistol. I saw Walter shoot his pistol. Walter shot first; he shot before Add shot. When he made the first shot I saw Add fighting the smoke out of his face, and I got out of the buggy and went toward the shelter.

Arthur Ogletree, sworn for the defendant, testified:

I should think about eight or ten shots were fired. I couldn't tell exactly. One shot fired, and then in about 15 or 20 seconds and then the shooting began; it was so fast you couldn't count it. It came from more than one pistol; one pistol could not have shot that fast.

Defendant's statement was as follows:

I was down there at church and I wanted a drink of liquor and decided to go to the shelter, and I went up to the shelter and got around there—I got a drink from Clarke that morning and he told me if I wanted any more to go to the shelter where Neb was. Neb was standing under the shelter when I got around there, and I asked him did he have anything and he said not as much as a pint. "I may can spare you a drink," and he pulled the pint bottle from his pocket. Walter walked up and said, "Don't sell that damn son of a bitch a drink." I said, "Keep your mouth out of my business;" and he said, "Don't you like what I said?" And I said, "No; I don't;" and that time he come out with his pistol. Just as he threw it up I turned my head that way and the smoke was all in my eyes. I knocked the smoke out of my face, and when he made his next shot and when I got mine out I let in on him.

—Statement by editor.

Alvin G. Golucke and J. A. Beazley, both of Crawfordville, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

GILBERT, J. [1-3] The evidence relied on by the state for a conviction tends to show that the accused committed murder, whereas the statement of the accused and the evidence introduced in his behalf tend to sustain the defense of justifiable homicide. The law of voluntary manslaughter was not involved. *McBeth v. State*, 122 Ga. 737, 50 S. E. 931. The court did not err in failing to instruct the jury in regard thereto. No error is assigned upon any ruling during the trial, nor upon any charge or any other omission to charge the jury. The evidence authorized the verdict.

Judgment affirmed.

All the Justices concur, except FISH, C. J., and ATKINSON, J., dissenting, and GEORGE, J., absent.

FISH, C. J., and ATKINSON, J. There was evidence which would have warranted a finding that the defendant and the deceased, upon a sudden quarrel, each being armed with a deadly weapon, mutually engaged in a mortal combat, each using his weapon and intending to kill the other therewith. Under such circumstances it was the duty of the judge, without request, to give in charge to the jury the law of voluntary manslaughter as related to the doctrine of

"mutual combat," and the omission to do so was cause for new trial; the accused having been convicted of murder. *Waller v. State*, 100 Ga. 320, 28 S. E. 77; *Butt v. State*, 150 Ga. 302, 103 S. E. 466.

(151 Ga. 371.)

DEAN v. STATE. (No. 2177.)

(Supreme Court of Georgia. April 18, 1921.)

(Syllabus by the Court.)

1. Nuisance \S 77—Public nuisance will be enjoined at instance of state, though constituting a crime.

A court of equity will not enjoin the commission of crime generally; but it has jurisdiction, at will, in a proper case, at the instance of the state, restrain an existing or threatened public nuisance, though the offender is amenable to the criminal laws of the state.

2. Injunction \S 102—Nuisance \S 77—Criminality neither gives nor ousts jurisdiction; treatment of diseases by chiropractor not enjoined merely because contrary to penal statute.

That the act of which abatement by injunctive process is sought is made penal by statute neither gives nor ousts jurisdiction in chancery. Accordingly injunction will not lie at the instance of the state, to restrain one from engaging in the practice of treating persons according to the chiropractic method merely because such person is amenable to the criminal laws of the state, in that he has not taken the prescribed examination and obtained a license from the state board of medical examiners, required of practitioners of medicine.

(Additional Syllabus by Editorial Staff.)

3. Nuisance \S 72—One damaged by public nuisance has right of action.

Under Civ. Code 1910, \S 4485, providing that any abuse of, or damage to, the personal property of another unlawfully is a trespass for which damages may be recovered, a private citizen caused special damage by a public nuisance has a right of action therefor.

4. Nuisance \S 59—"Public nuisance" defined.

A nuisance may be public, though it does not cause hurt, inconvenience, or injury to all of the public, if it injures those of the public who may come in contact with it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public or Common Nuisance.]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Suit by the State against C. L. Dean. Judgment granting an interlocutory injunction, and defendant brings error. Reversed.

Upon the information of the commissioner of health of Colquitt county, the solicitor general of the Southern circuit, in the name of the state, brought an equitable action in

the superior court of that county against Clay L. Dean. The petition alleges that the defendant is a chiropractor; that he visits the homes of the people in the community and county for the purpose of treating diseases, and maintains an office and place of business in the city of Moultrie, said county, where he treats diseases; that he lacks the necessary skill and training to combat the spread and growth of communicable diseases, and is maintaining a public nuisance in the practice of his profession, in that, without having obtained a license to practice medicine from the state board of medical examiners as required by statute, he engages in the practice of his profession in said county. The petition generally charges the defendant with misdeeds and with malpractice, to the injury of his patients and to the injury of the good morals and health of the public at large. The prayer is that he be restrained and enjoined from "treating any person or persons or prescribing or directing any method of treatment, or in any other manner violating the laws of said state regulating the practice of medicine." The defendant's answer admits that he is a chiropractor, as alleged in the petition; that he is engaged in the practice of his profession for compensation, and that he has not taken the prescribed examination and obtained a license from the state board of medical examiners, as required of practitioners of medicine. All other allegations of fact are expressly denied. He contends that he does not practice medicine; that he neither prescribes nor administers drugs or medicines in the treatment of disease; that he is not required, as a chiropractor, to take the examination and to obtain a license from the state board of medical examiners, as provided by the act approved August 18, 1913 (Acts 1913, p. 101), and the several acts amendatory thereof; and that, if any of the statutes of this state require him, as a chiropractor, to take the prescribed examination and to obtain a license from the state board of medical examiners, required of practitioners of medicine, such statutes are unconstitutional, for reasons stated. Upon the hearing for interlocutory injunction the chancellor passed an order enjoining the defendant as prayed. To this order the defendant excepted.

Shipp & Kline, of Moultrie, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, Dowling & Askew, of Moultrie, and Johnson & Scott, of Atlanta, for the State.

GEORGE, J. (after stating the facts as above). The chancellor did not pass upon any issue of fact raised by the pleadings. He based his order enjoining the plaintiff in error from practicing his profession as a

chiropractor expressly upon the ground that the act of the General Assembly approved August 18, 1913 (Acts 1913, p. 101), and the several acts amendatory thereof, were valid statutes of this state and applicable to the plaintiff in error, and that the practice of his profession by the plaintiff in error without having complied with the provisions of the statutes aforesaid constituted a violation of the criminal law of the state. Since the chancellor did not exercise his discretion upon the disputed issues of fact involved, the evidence introduced at the interlocutory hearing becomes unimportant.

[2] For the purposes of this case, and for the purposes of this case only, the validity of the statutes involved, as construed and applied by the chancellor, will be conceded. Section 6 of the act approved August 18, 1913 (Acts 1913, pp. 101, 103), declares that it shall be unlawful for any person to practice medicine in this state without having first taken the prescribed examination and obtained a license from the state board of medical examiners authorizing him so to do. Section 16 of the act declares that any person practicing medicine in this state without complying with the provisions of the act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as prescribed in section 1065 of the Penal Code of 1910. Neither the act approved August 18, 1913, nor any of the acts amendatory thereof, declares one who engages in the practice of medicine in this state without having first taken the prescribed examination and obtained a license from the state board of medical examiners to be a public or common nuisance. None of the medical acts of this state undertake to extend the jurisdiction of equity over nuisances or to enlarge the category of public nuisances. The unlawful practice of medicine in this state is simply declared to be a misdemeanor. The question is, therefore, whether equity, at the instance of the state, will enjoin as a common nuisance one who is engaged in the practice of medicine (conceding that the plaintiff in error is engaged in the practice of medicine) who has not taken the prescribed examination and obtained a license from the state board of medical examiners authorizing him to engage in the practice of medicine in this state. The question may be stated as follows: Will equity, at the instance of the state, enjoin a person from practicing the profession of medicine simply because such person has failed to take the prescribed examination and to obtain a license from the state board of medical examiners authorizing him so to do, in violation of the penal laws of the state? To state the question is to answer it. The chancellor did not find that the practice of plaintiff in error's profession worked hurt, inconvenience, or damage to any particular person or to the public or to any particular part of the public. If

the plaintiff in error had obtained the license required of practitioners of medicine, the same acts and conduct complained of in the petition, so far as determined by the chancellor, would have been legal and would have worked no hurt, inconvenience, or damage to any particular person, to the public at large, or to any part of the public. It is settled law that a private nuisance may injure either person or property or both, and in either case a right of action accrues to the person injured. Civil Code 1910, § 4456.

[3] It is also settled law that, if a public nuisance causes special damage to a private citizen, he has a right of action therefor. Civil Code 1910, § 4485; *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 349, 100 S. E. 207, 6 A. L. R. 1564, and cases there cited. It is also settled in this state that as a general rule a public nuisance gives no right of action to any individual, but must be abated by process instituted in the name of the State. Civil Code 1910, § 4454.

[1] If a criminal act affect the whole community, or a part of the community necessarily brought in contact therewith, the act may be abated by process in the name of the state as a public nuisance, although criminal. *Walker v. McNelly*, 121 Ga. 114, 48 S. E. 718. Where an act, though made penal by statute, is per se a public nuisance, it may generally be abated by injunction on petition brought in the name of the state. *Brindle v. Copeland*, 145 Ga. 398, 89 S. E. 332. While "equity has no jurisdiction, upon the petition of individuals, to interfere in matters merely criminal, or to enjoin any one from the commission of a crime, when it does not appear that the act complained of affected any property rights of the" individuals (*O'Brien v. Harris*, 105 Ga. 732, 31 S. E. 745), equity has jurisdiction, in a proper case, to enjoin a public nuisance upon information filed by the solicitor general. Under Civil Code 1910, § 4454:

"Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals."

[4] It may also be said that a nuisance is either public or private or mixed. It may likewise be said that a public nuisance is one which causes hurt, inconvenience, or damage to the public generally, or such part of the public as necessarily come in contact with it. It is obvious that a nuisance may be public though it does not necessarily consist in any act or thing which does in fact cause hurt, inconvenience, or injury to all of the public; generally it is sufficient if it injures those of the public who may come in contact with it. These general principles may be subject to certain limitations, but it is unnecessary to notice the limitations here. Before the first medical act of Geor-

gia (Ga. Laws 1880-81, p. 172) it was not illegal to practice medicine as such in Georgia without examination and without license. The treatment of diseases according to the chiropractic method cannot be classed as a common or public nuisance. It is not per se a nuisance. The chancellor has refused to find in this case (even if it be conceded that he was authorized so to find) that the treatment of persons according to the chiropractic method, as practiced by plaintiff in error, was harmful to his patients, or to any part of the public, or to the public generally as noted above. The mere fact that the plaintiff in error in practicing his profession without a license may be guilty of a misdemeanor will not authorize a court of equity to enjoin him from practicing his profession. If the medical acts of this state are applicable to the plaintiff in error, he is amenable to criminal prosecution. Unless the Legislature sees fit to extend the jurisdiction of equity or to enlarge the category of public nuisances (conceding the power of the Legislature so to do), equity will not enjoin the plaintiff in error from practicing his profession simply because in so doing he is violating the penal laws of the state (conceding the validity of the medical acts, as construed and applied by the chancellor).

Judgment reversed.

All the Justices concur, except ATKINSON, J., disqualified.

(151 Ga. 323)

**HOLY TRINITY GREEK ORTHODOX
CHURCH OF AUGUSTA v. BRANSFORD.** (No. 2143.)

(Supreme Court of Georgia. March 16, 1921.)

(Syllabus by Editorial Staff.)

Remainders ¶10—Beneficiary of life interest in realty and sole heir of grantor held entitled to specific performance of contract to purchase, where her children, the remaindermen, were all dead.

Beneficiary of trust in land for and during her natural life, and after her death in further trust for the use and benefit of any child or children living at her death during their minority, to go to such child or children when they reached majority, or, if they died prior thereto, remainder to go to the estate of the grantor, who was the father of the said beneficiary, was entitled to specific performance of a contract to purchase the land, entered into after the death of the grantor, his wife and all the children of the beneficiary prior to reaching their majority, parents dying intestate and beneficiary being the sole heir and having been substituted as trustee, where defendant agreed to be satisfied with deed tendered, if it should pass a good and marketable title, except for the legal possibility of additional issue.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by Mrs. Lizzie Baker Bransford against the Holy Trinity Greek Orthodox Church of Augusta. Decree for plaintiff, and defendant brings error. Affirmed.

The defendant entered into a contract with plaintiff to purchase land, the petition, among other things, alleging the making of the contract sued on and that—

(3) In said contract of sale your petitioner obligated herself to furnish to said defendant a good and marketable title to said property, and to execute and deliver a good and sufficient deed, with warranty of title, to the party of the second part; a copy of said agreement, without the plat, being hereunto attached, marked Exhibit A, to which the usual reference is prayed.

(4) That in compliance with said agreement your petitioner on the 16th day of February, 1920, duly executed a warranty deed to the said defendant covering said tract of land described in said agreement, and tendered the same to said defendant for acceptance, and requested or demanded the payment of the purchase price, to wit, \$7,500, for said tract of land; a copy of said deed so executed and tendered by your petitioner being hereunto attached, marked Exhibit B, to which the usual reference is prayed.

(5) That upon the tender of said deed by your petitioner to defendant the defendant declined and refused to accept the same, giving as a reason therefor that said property was held by your petitioner under the terms and conditions of a trust set forth in the deed from Alfred Baker, your petitioner's father, to the said Alfred Baker, as trustee for your petitioner (your petitioner being named in said deed as Lizzie F. Bransford), dated the 25th day of May, 1888; a copy of said deed being hereunto attached, marked Exhibit C, to which the usual leave of reference is prayed as often as may be necessary. * * *

(7) Your petitioner further shows that under the terms of said trust deed said land was conveyed to said Alfred Baker, as trustee, in trust for the sole and separate use, benefit, and behoof of Lizzie F. Bransford, your petitioner, daughter of said Alfred Baker, for and during her natural life, free from the debts, contracts, liabilities, or control of any husband, and after her death in further trust for the use and benefit of any child or children living at her death, during their minority. If she die leaving no children at her death, or if they all die during their minority, then this trust to cease, and the property hereby conveyed, and all additions thereto by gift, grant, devise, purchase, accumulation, or otherwise, and all the trust property, shall go by reversion or remainder to grantor hereof, the said Alfred Baker. But if she leave child or children and any of her children attain majority, and provided they attain majority, then and in such case, in further trust, to hold said property and all additions thereto until they attain majority, and as each child attains such age to convey said property

in fee simple, share and share alike, to such child or children so attaining majority.

(8) Your petitioner further alleges that at the time said trust deed was executed she was married to Dr. John F. Bransford, and thereafter there was born to them two children only, to wit, Alfred Baker Bransford and Henry W. Bransford, each of whom died before attaining their legal majority, to wit, on August 24, 1911, and shortly after the death of her said two children her husband, Dr. John F. Bransford, departed this life, and your petitioner is now a widow, without children, and is over 60 years of age, unmarried, and has attained the age where the possibility of issue is extinct.

(9) That Alfred Baker, your petitioner's father, departed this life intestate on the 16th day of June, 1896, owing no debts and leaving as his sole heirs at law his widow (your petitioner's mother), Sarah Elizabeth Thayer Baker, and your petitioner, who was his daughter and only child, and there is no administration on his estate.

(10) That your petitioner's mother, the said Sarah Elizabeth Thayer Baker, died intestate on May 16, 1899, owing no debts and leaving as her sole and only heir at law your petitioner, her only child and daughter, and there is no administration on her estate.

(11) That on the 16th day of January, 1897, following the death of your petitioner's father, Alfred Baker, trustee under said deed, your petitioner was duly and legally appointed substituted trustee in lieu of said Alfred Baker, in appropriate proceedings by the judge of the superior court of said Richmond county, and duly qualified by giving bond as required in said trust deed, and continued to act as said trustee until after the death of her said two children in August, 1911. * * *

(17) That as your petitioner has no other children there are no other remaindermen under said deed other than the estate of said Alfred Baker, which, as hereinbefore stated, now belongs to your petitioner as the sole heir at law of the said Alfred Baker and his said wife, petitioner's mother, Sarah Elizabeth Thayer Baker.

(18) That as your petitioner is a widow, unmarried, over 60 years of age, and having reached that age where the possibility of issue is extinct, she owns the entire fee-simple interest in all of the property conveyed under said trust deed, or belonging to said trust estate.

(19) That your petitioner as such owner of said property has the unqualified right, individually, to sell and convey said property by a warranty deed, and to receive and collect the purchase price therefor.

(20) That your petitioner, having duly executed a warranty deed in compliance with the terms of said contract or agreement of sale, and duly tendered the same to said defendant, is entitled to specific performance of said contract, and said defendant should be required to accept said deed and pay the purchase price set forth in said agreement, to wit, \$7,500.

Defendant answering paragraph 18 of petition, "denies the legal conclusions therein stated, and says that the interest of Alfred Baker as a contingent reversioner or remainderman under the trust deed will pass

to the heirs at law of Alfred Baker, to be determined at the death of Mrs. Bransford."

The agreed statement of facts was as follows:

The parties to the above-stated cause agree that all questions of law and of fact be, and they are hereby, submitted to the judge of the superior court of the Augusta circuit to determine without the intervention of a jury.

In addition to the facts alleged in the petition and admitted in the answer to be true, the following facts are agreed:

On December 17, 1919, the plaintiff, Mrs. Bransford, and the defendant, the Holy Trinity Greek Orthodox Church, entered into the agreement set out in the petition. The plaintiff duly tendered the deed in accordance with the terms of the contract, and demanded payment therefor. The deed was declined for the reasons alleged in paragraph 5 of the petition.

All of the property covered by the deed tendered by the plaintiff is embraced in the trust estate represented originally by Alfred Baker, except, perhaps, a small fraction thereof, which belongs to the plaintiff individually, but it is admitted that the deed offered by the plaintiff carries with it this small fraction if it legally carries the portion which is owned by the trust estate.

It is admitted that if Mrs. Lizzie B. Bransford, the plaintiff, owns the estate in reversion, by inheritance from her father, as well as the life estate under the trust deed, that she has a good, marketable title to said property, and the deed tendered by her would pass a good and sufficient title to the defendant.

When the trust deed was executed, the plaintiff was married to Dr. Bransford, and thereafter there was born two children to the plaintiff, both of whom died August 24, 1911, during their minority. Shortly thereafter Dr. Bransford died, and the plaintiff is now a widow, without children, and is over 60 years of age. The possibility of issue is, so far as this case is concerned, extinct. If the deed tendered by the plaintiff passes a good and marketable title except for the legal possibility of additional issue of the plaintiff, the defendant is satisfied therewith.

Alfred Baker, the father of the plaintiff, died intestate June 16, 1896, leaving as his sole heirs at law his wife, Mrs. Sarah F. Baker, and the plaintiff, his daughter; and all of his debts have been paid. The said Sarah E. Baker died intestate May 16, 1899, leaving as her sole heir at law the plaintiff, and all of her debts have been paid.

Mrs. Bransford was, after the death of Alfred Baker, appointed trustee in his place, by appropriate proceedings in the superior court of Richmond county.

The construction of the trust deed, and the interest of the plaintiff thereunder, is to be determined in the light of the facts herein agreed to, with the additional facts alleged in the petition and admitted by the defendant, but not the conclusions of law, which the defendant denies in its answer.

—Statement by editor.

Wm. H. Fleming, and Alexander & Lee, all of Augusta, for plaintiff in error.

Callaway & Howard, of Augusta, for defendant in error.

GILBERT, J. This is a suit for specific performance of a contract for land. Under the pleadings and the agreed statement of facts, the court did not err in rendering a decree in favor of plaintiffs.

Judgment affirmed.

All the Justices concur except GEORGE, J., absent.

(26 Ga. App. 652)

AMMONS v. STATE. (No. 12217.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

1. Homicide \S 82—Defendant liable, though fatal shot fired by another if there was a conspiracy.

If a conspiracy existed between defendant, convicted of manslaughter, and another to take the life of deceased, and both shot at deceased about the same time, it was not essential to a conviction that defendant's shot should have been the fatal one.

2. Homicide \S 340(4)—Erroneous charge on murder is harmless when verdict is for manslaughter.

An erroneous charge on the subject of murder does not require a new trial in a case where the verdict was for manslaughter.

3. Homicide \S 281—Submission of question of conspiracy held proper.

Where there was some evidence of a conspiracy between defendant and another to kill deceased, it was not error to submit the question of conspiracy to the jury, accompanied by appropriate instructions.

Error from Superior Court, Rockdale County; John B. Hutcheson, Judge.

Americus Ammons was convicted of manslaughter, and he brings error. Affirmed.

J. H. McCalla and C. R. Vaughn, both of Conyers, and King & Johnson, of Covington, for plaintiff in error.

A. M. Brand, Sol. Gen., of Lithonia, for the State.

BROYLES, C. J. [1] 1. The defendant was charged with murder, and upon the trial there was some evidence which would have authorized the jury to find that a conspiracy existed between the defendant and his half-brother to take the life of the deceased, and that both of them shot at the deceased about the same time, and that one of them killed him. In view of these facts, it was not error for the court to refuse to charge:

"In order to convict the defendant of the offense of murder or voluntary manslaughter, it is necessary that you believe beyond all reasonable doubt that the defendant now on trial fired the shot that took away the life of the deceased.

And, unless the evidence so convinces you, you would not be authorized to convict the defendant either of murder or voluntary manslaughter. In other words, unless you believe beyond a reasonable doubt that it was the bullet from the defendant's pistol that killed the deceased, you would not be authorized to find the defendant guilty of either murder or manslaughter, and in this view you would not be required to grade this homicide."

[2] 2. Under repeated rulings of the Supreme Court and of this court, an erroneous charge upon the subject of murder does not require a new trial in a case where the verdict was for manslaughter. Under this ruling, ground 5 of the motion for a new trial is without merit.

[3] 3. Under the evidence it was not error for the court to submit to the jury the question whether or not a conspiracy had been shown, and to accompany the submission of this question with appropriate instructions thereon.

4. The verdict was amply authorized by the evidence, and it was not error to overrule the motion for a new trial.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 671)

ALLEN v. STATE. (No. 12085.)

(Court of Appeals of Georgia, Division No. 1.
April 14, 1921.)

(Syllabus by the Court.)

Criminal law \S 1015—Errors in two proceedings for similar offenses not reviewable on one bill of exceptions.

Where a defendant is charged in two accusations with the offense of simple larceny, pleads guilty to both charges, and is sentenced to the chain gang for each offense, he cannot in one bill of exceptions bring to this court for review the question of whether or not the trial judge erred in overruling his single motion to withdraw his two pleas of guilty. There being no provision of law for such procedure, this court is without jurisdiction to entertain such a bill of exceptions. See *Futch v. Mathis*, 148 Ga. 558, 97 S. E. 516, and cases there cited.

Error from City Court of Albany; Clayton Jones, Judge.

John Allen, Jr., was convicted of simple larceny, and he brings error. Writ of error dismissed.

Lippitt & Burt, of Albany, for plaintiff in error.

Cruger, Westbrook, Sol., of Albany, for the State.

LUKE, J. Writ of error dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 725)

VENABLE v. S. W. BACON PRODUCE CO.
(No. 12022.)(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)*(Syllabus by the Court.)*

Certiorari \S 70(8)—For insufficiency of evidence, if finding affirmed by superior court is supported by evidence, there is nothing for review.

Where a petition for the writ of certiorari is based solely on the allegation that the finding of the trial court was unsupported by any evidence, and the finding is sustained on review by the judge of the superior court and the certiorari overruled, no question for decision by this court is presented, if there is some evidence to support the finding of the trial court.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between Sam Venable and the S. W. Bacon Produce Company. Judgment for the latter, and certiorari overruled by the superior court, and Venable brings error. **Affirmed.**

Walter A. Sims, of Atlanta, for plaintiff in error.

Westmoreland & Smith, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 709)

COLLINS v. HARRISON. (No. 11848.)(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)*(Syllabus by Editorial Staff.)*

Appeal and error \S 1097(9)—Instructions in harmony with law of case on former appeal cannot be held erroneous or inapplicable.

Where on a second trial the same and additional evidence was submitted, charges authorized by the law of the case as fixed and determined on the first appeal cannot be regarded as erroneous or inapplicable.

Error from Superior Court, Montgomery County; E. D. Graham, Judge.

Proceedings on a claim by J. C. Collins to property levied on under a distress warrant in favor of M. A. Harrison. Judgment for plaintiff, and the claimant brings error. **Affirmed.**

A. C. Saffold, of Vidalia, for plaintiff in error.

M. B. Calhoun, of Mt. Vernon, for defendant in error.

JENKINS, P. J. In *Collins v. Harrison*, 24 Ga. App. 404, 106 S. E. 794, the law of this case was fixed and determined. Those por-

tions of the charge of the court on the subsequent trial which are now complained of cannot therefore be adjudged to be erroneous statements of legal principles; and, under the same and additional evidence submitted at the second trial, such instructions cannot be held inapplicable to the issues involved. Under all the facts and circumstances disclosed by the evidence, the jury were authorized to find that the purchase made by the claimant was not bona fide.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 611)

BRYANT v. STATE. (No. 12093.)(Court of Appeals of Georgia, Division No. 1.
April 18, 1921.)*(Syllabus by Editorial Staff.)*

1. **Criminal law** \S 534(2)—Confession held sufficiently corroborated.

On a trial for having possession of alcoholic liquors, etc., defendant's confession held sufficiently corroborated to support a conviction by the finding of the liquor at the place designated by him.

2. **Criminal law** \S 535(1/2)—Proof of corpus delicti may be sufficient corroboration of confession.

Proof of the corpus delicti may be sufficient corroboration of a confession of guilt to sustain a verdict of guilty.

3. **Criminal law** \S 741(3)—Sufficiency of corroboration of confession is for jury.

While a conviction based on an uncorroborated confession cannot be sustained, the sufficiency of the corroborative circumstances is to be determined by the jury.

Error from City Court of Macon; Will Gunn, Judge.

Will Bryant was convicted of having possession of certain liquors, and he brings error. **Affirmed.**

H. F. Rawls, of Macon, for plaintiff in error.

Roy W. Moore, Sol., and H. S. Strozler, both of Macon, for the State.

BLOODWORTH, J. [1-3] The accusation in this case charged that the accused—

"did unlawfully have, control, possess, and have in possession, alcohol, alcoholic liquors, spirituous liquors, mixed liquors, whisky, brandy, wine, rum, and gin."

Upon the trial, a confession of guilt was clearly shown. In this confession defendant stated that he had brought certain whisky from Jones county on the morning of January 7th, and left it at the home of his sister. The confession was corroborated by proof that on that date the officers found at

the home of the defendant's sister, on Hall street in East Macon, "three gallons of stump rum whisky." "Proof of the corpus delicti may be sufficient corroboration of a confession of guilt to sustain a verdict of guilty." *Davis v. State*, 105 Ga. 808 (3), 32 S. E. 158; *Allen v. State*, 8 Ga. App. 90, 68 S. E. 558. "While a conviction based upon an uncorroborated confession cannot be sustained, the sufficiency of the circumstances adduced for the purpose of corroboration is to be determined by the jury." *Cook v. State*, 9 Ga. App. 208 (3), 70 S. E. 1019.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 603)

HALL COUNTY v. HULSEY et al.
(No. 12071.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 977(4)—Grant of first new trial not disturbed where evidence does not demand verdict.

The Court of Appeals will not interfere with the first grant of a new trial where the evidence, including alleged newly discovered evidence, does not demand the verdict returned.

2. Appeal and error \S 843(4)—Pendente lite exceptions not considered when grant of new trial affirmed.

When a judgment granting a new trial is affirmed, the court cannot consider exceptions pendente lite to rulings on the pleadings as the case is still pending in the lower court.

Error from City Court of Hall County;
A. C. Wheeler, Judge.

Action by J. M. Hulsey, executor, and others against Hall County. Verdict for defendant. Grant of a new trial, and defendant brings error. Affirmed.

H. H. Perry, of Gainesville, for plaintiff in error.

Hammond Johnson, of Gainesville, for defendants in error.

BROYLES, C. J. 1. The motion to dismiss the writ of error is denied.

[1] 2. This being the first grant of a new trial, and the evidence, including the alleged newly discovered evidence, not demanding the verdict returned, this court will not interfere.

[2] 3. The defendant brought the case here, complaining of the first grant of a new trial, and also assigning error upon exceptions pendente lite to interlocutory rulings of the judge. These pendente lite exceptions included exceptions to the allowance of amendments to the plaintiff's petition and to the overruling of general and special demurrers to the petition. The judgment granting a

new trial having been affirmed, the case is still pending in the lower court, and this court cannot now consider and determine the questions made by the pendente lite exceptions. *Armour & Co. v. Burkhalter*, 130 Ga. 370, 60 S. E. 850, and citations.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 584)

BUCKEYE COTTON OIL CO. v. EVERETT.
(No. 11691.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 302(4)—Exception to instruction in motion for new trial must set it forth literally or in substance.

An alleged erroneous instruction cannot be reviewed when the exception thereto in motion for new trial does not set forth its language literally or in substance so as to convey a clear understanding of the instruction.

2. Appeal and error \S 1078(6)—Grounds of motion for new trial not referred to in brief are abandoned.

Grounds of the motion for a new trial not referred to in the brief for plaintiff in error must be treated as abandoned.

Error from Superior Court, Bibb County;
H. A. Mathews, Judge.

Action by G. F. Everett against the Buckeye Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Miller & Jones, of Macon, for plaintiff in error.

Sibley & Sibley, of Milledgeville, and Hall, Grice & Bloch, of Macon, for defendant in error.

BLOODWORTH, J. 1. In *Buckeye Cotton Oil Co. v. Everett*, 24 Ga. App. 739, 102 S. E. 167, this court held that the petition in this case set out a cause of action. The evidence submitted at the trial supports the allegations of the petition, and the verdict has the approval of the judge who tried the case.

[1, 2] 2. Some of the special grounds of the motion for a new trial failed to conform to the rule laid down by the Supreme Court, that—

"This court cannot review an instruction alleged to be erroneous, when the exception thereto does not set forth, literally or in substance, the language complained of, so as to convey a clear understanding of such instruction." *Williams v. State*, 145 Ga. 177, 88 S. E. 958.

See, also, *Seaboard Air Line Ry. v. Phillips*, 117 Ga. 98 (2), 43 S. E. 494; *Smith v. Owen*, 112 Ga. 531 (1), 37 S. E. 729; *St. John*

v. Leyden, 111 Ga. 152 (4), 36 S. E. 610; Southern Railway Co. v. Dantzer, 99 Ga. 323 (2), 25 S. E. 606. Other of the special grounds are not referred to in the brief of plaintiff in error, and must be treated as abandoned. Crawford v. State, 149 Ga. 485 (4), 100 S. E. 633; Starling v. State, 24 Ga. App. 422 (3), 100 S. E. 771. In the condition in which we find the record and the brief of counsel for the plaintiff in error, we cannot say that the trial judge erred in overruling the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 702)

DECATUR COUNTY v. PHILYAW.
(No. 11811.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by Editorial Staff.)

1. Bridges §44(4) — Traveler may recover for injuries though knowing of defects.

A traveler on a public highway exercising due care may recover for injuries sustained in driving over a defective bridge, though he knows there is some danger, unless the danger is obviously of such a character that driving over the bridge in itself amounts to a want of ordinary care.

2. Appeal and error §1033(9)—Defendant cannot complain that verdict is too small.

Defendant cannot complain that the amount of the verdict was less than the proven damages.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by H. W. Philyaw against Decatur County. Judgment for plaintiff and defendant brings error. Affirmed.

Hartsfield & Conger, of Bainbridge, for plaintiff in error.

W. V. Custer, of Bainbridge, for defendant in error.

JENKINS, P. J. [1] 1. "A traveler on the public highway, exercising due care, although he knows there is some danger in driving over a defective bridge, may recover for injuries thus sustained, unless the danger is obviously of such a character that driving over the bridge, in and of itself, amounts to a 'want of ordinary care.'" *Elbert County v. Threkeld*, 145 Ga. 133, 88 S. E. 683. The charge of the court, having followed this language of the Supreme Court, and being otherwise qualified and enlarged by a correct statement of the law relative to the burden of proof, the respective duties of the plaintiff and the county to exercise ordinary care, and the burden on the plaintiff to

show actual or constructive notice to the county of the defect in the bridge, is not subject to the exceptions taken.

[2] 2. The verdict was warranted by the evidence, and the defendant cannot complain that the amount found was less than the proven damages. *Central of Ga. Ry. Co. v. Trammell*, 114 Ga. 312 (3), 40 S. E. 259; *Pullman Co. v. Schaffner*, 126 Ga. 609, 610 (4), 55 S. E. 983, 9 L. R. A. (N. S.) 407; *Parker v. Roberts*, 19 Ga. App. 270 (2), 91 S. E. 345. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 649)

EASON v. STATE. (No. 12202.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by the Court.)

Homicide §316—Failure to charge on involuntary manslaughter held not ground for new trial, in absence of request.

Under the facts of the case, the failure of the court to instruct the jury upon the law of involuntary manslaughter in the commission of a lawful act without due caution and circumspection was not, in the absence of a request for such an instruction, cause for a new trial.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Bill Eason was convicted of involuntary manslaughter, and he brings error. Affirmed.

Way & McCall, of Reidsville, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

BROYLES, C. J. The defendant was charged with murder, and convicted of involuntary manslaughter in the commission of an unlawful act. The evidence authorized a finding that the defendant was unlawfully pointing a rifle at the deceased, when it accidentally fired, killing the deceased. The defendant's sole defense was that the killing was accidental, and in his statement he said he did not know the gun was loaded, and that it went off accidentally, but he did not specifically deny that he had the gun pointed at the deceased when it fired. On the contrary, he admitted that a few minutes previous to the shooting he had "thrown" the gun towards the deceased, but that, if he had known it was loaded, he would not have been "pranking" with it. Furthermore, no witness in the case specifically testified that the defendant was not pointing the gun at the deceased when it fired. The court fully and clearly instructed the jury upon the law of accident. Under these facts, the failure to

charge upon the law of involuntary manslaughter in the commission of a lawful act without due caution and circumspection does not, in the absence of a request for such an instruction, require another trial of the case.

The verdict was amply authorized by the evidence, and it was not error to overrule the motion for a new trial.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 620.)

BRAY v. STATE. (No. 12113.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 453, 1064(4)—Testimony that man in automobile containing liquor was defendant in opinion of witness held competent; ground of motion for new trial not complete when brief of evidence must be examined.

The amendment to the motion for a new trial was without merit.

2. Intoxicating liquors \S 236(4)—Evidence sufficient to support conviction for possessing liquors.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Hall County;
A. C. Wheeler, Judge.

G. E. Bray was convicted of having possession of intoxicating liquors, and he brings error. Affirmed.

W. J. Phillips and B. P. Gaillard, Jr., both of Gainesville, for plaintiff in error.

E. D. Kenyon, Sol., of Gainesville, for the State.

BROYLES, C. J. [1] 1. The motion for a new trial complains that, over the objection of the defendant, the court admitted the following material evidence of a witness:

"As to who was in the car I couldn't say, my opinion it was Mr. Bray, or some one similar to him, looked like him that night. In the best of my opinion he was the man."

We think this evidence was admissible for what it was worth. Furthermore, the ground is not complete within itself, since it would require an examination of the brief of evi-

dence for this court to ascertain whether the evidence was material.

[2] 2. The defendant was charged with having in his possession intoxicating liquors. The evidence showed that on the night of March 17, 1920, in Hall county, an automobile containing 50 gallons of whisky was captured by two officers. Two men were in the automobile, and were seen by the officers, but these men escaped. The defendant was accused of being one of these men, but denied the charge and attempted to prove an alibi. He stated that on the night of March 17, 1920, he was in Augusta with a friend named J. C. Mitchell. J. C. Mitchell testified to the same effect. There was other testimony tending to support this alibi. It was proved that the defendant was engaged in the taxicab business in Athens, Ga., and that he had four automobiles, one of which was the "whisky" car captured by the officers. The defendant introduced evidence tending to show that this car was stolen from his garage while he was in Augusta with Mitchell. One of the arresting officers testified as follows:

"As to who was in the car (the "whisky" car in question) I couldn't say, my opinion it was Mr. Bray, or some one similar to him, looked like him that night. In the best of my opinion he was the man."

The other officer testified that he could not swear that the defendant was one of the men in the car, but this witness did swear positively and unequivocally that he did recognize the defendant's witness, J. C. Mitchell, as one of the two men who were in the car on the night it was captured. The jury had the right to believe this witness' testimony in preference to all of the other testimony in the case, and if they believed his testimony was true (J. C. Mitchell having sworn that he and the defendant were together in Augusta on the night of March 17, 1920, and the defendant having stated the same thing), then they were authorized to reject that part of Mitchell's testimony, and that part of the defendant's statement, as to their being in Augusta on that night, and to find that they were together in the "whisky" car in Hall county on that date. It follows that the defendant's conviction was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 398)

NORRIS v. LYNCH. (No. 11743.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by Editorial Staff.)*

1. New trial \Leftrightarrow 35—Admission of irrelevant evidence no ground.

The admission of irrelevant and immaterial evidence held not ground for a new trial.

2. Trial \Leftrightarrow 85—General objection to evidence admissible in part insufficient.

Where evidence is offered and objected to, and a portion thereof is admissible and a part objectionable, unless the illegal portion is specified and properly objected to, the whole will be admitted.

3. Appeal and error \Leftrightarrow 1078(6)—Grounds for new trial waived by failure to argue.

Special grounds of motion for new trial, not argued in the brief of plaintiff in error, will be treated as having been abandoned.

4. Appeal and error \Leftrightarrow 1005(2)—Approved verdict supported by evidence not disturbed.

Where there was some evidence to support the verdict, which has the approval of the trial judge, the appellate court will not interfere.

Error from City Court of Carrollton; James Beall, Judge.

Action by Grandison Lynch against H. C. Norris. Judgment for plaintiff, and defendant brings error. Affirmed.

Boykin & Boykin, of Carrollton, for plaintiff in error.

Emmett Smith, of Carrollton, for defendant in error.

BLOODWORTH, J. [1] 1. If the court erred in the admission of certain irrelevant and immaterial evidence, as complained of in the first and second grounds of the amendment to the motion for a new trial, this evidence was not of such materiality as to require the grant of a new trial. See *Arnold v. Stevens*, 139 Ga. 495, 77 S. E. 579; Ga., Fla. & Ala. Ry. Co. v. Parsons, 12 Ga. App. 180 (6), 76 S. E. 1063.

[2] 2. "Where evidence is offered and objected to, and a portion thereof is admissible and a part objectionable, unless the illegal portion is specified and properly objected to, the whole will be admitted." *City of Atlanta v. Sciple*, 19 Ga. App. 604 (3), 698, 92 S. E. 28, and cases cited. See, also, *Thacher v. Carolina Cement Co.*, 21 Ga. App. 569 (1), 94 S. E. 838, and cases cited; *Eckman v. State*, 23 Ga. App. 392, 98 S. E. 187; *Sykes v. State*, 23 Ga. App. 547, 548, 99 S. E. 55, and cases cited. This ruling disposes of ground 3 of the amendment to the motion for a new trial.

[3] 3. Grounds 4 and 5 of the amendment to the motion for a new trial, not being argued in the brief of plaintiff in error, will be treated as having been abandoned.

[4] There was some evidence to support the verdict, which has the approval of the trial judge, and this court will not interfere. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 479)

MAPP v. STATE. (No. 11884.)(Court of Appeals of Georgia, Division No. 1.
March 9, 1921.)*(Syllabus by Editorial Staff.)*

1. Criminal law \Leftrightarrow 1064(4)—Ground of motion for new trial, not showing objection overruled, is insufficient.

A ground of a motion for new trial, complaining of the overruling of an objection to a question asked a witness, presents nothing for consideration, where it does not state what the objection was.

2. Criminal law \Leftrightarrow 1064(4, 6)—Ground of motion for new trial, not showing objection to conduct of court and admission of evidence held insufficient.

A ground of a motion for a new trial, complaining that the court directed the solicitor general to ask a witness a question and admitted the answer, presents nothing for review where it fails to show any objection.

3. Witnesses \Leftrightarrow 367(1)—Cross-examination as to whether a witness was paid his expenses, held properly excluded.

On a trial for manufacturing intoxicating liquors, the exclusion, as immaterial, of a question, asked the sheriff on cross-examination, as to whether he got certain expenses back out of insolvent costs and other things, held not error.

4. Witnesses \Leftrightarrow 371—Rulings as to extent to which defendant could show motive for witness' implication of defendant's witness held not error.

Where a witness for the state had also implicated O., a witness for defendant, and defendant sought to show motive by the testimony of O. that the state's witness broke his contract to work for O. by running away, and that O. sent after him and had him brought back, the court's ruling that defendant could show he had a contract and went away, but not the particulars of the contract, held not error.

5. Witnesses \Leftrightarrow 363(1)—Cross-examination of defendant's witness, implicated by witness for state, held proper.

Questions asked a witness for defendant, who had been implicated in the offense by a witness for the state, on cross-examination, as to how many times he was before the grand jury, whether a third party brought him and others, and took considerable interest in the case, and why he objected "to turning this boy loose," held properly permitted.

6. Criminal law Ⓔ1064(4)—Motion for new trial, not naming witness giving objectionable testimony, not considered.

A ground of a motion for new trial, complaining of the admission of specified testimony, but not stating the name of the witness, cannot be considered on appeal.

7. Criminal law Ⓔ789(2)—Instruction defining "reasonable doubt" held not erroneous.

An instruction that there was a presumption of defendant's innocence, which remained until removed by proof sufficient to satisfy the jury beyond a reasonable doubt, defining a "reasonable doubt" as one growing out of the evidence, either the want of sufficient evidence or the conflicts in evidence, and leaving the mind of the jury, seeking the truth, wavering and unsettled, and unable to come to a conclusion as to the truth, and that when the jury had such a doubt they should acquit, was not erroneous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

8. Criminal law Ⓔ922(2)—Failure to charge that jury are judges of law and facts not ground for new trial.

The failure to charge in a criminal case that the jury are the judges of the law and the facts is not ground for reversal of a judgment refusing a new trial.

9. Intoxicating liquors Ⓔ167—One aiding in manufacturing liquors held guilty.

On a trial for manufacturing liquors, an instruction that one aiding in the manufacture of liquor, whether he owned the still or not, was as guilty as if he owned the still and did the work himself, held not to require a new trial.

Error from Superior Court, Douglas County; F. A. Irwin, Judge.

Ernest Mapp was convicted of manufacturing liquor, and he brings error. Affirmed.

The second ground of the amended motion for a new trial complained of the exclusion of a question asked the sheriff as to whether he got certain expenses back out of the insolvent costs and other things, on the ground that it was immaterial and had nothing to do with the case.

Jake Heflin was a witness against defendant, and also implicated one Odom. The third ground complained of the exclusion of questions asked Odom for the purpose of showing that Heflin's motive for implicating him was that he had broken his contract to work for Odom by running away, and that Odom had sent after him and had him brought back. The court's ruling was that—

"I will let you show that he had a contract and went away, but the particulars of the contract cannot be proved."

The fourth ground complained of the admission of questions asked Odom on cross-

examination as to the number of times he was before the grand jury, whether one Lumsden brought him and others every time, and if Lumsden did not take considerable interest in the case, and—

"What did you demand of the sheriff, that you objected to turning this boy loose?"

—Statement by editor.

James & Bedgood, of Atlanta, for plaintiff in error.

J. R. Hutcheson, Sol. Gen., of Douglasville, for the State.

BROYLES, C. J. [1, 2] 1. The first ground of the amendment to the motion for a new trial alleges that the court erred in not sustaining the objection of counsel for the defendant to a certain question propounded to a witness and to the answer thereto, but it is not stated in the ground what the objection was. In the same ground complaint is made that the court, on its own motion, directed the solicitor general to ask the witness a certain question, and error is assigned upon this direction of the court, and upon the admission of the answer of the witness; but the ground fails to show that any objection was made during the trial to the direction of the court or to the admission of the answer of the witness. It follows that the ground presents no question for the consideration of this court.

[3-5] 2. The rulings upon the admissibility of evidence, as set forth in the second, third, and fourth grounds of the amendment to the motion for a new trial, were not erroneous for any reason assigned.

[6] 3. The fifth ground of the amendment to the motion for a new trial cannot be considered, since it complains of the admission of specified testimony of a witness, but fails to state the name of the witness. *Adams v. State*, 22 Ga. App. 252 (1), 95 S. E. 877, and cases cited.

[7] 4. There was no error in the following excerpt from the charge of the court:

"The defendant comes before you with the presumption of innocence in his favor; that presumption should remain with him until it is removed by proof—by proof sufficient to satisfy you beyond a reasonable doubt. A reasonable doubt is a doubt that grows out of the evidence, either the want of sufficient evidence to satisfy you or the conflicts in the evidence. It is a doubt that leaves the mind of the jury, seeking the truth, wavering and unsettled—not satisfied from the evidence, unable to come to a conclusion as to what the truth is, and when you have such a doubt as that, you should give it to the defendant and acquit him."

[8] 5. The failure of the judge to charge the jury that in a criminal case they are the judges of the law and the facts is not

ground for a reversal of the judgment refusing a new trial. *Jones v. State*, 136 Ga. 187, 71 S. E. 6; *Brown v. State*, 151 Ga. —, 105 S. E. 289.

[9] 6. Under the facts of the case, a new trial is not required because of the following excerpt from the charge of the court:

"I charge you that, if a man aids in the manufacture of liquor in any way, whether he owns the still or not, if he aids in manufacturing liquor, he is as guilty as if he owned the still and did the work himself."

7. The verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 450)

TERRY SHIPBUILDING CORPORATION v. GREGORY. (No. 11914.)

(Court of Appeals of Georgia, Division No. 1. March 9, 1921.)

(Syllabus by Editorial Staff.)

1. Appeal and error \S 1002 — Verdict based on conflicting evidence not disturbed.

A verdict based on conflicting evidence will not be disturbed on appeal where sufficient to sustain the verdict.

2. Appeal and error \S 302(3)—Complaint of admission of evidence not considered in absence of evidence in ground for new trial.

A ground of motion for a new trial complaining of the admission of certain documentary evidence cannot be considered where the evidence is not set forth in the ground or attached to it as an exhibit.

3. New trial \S 35—Refusal to permit witness to testify not ground when no sufficient offer made.

Refusal to permit a witness to testify as to a certain matter is not cause for a new trial where it is not shown what he would have testified or was expected to testify as to the matter if he had been allowed to do so, nor unless it appears that the party complaining of such refusal offered the testimony or asked that it be admitted, nor unless the court was informed of what it was proposed to prove by the witness, and it should appear that such testimony was material and would have benefited the complaining party.

4. Appeal and error \S 1033(1)—No complaint of favorable ruling.

Party cannot complain on appeal of a ruling in his favor.

5. Trial \S 29(2)—Statement of court held not to amount to an expression of opinion.

Statement of court in presence of jury when admitting a letter: "I will admit this letter. It appears that it required an answer and contains a statement which, if found true, the de-

fendant had an opportunity to deny"—held not to amount to an expression or intimation of an opinion as to what had been proved in the case.

6. Trial \S 255(13)—Not necessary to explain to jury meaning of preponderance of evidence in absence of request.

In the absence of an appropriate request, it is not error to fail to explain to the jury the meaning of "the preponderance of the evidence."

7. Trial \S 233(1) — Charge held to set out contentions of defendant in plea excusing discharge of plaintiff as servant.

In an action by a servant for salary after an alleged wrongful discharge, where defendant contended that contract of employment terminated at time of alleged wrongful discharge, and that plaintiff had done no work after that date and was due no pay, and that the discharge was justified in that he had been employed upon representations that he was perfectly competent, and he proved to be incompetent, opinionated, egotistical, and incapable of working harmoniously with those around him, held, that charge of court substantially set out the contentions of defendant as contained in its plea.

8. Trial \S 248 — Charge held to apply to facts.

In an action by servant alleging that he was wrongfully discharged before the expiration of his contract of employment, charge held not subject to the criticism that it failed to apply the law to the particular facts in the case.

9. Master and servant \S 44 — Charge on breach of contract held not objectionable.

In an action by servant for wrongful discharge, the charge, viewing it as a whole, held not objectionable in the absence of a specific request to that effect for failing to charge more fully what constituted a breach of the contract.

10. Master and servant \S 44—Charge on issue of wrongful discharge held full and fair.

In an action for wrongful discharge before the expiration of contract of employment, where defendant contended that plaintiff had falsely represented that he was competent, when in fact he was incompetent and could not work in harmony with those about him, charge of court held full and fair.

11. Master and servant \S 44 — Instruction on condonation of breach of contract held applicable to issues.

In an action for wrongful discharge, an instruction as to waiver of breach of contract by the servant and presumption as to condonation held applicable to the issues and pleadings, defendant claiming that it rightfully discharged plaintiff by reason of his incompetency and inability to work harmoniously with others.

12. Trial \S 193(2), 240 — Instruction as to waiver of breach of contract of employment held not argumentative or expressive of opinion of court.

In action by employee against master who, he alleged, had wrongfully discharged him, an instruction as to condonation and waiver of

breach of contract of employment by employee *held* not argumentative or calculated to impress the jury with the idea that the court favored the plaintiff rather than the defendant.

13. Master and servant — Charge on damages for discharge held proper.

A charge that, if, because of the fact it suited the convenience of the defendant to change its business, or if for any reason not growing out of the fault of the plaintiff it saw fit to discharge him, the jury would be authorized to find that there was a breach of the contract of hiring, and then would determine what damages, if any, the plaintiff has sustained, *held* proper as against contentions that it contained an intimation that defendant had changed its business and discharged the plaintiff for that reason; there being no pleadings or evidence on which to properly predicate such a charge; and that the court did not point out any rule of damages, and did not point out that defendant would be entitled to a credit for whatever plaintiff earned in other employment.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by C. H. Gregory against the Terry Shipbuilding Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Some of the grounds of the motion for new trial were as follows:

(12) Because the court erred in admitting in evidence the letter of April 3, 1919, from the plaintiff, O. H. Gregory, to Mr. J. J. Seknicka, superintendent planning and progress department, over the objections of defendant that the same was a self-serving declaration and because the court in admitting the letter in evidence stated in the presence of the jury: "I will admit this letter. It appears that it required an answer and contains a statement which, if found true, the defendant had an opportunity to deny"—the expressions from the bench constituting an expression of opinion favorable to the plaintiff's side of the issue and was confusing and misleading to the jury, in that said ruling imposed upon the defendant an obligation of answering a letter which called for no reply, especially as the plaintiff in said letter construed his alleged discharge by Mr. Seknicka as not having any other meaning than an expression of Mr. Seknicka's desire and intention to have the plaintiff transferred to another department of the Terry Shipbuilding Corporation, the court having already declined to permit the defendant's general superintendent, George Baxter, to testify as to what took place between him and Mr. Waugh, superintendent of ship construction, and between him and Mr. Russ, the defendant's vice president and treasurer, with reference to the placing of plaintiff in another department of the Terry Shipbuilding Corporation.

(13) Because the court erred in charging the jury as follows: "In order to justify a master in discharging the servant, the servant must have been guilty of conduct that amounts to a breach of some expressed or implied provision

of the contract of hiring. Anything less than that will not amount to a legal justification or excuse"—without anywhere in the charge pointing out to the jury what would have constituted such a breach of contract in the light of the contentions made in defendant's plea.

(14) Because the court erred in charging the jury as follows: "The question as to whether the master has waived a breach of contract by the servant by retaining him in service after knowledge of such breach is a question of fact for the jury. Prima facie it is a waiver and a condonation is presumed; but, if there are circumstances shown that tend to establish a reasonable or proper excuse for delay, it is for the jury to say whether in fact the breach was condoned. If, however, such breach has in fact been condoned, it cannot subsequently be relied on by the master to discharge the servant from the master's service"—the errors being: * * *

(b) It was inapplicable to the issues in the case and not warranted by the pleadings or the evidence.

(c) It was argumentative and calculated to impress the jury with the idea that the court favored the plaintiff rather than the defendant.

(15) Because the court erred in charging the jury as follows: "But if you find that the plaintiff entered the service of this defendant company under a contract, and if because of the fact it suited the convenience of the company to change its business, or if for any other reason not growing out of the fault of the plaintiff it saw fit to discharge the plaintiff from its service, you would be authorized to find that there was a breach of the contract of hiring, and then you would determine what damages, if any, the plaintiff has sustained by reason of the breach of that contract, and you would be authorized to find a verdict for that amount"—the errors being:

(a) That the instruction quoted contained an intimation to the jury that the defendant company had changed its business and discharged the plaintiff from its service for that reason, there being no pleadings or evidence on which to properly predicate such a charge.

(b) The court did not in said instruction, nor elsewhere in the charge, point out to the jury any rule or measure by which to determine what damages, if any, the plaintiff sustained by reason of his discharge.

(c) The court did not in said instruction, nor elsewhere in the charge, point out to the jury on the question of damages that the defendant would be entitled to a credit or offset against plaintiff's damages for whatever amount the plaintiff earned in other employment or might by proper application and due diligence have earned in other employment during the period of time from April 15 to May 1, 1919, which was the period of time involved in the suit.

The charge of the court was as follows:

The plaintiff brings his action against the defendant for \$100. The defendant denies that it owes the plaintiff \$100 or any part thereof. The defendant says that the plaintiff performed no service for it between April 15th and May 1st, and that the defendant is not indebted to the plaintiff for any salary for that period of time. The defendant, for further plea, says

that, effective April 15, 1919, the service of the plaintiff with the defendant was discontinued by the defendant, due notice thereof and all the notice that the plaintiff was entitled to being given to the plaintiff by the defendant. The defendant insists that, "irrespective of any question as to the term for which plaintiff may have been employed, the dismissal of the plaintiff by the defendant from its employment was justified by law. The defendant avers that the plaintiff had been employed by the defendant to work in its shipyard at Port Wentworth and represented himself, or caused himself to be represented, to this defendant as well-trained, experienced, and skillful and in all respects competent and qualified to perform the duties to which he was assigned. Defendant found him to be incompetent, unskillful, and unsatisfactory. He was first assigned to the purchasing department, and was employed in that department for two or three months. He was frequently in trouble with the officers in the purchasing department, as well as with the storekeeper, and on one occasion engaged in a fist fight with the storekeeper. He was contentious, opinionated, egotistical, and seemingly incapable of working harmoniously with those around him. Thinking he might perhaps be a useful employee in some other department, defendant placed him in the planning and progress department. He manifested the same characteristics in this department that had made him so objectionable in the purchasing department. He had considerable trouble with Mr. Thompson, who was the head official of the planning and progress department, and the situation became so disagreeable to Mr. Thompson that he resigned. Mr. Seknicka was then placed at the head of the planning and progress department, and his experience with the plaintiff was no more satisfactory than Mr. Thompson's experience had been. The plaintiff continued to be so egotistical, opinionated, disrespectful to those in authority over him, discourteous to his fellow servants, and altogether such a source of discord, dissension, and dissatisfaction among the other employees that defendant was compelled to relieve him of further duties and discontinue his employment. Any further retention of the plaintiff by defendant in defendant's service would have been distinctly injurious to the defendant's business and interests, and as a measure of self-protection the defendant was compelled to dismiss the plaintiff from its employment."

That plea makes the issue you are to pass upon. This is an appeal case. It is none of your business what the judgment in the court below was, and if in the progress of this case you should find out which way that judgment was rendered you must not be governed thereby. But you must take the law from the court and the facts from the witness stand, apply the one to the other, and render a verdict in accordance with the dictates of your own consciences.

The plaintiff contends that he entered the service of this defendant company, and was wrongfully discharged. The burden is on the plaintiff to prove his contract of service as he represents it. The further burden is upon him to show to your satisfaction and by the preponderance of the evidence that he was wrong-

fully discharged from the service of this company. He is further bound to show by competent evidence what damages he has sustained by reason of the alleged discharge.

In order to constitute an express contract of hiring, the contract should be definite as to all essential elements, as time, business, and compensation, and, in order to be enforced, both the parties must be bound thereby. On the part of the servant (the plaintiff in this case) there is an implied obligation to enter the master's service and serve him diligently and faithfully, to obey all his reasonable commands, treat him respectfully, and to perform the duties incident to his employment honestly, with ordinary care and due regard to his master's interest and business, and that he is competent to discharge the duties for which he is employed, that he possesses the requisite skill, and that there is nothing that unfits him physically or mentally for the duties incident to his employment. In order to justify a master in discharging a servant, the servant must have been guilty of conduct that amounts to a breach of some express or implied provision of the contract of hiring. Anything less than that will not amount to a legal justification or excuse. The question as to whether the master has waived a breach of contract by the servant by retaining him in service after knowledge of such breach is a question of fact for the jury. Prima facie it is a waiver and a condonation is presumed; but, if there are circumstances shown that tend to establish a reasonable or proper excuse for delay, it is for the jury to say whether in fact the breach was condoned. If, however, such breach has been in fact condoned, it cannot subsequently be relied on by the master to discharge the servant from the master's service. If you find that the plaintiff was incompetent, then the master would have the right to have discharged him. If you find that the plaintiff made false representations as to his qualifications, and that the master acted upon those misrepresentations and took the plaintiff into his employment, and when he found that he, the plaintiff, did not possess those qualifications, the defendant discharged him on that account, then the plaintiff could not recover. But if you find that the plaintiff entered the service of this defendant company under a contract, and if because of the fact it suited the convenience of the company to change its business, or if for any other reason not growing out of the fault of the plaintiff, it saw fit to discharge the plaintiff from its service, you would be authorized to find that there was a breach of the contract of hiring, and then you would determine what damages, if any, the plaintiff had sustained by reason of the breach of that contract, and you would be authorized to find a verdict for that amount. If, on the other hand, the representations made were false, or that the man was incompetent, or that for any of the reasons set out in this plea this defendant, the master, was justifiable in discharging the plaintiff, then your verdict should be for the defendant. Look and see what the contract of hiring was; see whether or not there has been a breach of that contract upon the part of the defendant, and what damages, if any, the plaintiff has sustained. If you find that the contract was made, and you determine there was a breach of that

contract by this defendant, and you find that the amount of damages was fixed, or you can ascertain them from the evidence, then you would be authorized to find for the plaintiff. If, on the other hand, you find that the plaintiff in this case made false representations, and that this defendant, upon finding that the representations were false, discharged him, and if that was the reason of this discharge, or if for any other good reason set out in this plea this company, exercising its right to discharge him, was justified in discharging him, then your verdict should be for the defendant.

You are to try this case under the evidence you have heard on this witness stand and the rules of law given you in charge by this court, and not from the result of any other court.

—Statement by editor.

Hitch & Denmark, of Savannah, for plaintiff in error.

Edwards & Lester, of Savannah, for defendant in error.

PER CURIAM. [1] 1. In this case, the plaintiff sued for \$100, alleged to be due as salary for a time extending from April 15, 1919, to May 1, 1919. The plaintiff contended, and adduced evidence to show, that he was employed by the defendant to work for it from October 14, 1918, to October 14, 1919, for a salary of \$2,400 a year, his salary being paid semimonthly, and that he was discharged and was paid nothing after April 15, 1919. The defendant contended that the contract of employment terminated on April 15, 1919; that the plaintiff had done no work for it since that date, and was due no pay. It pleaded also that the discharge was justified, in that he had been employed to work in its shipyard upon representations by him that he was perfectly competent to perform the duties to which he was assigned, whereas he proved to be incompetent. It further pleaded that he was contentious, opinionated, egotistical, and incapable of working harmoniously with those around him; that he was shifted from one department to another, but manifested the same characteristics as before; that he fought with one employee, was so disagreeable that the head of the second department in which he worked resigned; and that he was such a source of discord among the other employees that it was necessary to discharge him. Though conflicting, the evidence was sufficient to sustain the plaintiff's contentions, and this court cannot set aside the verdict.

[2] 2. The fourth ground of the amendment to the motion for a new trial, complaining of the admission of certain documentary evidence, cannot be considered, as the evidence is not set forth in the ground or attached to it as an exhibit. *Carson v. State*, 23 Ga. App. 535 (3), 98 S. E. 817.

[3] 3. Refusal to permit a witness to testify as to a certain matter is not cause for a new trial where it is not shown what he would have testified or was expected to tes-

tify as to the matter if he had been allowed to do so, nor unless it appears that the party complaining of such refusal offered the testimony or asked that it be admitted, nor unless the court was informed of what it was proposed to prove by the witness. It should appear that such testimony was material and would have benefited the complaining party. This court therefore will not consider grounds of the motion for a new trial in this case which complain that "the court erred in refusing to permit" a named witness "to testify what kind of man he found the plaintiff to be," or "to testify as to the impressions derived by him as to the plaintiff with respect to his employment, from information given him" by a named person, and similar grounds which appear in the motion. See the opinion of Justice Lamar, in *Griffin v. Henderson*, 117 Ga. 382, 43 S. E. 712. See, also, *Morris v. State*, 129 Ga. 434, 59 S. E. 223; *Lowe v. Burden*, 22 Ga. App. 679 (1), 97 S. E. 106; *Carson v. State*, 22 Ga. App. 744 (7), 745, 97 S. E. 202; *Kimbrel v. State*, 24 Ga. App. 696, 101 S. E. 920.

[4] 4. The eleventh ground of the amendment to the motion for a new trial is without merit, since the ruling therein complained of was in favor of the plaintiff.

[5] 5. The twelfth ground of the amendment to the motion for a new trial is defective because it complains of the admission in evidence of a certain letter, but the letter is not set forth in the ground or attached thereto as an exhibit.

(a) The statement of the court made while ruling upon the admissibility of this evidence did not amount to an expression or intimation of an opinion as to what had been proved in the case.

[6] 6. In the absence of an appropriate request, it is not error to fail to explain to the jury the meaning of "a preponderance of the evidence." *Seaboard Air Line Ry. v. Randolph*, 136 Ga. 505 (4), 71 S. E. 837.

[7] 7. The charge of the court substantially set out the contentions of the plaintiff in error as contained in its plea, and the assignment that it did not do so is without merit.

[8] 8. The charge was not subject to the criticism that it failed to apply the law to the particular facts in the case.

[9] 9. Viewing the charge as a whole, it was not objectionable, in the absence of a specific request to that effect, for failing to charge more fully what constituted a breach of a contract on the part of the defendant in error.

[10-13] 10. The charge of the court was full and fair, and not subject to any of the criticisms of it made in the motion for a new trial. For no reason assigned was it error to overrule the motion for a new trial. Judgment affirmed.

BROYLES, C. J., and LUKE and BLOOD-WORTH, JJ., concur.

(26 Ga. App. 394)

HAGAN GROCERY CO. v. NOBLES.
(No. 11732.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)*(Syllabus by Editorial Staff.)*

1. Sales \S 418(12)—That seller had notice of resale by buyer must be pleaded and proved.

Where the purchaser of goods seeks to recover of the seller damages for nondelivery measured by the difference between the contract price and the price on a resale, he should both allege and prove that at the time of making the contract of sale the seller had notice of such contract of resale.

2. Sales \S 413—Evidence that buyer had resold the goods to knowledge of seller failing to deliver held not admissible.

In action by buyer for failure to deliver goods, in which complaint failed to allege that seller had notice of intended resale, rejection of evidence that seller had knowledge of a resale, and as to expenses of purchasing other goods to fill contract of resale, is not error.

3. Customs and usages \S 18—Petition held not to authorize proof of custom to resell, in advance, oranges bought.

In an action by buyer for failure to deliver carload of oranges purchased, petition held not to contain any allegations that would warrant proof of the usual custom in trade of the wholesale purchaser of oranges in carload lots to resell them in advance.

4. Sales \S 418(2)—Market price of goods not delivered at time after breach and place other than delivery not admissible.

In action for breach of contract to deliver a car of oranges, exclusion of evidence of market price at place other than place of delivery and at time after the breach held not error.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by the Hagan Grocery Company against W. H. Nobles. From a judgment of nonsuit, plaintiff brings error. Affirmed.

So much of the petition as was material was as follows:

(3) Your petitioner alleges that on or about October 10, 1918, it purchased from W. H. Nobles one car of Indian River oranges, consisting of 400 crates, to be shipped to your petitioner on December 10, 1918, at Donalsonville, Ga., and for which it was agreed that your petitioner was to pay the defendant on delivery the sum of \$3.85 per crate, or a total of \$1,540.50, said fruit to be in prime condition and to be of good merchantable quality.

(4) Your petitioner alleges that said contract of sale was duly confirmed about October 10, 1918, and your petitioner, after purchasing said oranges, sold the same to its trade before the same arrived at Donalsonville, as-

suming that the defendant would perform his contract as made and entered into.

(5) Your petitioner alleges that the defendant did, on December 10, 1918, ship to your petitioner a car of oranges, consisting of 400 crates, which arrived at Donalsonville, about December 13, 1918, in a badly damaged condition, about 50 per cent. of the same being rotten and damaged, and having been damaged for a period of several days before being shipped to your petitioner.

(6) That the oranges shipped to your petitioner were practically worthless, and about 50 per cent. of same were unsalable, and your petitioner declined to accept the same, and requested the defendant to ship another car in order to complete his contract as made and entered into with your petitioner, which the defendant declined and refused to do.

(7) Petitioner alleges that by reason of the failure of the defendant to perform its contract petitioner was compelled to go into the market and buy other oranges at much higher price in order to fill its contract with its customers, and in so doing it suffered a loss by reason of so doing in the amount herein sued for.

Exceptions to introduction of evidence not sufficiently indicated in the opinion of the court were as follows:

Because the court erred in excluding from the consideration of the jury, on objection of counsel for defendant in the court below, the following material evidence of the witness A. G. Hagan, president and general manager of the Hagan Grocery Company, the same being ruled out by the court on the ground that the price would be at the place of delivery, and not at some other point than the place of delivery, the questions and answers ruled out being as follows:

"Q. Mr. Hagan, you tried to get Indian River oranges from several brokers, after Mr. Nobles refused to ship you another car, did you not? A. Yes, sir.

"Q. Were you unable to get them nearer than Jacksonville, Fla.? A. The only place I was able to get them at all was Jacksonville, Fla.

"Q. What were Indian River oranges worth at that time at Jacksonville, Fla., and were you familiar with quotations at that time on Indian River oranges? A. Yes, sir; they were worth at that time \$5 per crate at Jacksonville, Fla."

The foregoing evidence was excluded from the jury by the court on objection of counsel for defendant on the ground that the plaintiff was restricted to proving the market price on the date of the breach of the contract, and when oranges were purchased in lieu of those which the seller had declined to furnish, at the time and place of sale.

Because the court erred in excluding from the consideration of the jury the following material evidence of the witness A. G. Hagan, president and manager of the Hagan Grocery Company, on objection of counsel for defendant, the evidence excluded being substantially as follows:

"Q. Mr. Hagan did you try to locate any

Indian River oranges when you were unable to purchase them at Titusville, Fla.? A. I could not locate any except at Jacksonville, Fla.

"Q. You couldn't locate any at any price? A. I couldn't locate any at all, except at Jacksonville, and price wasn't an object.

"Q. What was the best price that you could obtain Indian River oranges for, such as you had contracted with Mr. Nobles to deliver to you? A. \$5 per crate f. o. b. Jacksonville, Fla."

The court on objection of defendant ruled out the foregoing evidence, and excluded the same from the consideration of the jury, and plaintiff in the court below then and there excepted, and here and now excepts, and says that the court erred in excluding said evidence from the consideration of the jury.

Because the court erred in withholding and excluding from the consideration of the jury the following material evidence of the witness A. G. Hagan, the same being substantially as follows:

"Q. Mr. Hagan what was the contract price you were to pay Mr. Nobles for the oranges? A. I was to pay him \$3.85 per crate.

"Q. Mr. Hagan how much were you afterwards compelled to pay for these same oranges in Jacksonville, Fla.? A. \$5 per crate.

"Q. Mr. Hagan, what amount per crate did your company lose on account of having to repurchase the oranges, after Mr. Nobles had failed to deliver the same? A. \$1.15 per crate."

Counsel for defendant objected to this evidence on the ground that the same was irrelevant and immaterial, and because there was no pleading to justify the same, and on this objection the court declined to permit the evidence to go to the jury.

Because the court erred in excluding from the evidence the following material testimony of the witness A. G. Hagan, the testimony being substantially as follows:

"Q. Mr. Hagan, do you know what the market price was for Indian River oranges, such as those contracted for from Mr. Nobles, in Donalsonville, on or about December 13, 1919? A. There was no market price for Indian River oranges in Donalsonville, Ga., during the month of December, 1918, for the reason that there were none to be had at that point, and they could not be bought in Donalsonville."

Because the court declined to permit the witness A. G. Hagan, for plaintiff, to answer the following material questions, which were propounded by counsel for plaintiff in the court below. Counsel stating what answer was expected of the witness, the question and answer being substantially as follows:

"Q. Mr. Hagan, did you undertake or make any effort to purchase Indian River oranges at Donalsonville, Ga., on December 13, 1918,

which was the date the car arrived from Titusville, and, if so, state the best price you were able to get on Indian River oranges? A. I tried to purchase Indian River oranges, such as those contracted for, at Donalsonville and all nearby points, but was unable to locate any except at Jacksonville, Fla., which was the nearest and only place where they could be obtained, and the price paid was \$5 per crate f. o. b. Jacksonville."

—Statement by editor.

John R. Wilson and Handley C. Harrison, both of Bainbridge, for plaintiff in error.

J. C. Hale and W. V. Custer, both of Bainbridge, for defendant in error.

LUKE, J. [1] 1. Where the purchaser of goods seeks to recover of the seller damages for nondelivery, measured by the difference between the contract price and the price on a resale, he should both allege and prove that at the time of making the contract of the sale the seller had notice of such contract of resale. See *Truitt v. Rust & Shelburne Sales Co.*, 25 Ga. App. 62, 102 S. E. 645 (1).

[2] 2. Where the buyer in such a case fails to allege in his petition that the seller knew of the contract of resale, and no demurrer or motion to dismiss is interposed, the plaintiff has the right to prove his case as laid, but it is not error to repel all evidence tending to show knowledge of the seller at the time of the sale of the intended resale. See *Kelly v. Strouse*, 116 Ga. 872 (4), 43 S. E. 280.

3. Nor was it error, in the absence of an appropriate allegation in the petition, to reject evidence as to expenses incurred by the buyer in purchasing other oranges to fulfill his contracts of resale.

[3] 4. The petition contained no allegation that would warrant proof of the "usual custom of trade of the wholesaler purchasing oranges in carload lots to sell them in advance to the retail trade."

[4] 5. There was no merit in any of the other exceptions as to the introduction of evidence.

6. The plaintiff having failed to prove any ascertainable damages, his petition was not proven as laid, and it was not error to grant a nonsuit. *Kelly v. Strouse*, supra.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 663)

(26 Ga. App. 694)

TICKNOR v. SPENCE. (No. 12073.)(Court of Appeals of Georgia, Division No. 1.
April 14, 1921.)*(Syllabus by Editorial Staff.)***Brokers** ⇨71—Offer to sell for certain price not agreement to pay excess above such price to broker.

A real estate owner's statement to a broker that he would sell the property for a certain sum net to him was not an offer or agreement to pay the broker the excess above such price of any amount paid by a purchaser obtained by the broker.

Luke, J., dissenting.

Error from City Court of Albany; Clayton Jones, Judge.

Action by T. M. Ticknor against R. E. L. Spence, Sr. Judgment for defendant, and plaintiff brings error. Affirmed.

R. H. Ferrell, of Albany, for plaintiff in error.

Lippitt & Burt, of Albany, for defendant in error.

BLOODWORTH, J. 1. The owner of certain real estate wrote to a broker that he would sell the property for a certain sum net to him (the owner), and the broker procured a purchaser who was able, willing, and ready to buy at a price in excess of the amount named, but the owner refused to sell. Held, that the terms of the agreement on the part of the owner did not import an offer on his part to pay the broker the excess in the amount which the purchaser was willing to pay for the property, above the sum named, for which the owner was willing to sell it.

2. A petition alleging the foregoing facts and praying for judgment for a sum equal to the excess in the amount at which the alleged purchaser was willing to buy, above the "net" amount at which the owner was willing to sell, was demurrable. *Matheney, Beasley & Koon v. Godin*, 180 Ga. 713, 61 S. E. 703.

Judgment affirmed.

BROYLES, C. J., concurs.

LUKE, J. (dissenting). I think, upon the particular facts pleaded in this case, we might distinguish it from the case of *Matheney, Beasley & Koon v. Godin*, 180 Ga. 713, 61 S. E. 703. In the opinion of the writer the petition is sufficient to show a contract whereby the broker was to receive for his services the sum in excess of the price at which the owner agreed to sell the property.

JARRETT v. McKINNON. (No. 11781.)(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)*(Syllabus by Editorial Staff.)***1. Vendor and purchaser** ⇨176—Purchaser entitled to apportionment of price when deficiency justifies inference of fraud.

Where a sale of land is by the tract described as containing a certain number of acres "more or less," the purchaser may obtain an apportionment of the purchase price upon proof of such a deficiency in acreage as justifies the inference that the sale was induced by actual fraud.

2. Vendor and purchaser ⇨34—Exhibition of deed misrepresenting acreage may constitute "fraud" justifying apportionment of price.

Under Civ. Code 1910, § 4626, providing that slight circumstances may carry conviction of the existence of fraud, and section 4622, providing that actual fraud consists in any artifice by which another is deceived, a vendor's exhibition to the purchaser of a deed, indicating that the land contained 319 acres, when in fact it contained 157 acres less, might constitute actual fraud, entitling the purchaser to an apportionment of the price, where the deficiency was known to the vendor, but unknown to the purchaser.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

Error from City Court of Thomasville; W. M. Hammond, Judge.

Action by J. A. McKinnon against F. M. Jarrett. Judgment for plaintiff, and defendant brings error. Reversed.

Titus, Dekle & Hopkins, of Thomasville, for plaintiff in error.

Branch & Snow, of Quitman, for defendant in error.

STEPHENS, J. [1] 1. Where there is a sale and conveyance of land by the tract, described in the conveyance as containing so many acres, with the qualifying words "more or less," the purchaser may defend against a suit for the purchase money and obtain an apportionment in the purchase price, upon proof of a deficiency in the number of acres, and that there was such a deficiency as to justify the inference that the sale was induced by actual fraud. See, in this connection, *Emlen v. Roper*, 133 Ga. 726, 66 S. E. 934; *Kendall v. Wells*, 126 Ga. 843, 55 S. E. 41.

[2] 2. "Fraud, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence" (Civil Code 1910, § 4626); and, since "actual fraud consists in any kind of artifice by which another is deceived" (Civil Code of 1910, § 4622), it follows that where a vendor, in order to induce a sale of land, even though the land

is to be sold by the tract, exhibits to the purchaser and produces, for his inspection a deed to the tract from another party to the vendor, which deed indicates that the land contains so many acres, to wit, 319, more or less, when as a matter of fact the tract sold is deficient in the number of acres by nearly one-half (to wit, 157 acres) of the number of acres indicated in the deed exhibited, which deficiency is known to the vendor but unknown to the purchaser, such act on the part of the vendor in exhibiting such conveyance to the purchaser is such as may amount to a false representation as to the size of the tract and thereby constitute actual fraud upon the purchaser.

3. In a suit by the vendor for the purchase price of the land, it was error to strike the defendant's plea, setting up the above facts by way of defense, and for the purpose of obtaining an apportionment of the purchase price.

Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(26 Ga. App. 685)

COLLINS v. STATE. (No. 12201.)

(Court of Appeals of Georgia, Division No. 1.
April 14, 1921.)

(Syllabus by Editorial Staff.)

Criminal law §510—New trial improperly denied when evidence aside from accomplice's testimony does not connect accused with offense.

Where there is no evidence other than the testimony of an accomplice to connect accused with the perpetration of the offense and leading to the inference of his guilt, a motion for a new trial is erroneously overruled.

Error from Superior Court, Grady County; John R. Wilson, Judge.

John Collins was convicted of an offense, and he brings error. Reversed.

S. P. Cain, of Cairo, for plaintiff in error.

B. C. Gardner, Sol. Gen., and O. E. Crow, both of Camilla, for the State.

BLOODWORTH, J. This case is controlled by the principles announced in *Butler v. State*, 17 Ga. App. 522, 87 S. E. 712, and the cases therein cited. Eliminating from this case the testimony of the accomplice, there is left no evidence to connect the accused with the perpetration of the offense and leading to the inference of his guilt.

The court erred in overruling the motion for a new trial.

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 712)

NATIONAL CASH REGISTER CO. v. G. G. HENDERSON FURNITURE CO.
(No. 11980.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by Editorial Staff.)

Sales §50—Substituted contract may be rescinded for fraud, notwithstanding waiver of fraud in first contract.

Where a cash register was not as represented by the seller and a new contract was made for another cash register, the buyer's waiver of the fraud in the procurement of the first contract, by executing the second contract with knowledge of its existence, did not prevent rescission of the second contract for false and fraudulent representations in connection with its procurement.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by the National Cash Register Company against the G. G. Henderson Furniture Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Dowling & Askew, of Moultrie, for plaintiff in error.

Hill & Gibson, of Moultrie, for defendant in error.

HILL, J. The defendant bought from the plaintiff a cash register on express warranty that it would give certain definite results. He made a cash payment and gave his notes for the balance of the purchase price. On receipt of the register it was found to be defective in its physical construction, and would not perform the particular kind of work demanded by the defendant and which at the time of the purchase the plaintiff represented it would perform. The plaintiff admitted these defects and entered into a new contract with the defendant to furnish another register of exactly the kind described by the defendant as necessary to his business. Relying upon these statements made to him by the plaintiff the defendant agreed to the second contract. When the second register was delivered to the defendant for use, he discovered, after thoroughly testing it, that the representations and statements of the plaintiff as to the efficiency of the register to perform the work demanded were false and fraudulent. When defendant discovered that the second contract had been secured from him by these false and fraudulent representations, he promptly tendered the register back to the plaintiff, while it was in the condition in which he had received it, and demanded the return of the cash paid as the initial payment on the first contract and a rescission of the second contract. The plaintiff refused compliance with the

defendant's demand, and brought suit on the purchase-money notes executed at the time of the purchase of the first register. The defendant filed an answer, setting up substantially the facts stated above, and assumed the burden, and the verdict was in his favor. The plaintiff's motion for a new trial, based on the general grounds alone, was overruled.

Held, the trial judge did not err in overruling the motion for a new trial. The principle that, even if there had been fraud in the procurement of the first contract, it was waived by the defendant when he executed the second contract with knowledge of its existence has no application, because here fraud is also alleged in connection with procurement of the second contract.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 586)

CHAMBERS v. WALKER, County Treasurer.
(No. 11903.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

Appeal and error \Leftrightarrow 15 — Writ of error not maintainable in cases tried together on one motion for new trial and bill of exceptions.

Where separate cases between the same parties were by agreement tried together, but there were two separate verdicts, a single motion for a new trial and a single bill of exceptions will not support a writ of error.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Two actions between D. C. Chambers and W. C. Walker, County Treasurer. Judgment for the latter, and the former brings error. Writ of error dismissed.

Lloyd Thomas and M. J. Head, both of Tallapoosa, for plaintiff in error.

J. S. Edwards and Price Edwards, both of Buchanan, for defendant in error.

LUKE, J. 1. It is recited in the bill of exceptions in this case that by agreement of counsel the issues upon two separate cases between the same parties were tried together before one jury. The record shows there were two separate verdicts. The plaintiff in error filed only one motion for a new trial, in which complaint is made as to the admissibility of evidence, and certain errors are assigned upon excerpts from the charge of the court. The plaintiff in error undertakes to have both cases considered on one motion for a new trial, and presents only one bill of exceptions, to bring into question the legality of the two verdicts in the two separa-

rate cases. Under the ruling of this court in Jones v. Maril, 19 Ga. App. 216 (4), 91 S. E. 445, and cases there cited, this writ of error must be dismissed.

Writ of error dismissed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 725)

SIMMONS v. ALLEN. (No. 12025.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by Editorial Staff.)

Justices of the peace \Leftrightarrow 141(4)—Appeal not prevented by entry of claim and rendition of judgment for \$45 where suit was for \$55.

The right to appeal is fixed by the pleadings, and where suit was brought in justice's court on a note for \$55, the subsequent entry of a credit of \$10 and the rendition of judgment for \$45 did not deprive defendant of the right of appeal to the superior court.

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

Action by W. M. Allen against S. E. Simmons. An appeal from a judgment for plaintiffs before a justice was dismissed by the superior court, and defendant brings error. Reversed.

J. P. Burnett and H. F. Strohecker, both of Macon, for plaintiff in error.

Hunter & Daly, of Macon, for defendant in error.

HILL, J. Suit in a justice's court was brought upon a promissory note for the principal sum of \$55 and during the trial in that court the defendant's attorney entered a credit of \$10 on the note, and judgment was thereupon rendered for the plaintiff for \$45 principal, besides interest; and within the time allowed by law the defendant filed an appeal to the superior court. When the case was called in the superior court counsel for the plaintiff moved to dismiss the appeal, on the ground that the court was without jurisdiction, as the amount in controversy was less than \$50, and this motion was sustained, and the appeal dismissed. Held error. The right to appeal is fixed by the pleadings, and not by reductions which may be made at the trial in the justice's court, nor by the amount of the final judgment. Hart v. Gordon, 8 Ga. App. 825, 70 S. E. 193; Bell v. Davis, 93 Ga. 233, 18 S. E. 647; Dyar v. Scott, 99 Ga. 96, 24 S. E. 855; Barnes v. Vandiver, 5 Ga. App. 162, 62 S. E. 994; Civil Code 1910, § 4738.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 619)

PORTERVINT v. STATE. (No. 12101.)(Court of Appeals of Georgia, Division No. 1.
April 18, 1921.)Error from Superior Court, Thomas County;
W. E. Thomas, Judge.Action by the State against W. S. Portervint.
Judgment against Portervint, and he brings error. Affirmed.J. E. Craigmiles, of Thomasville, for plaintiff
in error.Clifford E. Hay, Sol. Gen., of Thomasville,
for the State.

LUKE, J. This case is here upon the single assignment of error that the evidence did not authorize the verdict. This court cannot say that there is no evidence which would authorize the verdict.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(26 Ga. App. 710)

WRIGHT v. BELL. (No. 11973.)(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)*(Syllabus by the Court.)*Landlord and tenant \S 331(6)—In proceeding
on distress warrant, undisputed facts held to
demand verdict for landlord.

Where there was no evidence to support a verdict for the defendant, and positive and unequivocal evidence demanded a verdict for the plaintiff, for a specific amount, a verdict for the defendant should have been set aside as being contrary to law.

Error from Superior Court, Barrow County;
A. J. Cobb, Judge.Action by M. A. Wright against Zion Bell.
Judgment for defendant, and plaintiff brings
error. Reversed.

A distress warrant was levied for rent alleged to be due in 1917. A counter affidavit was made and bond given, as provided by statute, and on the trial of the issue thus made the verdict was adverse to the plaintiff. Her motion for a new trial was overruled, and she excepted. The evidence in her behalf, substantially stated, makes the following case: The defendant rented 100 acres of land from the plaintiff in the year 1917 under a contract to pay her one-third of the corn and one-fourth of the cotton to be grown on the rented land, she to pay for one-half of the fertilizers used by the tenant. The plaintiff and four witnesses testified positively that in the year 1917 the tenant made 30 bales of cotton and no corn; that early in January, 1918, he settled with her for 23 bales of cotton according to the contract; that after this partial settlement he

made and sold 7 bales more, for which he had made no settlement and paid no part of the rent. It was admitted that no corn had been made. It was also admitted by the plaintiff that she owed one-fourth of the cost of the fertilizer for the year 1917, the total amount being \$247.50. The plaintiff proved also that the market price of cotton during the month of January averaged 31 cents per pound. The defendant introduced no evidence.

J. C. Knox, of Monroe, for plaintiff in
error.Lewis C. Russell and Jos. D. Quillian, both
of Winder, for defendant in error.

HILL, J. (after stating the facts as above). We are somewhat puzzled to understand why the jury found the verdict. The evidence indisputably demanded a verdict for the plaintiff. Counsel for the defendant in error, in his brief, states as the only reason for the verdict that—

"The plaintiff had not proved any definite amount of cotton or corn that had been raised or produced by the defendant, and left the jury absolutely without any evidence from which it could reasonably calculate that the defendant was due the plaintiff any amount as rent."

This conclusion seems not to be supported by the undisputed evidence, which was unequivocally that the defendant had made 30 bales of cotton and no corn; that he had settled with the plaintiff for 23 bales, but had not settled for the 7 additional bales. The market price of cotton for the month of January, 1918, when the balance of the rent should have been paid, was proved to have been 31 cents per pound, and it was admitted by the plaintiff that she owed one-fourth of the balance of the fertilizer which she had agreed to pay; the total amount being \$247.50. It was but a plain, simple mathematical calculation, from the undisputed evidence, as to how much cotton the defendant had raised for the year 1917, how much he had settled for, and how much he still owed after deducting from the balance of the rent the amount due by the plaintiff for fertilizers. The special grounds of error set out in the motion for a new trial and approved as true by the judge were:

First, "that the court erred in not submitting to the jury in his charge, under the evidence in said case, the question of whether or not the defendant, Zion Bell, had settled with the plaintiff, Mrs. M. A. Wright, for the seven bales of rent cotton in controversy gathered by the defendant from plaintiff's farm, in which the plaintiff contended that he had not"; and, second, "that the court erred in not submitting to the jury the question of whether or not the defendant had settled with the plaintiff for the cotton seed from the seven bales of cotton in controversy, gathered by the de-

defendant from plaintiff's farm, in which the plaintiff contended in said case that he had not."

As these two items constituted the matters to be determined, upon which there was direct and positive proof for the plaintiff and none for the defendant, it is possible that the failure of the trial judge to charge the jury upon these two issues left the jury under the impression that there was no issue before them for determination. However this may be, it is manifest that the verdict against the plaintiff was contrary to law, as there is not a scintilla of evidence to support it, and as the evidence in behalf of the plaintiff clearly demanded a verdict for the plaintiff for a definite amount, proved by the evidence in her behalf, and that a new trial should be granted on this general ground, irrespective of any error excepted to in the two special grounds of the motion.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J.,
concur.

(28 Ga. App. 591)

BONNETT v. STATE. (No. 12001.)

(Court of Appeals of Georgia, Division No. 1.
April 18, 1921.)

(Syllabus by the Court.)

Animals — 45—Circumstantial evidence held insufficient to support conviction for killing of cows.

"The evidence against the accused was entirely circumstantial, and, while it raised a suspicion of his guilt, was not sufficient, though given its strongest intentment as against him, to exclude every other reasonable hypothesis. It was therefore error to refuse a new trial." *Williams v. State*, 113 Ga. 721, 39 S. E. 487.

Error from City Court of Statesboro; W. H. Lanier, Judge.

J. F. Bonnett was convicted of maliciously maiming and killing cows and a steer, and he brings error. Reversed.

R. Lee Moore, of Statesboro, for plaintiff in error.

H. M. Jones, J. R. Roach, Sol., and Deal & Renfro, all of Statesboro, for the State.

BLOODWORTH, J. The accusation in this case alleged that the accused did "maliciously maim and kill" two cows and a small steer. The accusation does not allege in what manner they were killed, but the record shows that the state endeavored to prove that they were shot on a certain Saturday afternoon. While the steer was found dead in the field of the accused, and one of the cows near this field, there is no evidence that either of these had been shot, but it was shown that they had been in a field where

peas, corn, and ground peas were growing. The evidence shows that it had been raining just before the dead cattle were found, that the steer was found in a flat place in the field, and that there had been water in the place where he was found; and one witness swore that the cow laid down in the edge of a pond of water and died, that he examined the contents of her paunch and found therein "a pile of food that consisted of pea vines, pea hulls, and fodder stems," that "where cows eat too much green peas, or dry peas and pea vines, it will kill them," and that he believed that eating peas and drinking water caused the death of both of these cattle. The other cow lived several days. The only evidence to show that she was shot was a hole that was found in her "tripe"; but, granting that this was sufficient proof that she had been shot, there is no evidence to show that this particular cow had been on the premises of the accused, and none to show that he had shot her.

It was the contention of the state, as stated above, that the cattle were shot on Saturday afternoon, and that this killing occurred at or near the home of the accused. There was some evidence that gunshots were heard in the direction of the farm of the accused on Saturday afternoon, but no evidence that the accused fired these shots. The uncontradicted evidence shows that the accused was away from home practically all that afternoon after 2 o'clock and some time prior thereto. The defendant was convicted on circumstantial evidence, and we do not think it sufficient to show beyond a reasonable doubt that the accused did "maliciously maim and kill" the cattle, or that it "excludes every other reasonable hypothesis save that of the guilt of the accused." Penal Code 1910, § 1010. As was said in *Henderson v. State*, 147 Ga. 134(2), 92 S. E. 871:

"The verdict in this case is dependent entirely on circumstantial evidence. The proved facts are consistent with innocence, and are insufficient to exclude every reasonable hypothesis save that of the guilt of the accused. Suspicion of guilt will not authorize a conviction."

The evidence in this case may point toward the guilt of the accused, but—

"the law recognizes that there may be evidence pointing to guilt, without that evidence being sufficient to warrant conviction." *Patton v. State*, 117 Ga. 230(3), 43 S. E. 533.

In *Davis v. State*, 17 Ga. App. 820, 88 S. E. 706, Judge Wade said:

"Summing up the entire evidence, it may be said that, while it is sufficient to create a strong suspicion as to the guilt of the accused, it by no means comes up to the rule that circumstantial evidence must exclude every other reasonable hypothesis than that of the guilt of

the accused, in order to support a conviction of crime."

See also *Phillips v. State*, 17 Ga. App. 824(1), 88 S. E. 716, and cases cited; *Bowen v. State*, 19 Ga. App. 782, 92 S. E. 299.

The court erred in overruling the motion for a new trial in this case. As a new trial must follow from the above ruling, it is unnecessary to consider the other grounds of the motion for a new trial. The errors alleged therein are of such a character that they will not likely recur when the case is tried again.

Judgment reversed.

LUKE, J., concurs.

BROYLES, C. J. (concurring specially). I think the evidence authorized a finding that the cattle had been shot, but not that the defendant did the shooting.

(26 Ga. App. 604)

GHOSTIN v. STATE. (No. 12077.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law § 776(5)—Instruction as to effect of good character to raise doubt properly refused.

An instruction that defendant had put his character in issue through his statement, that he had a right to do so, and that good character alone might sometimes, if the other evidence was doubtful, raise a doubt and work an acquittal was properly refused.

2. Criminal law § 1178—Assignments not argued in brief are abandoned.

Assignments of error not referred to in the brief of plaintiff in error are treated as abandoned.

Error from Superior Court, Bibb County; J. R. Terrell, Judge.

Cleonis Gholstin was convicted of an offense, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

BROYLES, C. J. [1] 1. The court did not err in refusing to charge the jury as follows:

"The defendant has put his character in issue through his statement. This he has a right to do and can do just as effectively as by sworn testimony. I charge you that good [character] alone might sometimes, if the other evidence is doubtful, raise and generate a doubt in your mind and work an acquittal."

See, in this connection, *Hill v. State*, 18 Ga. App. 259, 89 S. E. 351.

[2] 2. The other assignments of error, not having been referred to in the brief of counsel for the plaintiff in error, are treated as abandoned.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 609)

FOUNTAIN v. STATE. (No. 12090.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

Criminal law § 1160—Verdict supported by evidence and approved by trial judge not disturbed.

Where a verdict of guilty was authorized if the jury believed the evidence for the state, and the trial judge approved the verdict, the Court of Appeals cannot set it aside.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Dewey Fountain was convicted of an offense, and he brings error. Affirmed.

Evans & Thomas, of Dublin, for plaintiff in error.

E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

LUKE, J. The only question raised in this case is as to the sufficiency of the evidence. The evidence was in conflict, but we cannot say that there was no evidence to support the verdict, since, if the jury believed the evidence for the state—which they did—a verdict of guilty was authorized; and, the trial judge having approved the verdict, this court cannot set it aside. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 638)

RICE v. STATE. (No. 12172.)(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)*(Syllabus by Editorial Staff.)***Criminal law** ⚡1092(4)—Writ of error dismissed when bill of exceptions tendered more than 20 days after judgment complained of.

Where the bill of exceptions in a criminal case was tendered more than 20 days after the judgment overruling the motion for a new trial of which complaint was made, the writ of error will be dismissed.

Error from Superior Court, Campbell County; John B. Hutcheson, Judge.

Criminal prosecution by the State against Will Rice. Judgment against defendant, and he brings error. Writ of error dismissed.

Parker & Parker, of Fairburn, for plaintiff in error.

Geo. M. Napier, of Atlanta, and A. M. Brand, Sol. Gen., of Lithonia, for the State.

BLOODWORTH, J. The bill of exceptions and the record in this case show that the motion for a new trial was overruled on the 25th day of September. The certificate to the bill of exceptions is dated October 23, 1920, and the bill of exceptions shows that it was tendered on that date to the judge who tried the case. This being a criminal case, and the bill of exceptions having been tendered more than 20 days from the date of the judgment complained of, the writ of error must be dismissed.**BROYLES, C. J., and LUKE, J., concur.**

(26 Ga. App. 622)

ROZIER v. STATE. (No. 12115.)(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)*(Syllabus by Editorial Staff.)***Criminal law** ⚡938(1)—New trial properly denied for newly discovered evidence impeaching, cumulative, and not likely to produce different verdict.

Where part of the newly discovered evidence was impeaching and the rest was cumulative and not of such character as would likely produce a different verdict on a new trial, a motion for a new trial was properly overruled under Park's Ann. Pen. Code, § 1088.

Error from Superior Court, Banks County; Andrew J. Cobb, Judge.

Proceeding between the State and Bud Rozier. Judgment against Rozier, and he brings error. Affirmed.

(108 S.E.)

G. P. Martin, of Commerce, Sam Jolly, of Homer, and P. Oooley, of Jefferson, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, and E. O. Stark, of Commerce, for the State.

BLOODWORTH, J. 1. The special ground of the motion for a new trial based upon newly discovered evidence was properly overruled. A part of this evidence was impeaching in its nature; the remainder was cumulative, and not of such character as would likely produce a different verdict should a new trial be granted. See Park's Penal Code, § 1088, and citations under the catchwords "Cumulative," "Impeaching," pp. 752, 755.

2. The verdict is supported by evidence, and has the approval of the trial judge, and it was not error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 527)

BENTLEY v. BARRETT. (No. 11883.)(Court of Appeals of Georgia, Division No. 2.
March 16, 1921. Rehearing Denied April
14, 1921.)*(Syllabus by the Court.)***1. Vendor and purchaser** ⚡176—Number of acres held of the essence of the contract, and purchaser entitled to reduction for deficiency.

Where the entire description of land contained in a written agreement to sell was "500 acres of land in said county (Wilkes) in the 180th district, G. M., known as a portion of the Blakey Sutton lands," the number of acres was of the essence of the description, and if it developed that in fact the number of acres subsequently sold under the agreement contained only 471½ acres, the vendee was entitled to a reduction in the price accordingly. Strickland v. Hutchinson, 123 Ga. 396, 51 S. E. 348.

2. Vendor and purchaser ⚡176—Purchaser entitled to reduction in price for deficiency where sale by acre.

The evidence in the present case, in addition to the description of the land contained in the written obligation to sell, clearly showing that the sale of the land was by the acre and not by the tract, a reduction of the price in proportion to the deficiency of the land was the legal right of the vendee at his option. Owens v. Durham, 9 Ga. App. 179, 70 S. E. 989; Civil Code 1910, § 4122.

3. Landlord and tenant ⚡197—Landlord held not entitled to rent, where tenant exercised option to purchase.

Where a written contract of rent contained a promise by the obligor to sell the land rented to the obligee, at his election, during the year of the rental, at a stipulated price, and

before the expiration of the year the tenant exercised his option and the vendor received the full amount of the purchase money, with interest from the date of the sale, he was not also entitled to receive rent.

4. Interest Ⓒ31—Only legal rate recoverable when different rate not specified.

Where no rate of interest is agreed to be paid in a written contract, the obligor can only recover the legal rate of 7 per cent.

5. No error in charge or otherwise.

The excerpts from the charge excepted to, when considered in connection with the evidence and the entire charge, contain no prejudicial error. The verdict is supported by the evidence, and no error appears.

Error from City Court of Washington; O. E. Sutton, Judge.

Action between H. N. Bentley and W. M. Barrett. Judgment for Barrett, and Bentley brings error. Affirmed.

W. A. Slaton, of Washington, Ga., for plaintiff in error.

Colley & Colley, of Washington, Ga., for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 709)

GEE v. HALL. (No. 11858.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by Editorial Staff.)

1. Execution Ⓒ184—Claim to property levied on treated as filed by claimant, though ambiguous.

Where an affidavit, made as the basis of a claim to property levied on under execution, stated that the deponent was attorney for a named party, and the accompanying bonds were executed in the name of such party as principal by the deponent as his attorney, the claim will be construed as filed by such named party, though the affidavit alleges that the property is the property of "the deponent."

2. Execution Ⓒ184—Affidavit of claim to property amended to show property was claimed by attorney's principal, and not by attorney.

Under Civ. Code 1910, § 5706, relative to the amendment of affidavits and section 5682,

relative to the amendment of pleadings, where an affidavit made as the basis of a claim to property levied on under execution showed that the deponent was attorney for another party, but alleged that the property was the property of "the deponent," it could be amended to allege that it was the property of the attorney's principal.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Proceedings on a claim by S. M. Hall to property levied on under a fl. fa. in favor of C. W. Gee. Judgment for the claimant, and the plaintiff in fl. fa. brings error. Affirmed.

J. A. Mitchell, of Crawfordville, for plaintiff in error.

P. B. Johnson, of Thomson, for defendant in error.

STEPHENS, J. [1,2] 1. Where an affidavit made as the basis of a third party's claim of title to property levied on under an execution states that the deponent is the attorney at law of a certain named party, and describes the property levied on, reciting the name of the plaintiff and the defendant in fl. fa., and states that the property is not the property of the defendant in fl. fa., but fails to allege that it is the property of the named third party, and alleges that it is the property of the deponent, and where the required bonds accompanying the affidavit are executed in the name of such named third party as principal, and signed in such party's name by the deponent as such party's attorney, the proceeding will be construed as a claim filed by such named third party, and not a claim filed by the deponent, and since a claim affidavit is amendable under the Civil Code 1910, § 5706, such an affidavit was properly amended by striking therefrom the allegation that the property levied on was the property of the deponent, and substituting in lieu thereof an allegation that the property levied on was the property of such named third party, the claimant, and the trial judge did not err in allowing such amendment over the objection of the plaintiff in fl. fa. See, in this connection, Civil Code 1910, § 5682.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

Ⓒ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(181 N. C. 546)

STATE v. JONES. (No. 378.)

(Supreme Court of North Carolina. April 27, 1921.)

1. Criminal law \S 564(6)—Court's remarks on accused's testimony not error.

Where accused, a witness in his own behalf, had been testifying for some little time and had said nothing material or relevant to the issue, notwithstanding efforts of the court to direct his statements to the matters on issue, the court's comment, "Up to now the defendant's personal testimony was like a Georgia lake, a mile wide and an inch deep," was not erroneous as violating C. S. \S 564, prohibiting the expression of the judge's opinion in the trial of cases before a jury; the remark being necessarily to be understood as a mere pleasantry, and not intended as a comment adverse to the witness on his character or veracity or the weight of his evidence on any essential feature of the charge, but on the rambling and irrelevant nature of his statements to this time.

2. Indictment and information \S 188—To justify conviction of assault by man over 18, on indictment for assault with intent to rape, bill need not state that defendant was over 18.

Where defendant was prosecuted for assault with intent to rape, a conviction of assault on a female by a man over 18 years of age was not erroneous because there was no charge in the bill that at the time of the alleged assault accused was over 18, where the proof clearly showed that he was over 18 at that time and on the trial no question was made as to that fact.

Appeal from Superior Court, Guilford County; J. Bis Ray, Judge.

Charlie Jones was convicted of an assault on a female, and appeals. No error:

The indictment is for assault with intent to commit rape on one Lillian Marshall, tried before his honor, J. Bis Ray, judge, and a jury at December term, 1920, of the superior court of Guilford county. The jury rendered a verdict of guilty of an assault on a female.

S. B. Adams and R. C. Strudwick, both of Greensboro, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. [1] It is chiefly urged for error that, while the defendant was on the stand as a witness in his own behalf, the court, in endeavoring to bring the witness to testify on matters relevant to the issue, made comment:

"Up to now the defendant's personal testimony was like a Georgia lake, a mile wide and an inch deep."

This court has always been very careful to enforce the provision of the statute which prohibits a judge from expression of opin-

ion in the trial of causes before the jury, Consolidated Statutes, \S 564, extending the inhibition to such expression in the hearing of the jury at any time during the trial, and whether the objectionable comments may be towards the testimony offered, the witness testifying, or the litigant and the cause he is endeavoring to maintain. State v. Rogers, 173 N. C. 755, 91 S. E. 854, L. R. A. 1917E, 857; State v. Harris, 166 N. C. 243, 80 S. E. 1067; State v. Cook, 162 N. C. 586, 77 S. E. 759; Park v. Exum, 156 N. C. 228, 72 S. E. 309; Withers v. Lane, 144 N. C. 184, 56 S. E. 855; State v. Dick, 60 N. C. 440, 86 Am. Dec. 439.

In the present instance, however, while the comments objected to may have been ill advised, we are of opinion that they should not be held for reversible error, because, from the facts and attendant circumstances disclosed in the record, it appears that they were made and necessarily understood as a mere pleasantry, and could have reasonably had no appreciable effect on the result. The defendant, a witness in his own behalf, had been testifying for some little time and had said nothing material or relevant to the issue. The judge, with commendable patience, had requested his counsel to direct the statements of the witness to the matters on issue, the judge himself had tried more than once, and in another effort in this direction made the remark objected to. It was not intended or understood as a comment adverse to the witness on his character or veracity or the weight of his evidence on any essential feature of the charge, but on the rambling and irrelevant nature of the witness' statements to that time. And herein the instant case differs from that of State v. Rogers, to which we were cited on the argument. There a defendant, testifying in his own behalf, was told by the presiding judge "to answer the question more concisely and quit dodging," an adverse comment on the witness both as to his manner and the weight of his statements well calculated to prejudice defendant and his cause in the estimate of the jury.

[2] Defendant excepted further and moved on arrest of judgment that there was no charge in the bill that defendant had made an assault on a female, he being at the time over 18. The proof clearly showed that the defendant was over 18 at the time of the alleged assault, and on the trial no question was made as to that fact. On the form of the bill the objection was expressly resolved against the defendant in State v. Smith, 157 N. C. 578, 72 S. E. 853.


On the record, there has been no error shown that would justify the court in disturbing the results of the trial, and the judgment of the court below is affirmed.

No error.

(181 N. C. 292)

MARSHALL v. INTERSTATE TELEPHONE & TELEGRAPH CO. et al. (No. 331.)*

(Supreme Court of North Carolina. April 27, 1921.)

Evidence  472(5)—Opinion as to whether place where servant was working was safe held inadmissible under shorthand statement of fact rule.

The exception to the rule against opinion evidence permitting a "shorthand statement of fact" or the statement of a "composite or compound fact," while favored by the courts in a proper case, does not render admissible an opinion upon the exact issue to be determined by the jury; so that in an action by telephone company employee against that company and a traction company from uninsulated wires, where the pleadings raised the issue that defendants failed to furnish plaintiff a safe place to work, and the facts were few and easily understood—two sets of wires on one pole, the voltage of the wires, their proximity, their state of insulation, the fact that they passed through a sycamore tree with swaying limbs, at which place plaintiff was injured—it was error to permit a witness to express the opinion that the place where plaintiff was working was not safe.

Hoke, J., and Clark, C. J., dissenting.

Appeal from Superior Court, Durham County; Allen, Judge.

Action by Frank H. Marshall against the Interstate Telephone & Telegraph Company and another. From judgment for plaintiff, defendants appeal. New trial.

This is an action brought by the plaintiff, a minor, through his next friend, to recover damages for the loss of his arm and other injuries resulting from the alleged negligence of the two defendants.

The plaintiff offered evidence tending to prove the following facts:

The plaintiff was 19 years of age at the time of his injury in October, 1919. He was employed by the defendant Interstate Telephone & Telegraph Company in 1918 as general utility boy or apprentice lineman, at \$2 per day, and had been climbing poles some 4 to 6 months prior to the injury, and was then getting \$3 per day. He had been working for the defendant telephone company about 14 months.

On October 21, 1919, L. D. Darnell, four colored laborers, and plaintiff composed the crew of the defendant telephone company that was sent to Vickers avenue, in the city of Durham, N. C., to string two new telephone wires down said avenue southwardly from Chapel Hill street and along the west side of Vickers avenue. Both of the defendants had poles and wires along the west side of said avenue, and at some places the wires were attached to the same poles and at others to separate poles. The poles of the telephone

company were taller than the traction company poles, and the phone wires were above the power wires of the defendant traction company. About three or four poles southward from Chapel Hill street, and in a line with said poles and wires, there was a sycamore tree as tall or taller than the highest poles and wires, with a large number of outspreading branches, through which the wires of both the defendants run and mix together through the branches of said tree, and in some instances are from four to six inches apart. The insulation was worn off of the electric power wires, which carry a voltage of 2,300, in several places in and near the sycamore tree. The distance between the cross-arms of the two companies are not uniform, but run from fourteen inches to two feet apart. At one place near where the plaintiff was injured the power of primary wires of the traction company are separated from the telephone company's wires only by the thickness of a piece of plank or board. The defendant traction company had two 2,300-voltage primary or power wires and one arc circuit, and the telephone company from 40 to 60 wires running along this line. The telephone wires carry no voltage or electricity, and within themselves are not dangerous to handle.

When the crew arrived at Vickers avenue for the purpose of stringing phone wires, plaintiff would climb one pole and Darnell the other, and the colored laborers would throw up the tie ropes and play off the wire. When plaintiff had gone up the fifth pole, to which pole the wires of both companies are attached, and had passed the cross-arm carrying the wires of the traction company, and had dead-ended one of the new wires he was stringing, and with his spikes fastened in the pole and with one hand holding iron brace he had leaned back a little and was waiting for the tie rope, with the other wire, to be thrown to him, he was caught with an electric current, severely burning his hand and shoulder, and remained there until he was burned into unconsciousness, from 30 to 40 minutes, and until the fire department came and took him down.

There was evidence on the part of the defendants in contradiction of much of the evidence of the plaintiff.

A witness for the plaintiff who had examined the place of the injury was asked the following question:

"State whether or not the conditions as you found them over there of these wires were in a safe condition."

To which question the defendants objected. Objection overruled, and defendants excepted. The witness answered that they were not safe.

There were other exceptions taken by defendants, not necessary to be stated.

There was a verdict and judgment for the plaintiff, and defendants appealed.

Bryant & Brogden and W. L. Foushee, all of Durham, for appellant Durham Traction Co.

Fuller, Reade & Fuller, of Durham, for appellant Interstate Telephone & Telegraph Co. Brawley & Gantt, of Durham, for appellee.

ALLEN, J. The general rule is that the opinion of a witness is not competent evidence; he must state facts, and let the jury form the opinion. *Horton v. Green*, 64 N. C. 66.

There is, however, a well-recognized exception to the rule, and "it includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury." *Britt v. Railroad*, 148 N. C. 41, 61 S. E. 601.

This is sometimes spoken of as the "short-hand statement of a fact" or as the statement of a "composite or compound fact," several circumstances combining to make another fact, and the tendency of the courts is to enlarge, and not restrict, this class of evidence (*Lumber Co. v. Railroad*, 151 N. C. 221, 65 S. E. 920), because frequently its exclusion would prevent the proper development of the cause of action or defense, and injurious effect, if the statement of the witness is not true, may be obviated by cross-examination and the intelligence of the jury.

We have permitted witnesses to testify that a pole on which wires were strung could have been placed differently and a source of danger eliminated (*Horne v. Power Co.*, 144 N. C. 378, 57 S. E. 19); that two chains would be safer than one, a fact which, it would seem, would be self-evident (*Britt v. Railroad*, 148 N. C. 41, 61 S. E. 601); that a core used in manufacturing iron was defectively made (*Alley v. Pipe Co.*, 159 N. C. 328, 74 S. E. 885); that a voltage of 110 was not dangerous (*Monds v. Dunn*, 163 N. C. 110, 79 S. E. 303); and there are other instances, but the exception has as its foundation necessity, arising from the difficulty, and frequently the impossibility, of so placing a number of complicated facts before a jury that the proper deduction may be drawn from them, when a single statement, conveying the impression on the mind of the witness of all the facts, the combination considered together constituting a fact, could be easily understood, and the exception is subject to the limitation that the opinion or inference of the witness must not be on the exact issue to be determined by the jury.

As said in *McKelvey on Evidence*, p. 176:

"It is a method of placing before the jury, in a general and broad way, a group of facts which, in detail, would be difficult of description, but which, as a whole, make up a certain conception, grasped at once by the mind.

"The admissibility of such evidence does not extend to cases where it would not prove helpful to the jury, nor where its application would carry the witness into an expression of real opinion upon matters which it is the jury's province to decide."

This rule, excluding the opinion of a witness on the point in issue, has been approved in *Summerlin v. Railroad*, 133 N. C. 550, 45 S. E. 898, *Lynch v. Mfg. Co.*, 167 N. C. 99, 83 S. E. 6, and in other cases.

Applying these principles, it was error to permit the witness to express the opinion that the place where the plaintiff was working was not safe.

The facts were few and easily understood—two sets of wires on one pole, the voltage of the wires, their proximity, whether without insulation or not, the fact that they passed through a sycamore tree with swaying limbs, the injury to the plaintiff—and the jury ought to have been permitted to draw the inferences from the evidence instead of the witness.

It was also an expression of opinion on the most important issue raised by the pleadings; it being alleged in the complaint and denied in the answer that the defendants failed to furnish the plaintiff a safe place to work.

In view of the pleadings the witness might as well have been permitted to say that in his opinion the defendants were negligent as to say that the place where the plaintiff was working was not safe.

In *Marks v. Cotton Mills*, 135 N. C. 289, 47 S. E. 432, the court, while discussing the admissibility of an opinion expressed by a witness, uses language very pertinent here. The court says:

"The witness, in our judgment, was permitted to invade the province of the court and the jury in thus testifying. A witness should state facts, the jury should find the facts, and the court should declare and explain the law. The functions of the three within their several spheres are clearly defined and should always be kept separate and distinct. Whether the speeder was so constructed as that its operation was safe to the defendant's employees was the very question upon which the parties were at issue and which the jury were impaneled to decide. The witness' opinion upon that question was incompetent, and the plaintiff's objection to it should have been sustained."

The case of *Hoyle v. Hickory*, 167 N. C. 221, 83 S. E. 738, does not decide that a witness may say that certain conduct was negligent, but that the opinion of experts as to whether streets were properly graded were not conclusive on the jury.

There must be a new trial.
New trial.

HOKE, J. (dissenting). I am unable to concur in the decision awarding a new trial on the ground stated in the opinion. There are facts in evidence tending to show that on

October 21, 1919, the defendants, the telephone and telegraph company and the traction company, had their poles and wires along Vickers avenue in the city of Durham and at places and at the point of the occurrence three wires were strung upon the same poles; that the telephone company's wires were in themselves harmless, but the wires of the traction company, two primary wires, each carried 2,300 voltage, and that, while it was at times permitted to place such wires on same poles, there were recognized rules for the placing of the wires, established by municipal regulations, as necessary to the safety of employees and others engaged in working with or about the same which had been violated; that at the time of the occurrence plaintiff, employed as lineman by the telephone company, was engaged with others in stringing some additional wires, and as he ascended one of the poles for the purpose he was caught by a current of electricity transmitted from the traction wires and held helpless for some 35 or 40 minutes, and had his arm burned off, or so severely that amputation became necessary, and received other severe burns which caused him great suffering and seriously impaired his health and strength, etc. For this injury, caused by the alleged negligence of both defendants, after an arduous trial involving expenditure of much time and strength and incurring of much cost and expense, plaintiff has been awarded compensatory damages by the jury, and all this is to be entirely done away with because, as stated, a witness was allowed to say over defendant's objection that at the time and place of the injury the wires of the two companies were not in a safe condition, and this on the ground chiefly that the witness was thereby giving an opinion as to a principal question involved in the issue. The witness who was allowed to make this statement was Chester Whitaker, the city electrician, and had been for more than 7 years. He was on the ground about 30 minutes after the occurrence, when there was no suggestion of any change, and he spoke from personal observation of the facts and conditions to which he testified; that he had formerly been employed by the traction company for 8 years and by the Carolina Light & Power Company for 2 years, and had had 12 or 14 years' experience in this line of work. And in further bearing on the correctness of his honor's ruling in this matter it appears from the record and without substantial dispute that 40 or 50 feet west of the pole on which plaintiff received his injuries the wires of both companies ran through a sycamore tree, and there the insulation of the primary wires of the traction company had worn off for 2 or 3 inches, and that the swaying boughs of the tree afforded a not improbable means of connection between this exposed wire carrying, as stated, a 2,300 voltage and the

telephone wires of the other defendant, and that 60 to 80 feet east of the place of injury the wires of the telephone company were carried over a small piece of plank laid on the top of the glass knobs or insulators of a cross-arm of a traction company pole and affording a separation between these wires and the high voltage wires of the traction company of not more than 6 inches.

From this, a statement of the facts chiefly relevant to the question, presented and considered in connection with the fact also admitted that plaintiff in performing his duty as lineman for the telephone company had been caught by a strong current of electricity and held for 35 or 40 minutes and till his arm was practically burned off and other serious injuries inflicted, the testimony objected to should not be held for reversible error for the reason that it was entirely harmless. The danger of the conditions presented would seem to stand revealed.

The wholesome principle that a new trial should not be granted for slight errors which could have worked no substantial prejudice to appellant's cause has been again and again approved in our decisions and has nowhere been stated more clearly than in a recent case of *Brewer v. Ring, etc.*, 177 N. C. 476, 484, 99 S. E. 358, 362, where Associate Justice Walker, in delivering the opinion, said:

"Courts do not lightly grant reversals, or set aside verdicts, on grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it. There should be at least something like practical treatment of a motion to reverse, and it should not be granted except to subserve the ends of substantial justice. *Hilliard on New Trials* (2d Ed.) §§ 1-7."

The same position was stated with approval and applied in a subsequent decision, *Powell v. Railroad*, 178 N. C. 243, 100 S. E. 424, where, in reference to some trivial error suggested in the course of the trial, the court said:

"No jury could have been misled or failed to apprehend fully the significance of the issue and the evidence relevant to its proper determination, and assuredly there is no case presented for reversible error. This cause, requiring much time and work, has been fully and carefully tried with the assistance of competent, alert, and diligent counsel on both sides. The determinative issues have been fairly decided, and the results of the hearing should not be disturbed unless it is reasonably made to appear that the appellant's defense has been prejudiced in some way by substantial error."

And *State v. Standill*, 178 N. C. 683, 100 S. E. 241, *Griffin v. Railroad*, 138 N. C. 55, 50 S. E. 516, *West v. Grocery Co.*, 138 N. C. 166, 50 S. E. 565, and many other well-considered decisions with us are to like effect. And, if the statement of the witness is to be taken as having significance, it is

to my mind clearly competent, and in no event should it be excluded on the ground advanced in the decision of the court "that it is an opinion on a fact directly involved in the issue." This position that opinion evidence otherwise competent must be excluded for the reasons suggested has to my mind been very much overworked in some of the decisions in the American courts, and with the result that both courts and juries have been deprived of much proper and helpful evidence in the trial of causes before them. As applied in these cases, the doctrine has been criticized by intelligent writers on the law of evidence and disapproved in the more recent and better considered decisions on the subject. 3 Wigmore on Evidence, §§ 1919, 1920. And accordingly in my judgment it is now the approved principle that on relevant facts properly established and on "questions of science and skill opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates." And on pertinent facts coming under their personal observation witnesses who are not in strictness scientific experts may give an opinion relevant to the issue when they are shown to be qualified by training, and experience to so aid the jury in coming to a correct conclusion. *Caton v. Toler*, 160 N. C. 104, 75 S. E. 929; *Tire Co. v. Whitehurst*, 148 N. C. 446, 62 S. E. 523; *Hardy v. Merrill*, 56 N. H. 227-241, 22 Am. Rep. 441; *McKelvey on Evidence*, pp. 230, 231; 1 Elliott, § 675. In many cases the opinion or estimate or mental inference of such a witness based upon such facts is the only way that the evidence can be properly presented, and in such instances, when otherwise competent, it should not be excluded merely because it may be on a fact directly involved in the issue. And our more recent decisions are in full approval and illustration of the principle as stated. Thus in *Britt v. Railroad*, 148 N. C. 37, 61 S. E. 601, question of negligence by an employer in not supplying chains of sufficient strength to pull heavy logs into a car, a witness taking part and having personal knowledge and observation of conditions was allowed to state "that a double chain would have been safer than the single one the employees were using."

In *Hux v. Reflector Co.*, 173 N. C. 97, 91 S. E. 591, suit by employee for negligent injury in supplying a defective printing press, as a witness, "plaintiff was allowed to state that the press was out of date, old, and worn."

In *Renn v. Railroad*, 170 N. C. 128-141, 86 S. E. 964, 970, action for negligence in affording improper place for employee to do his work by which he stepped on the ice and was severely injured, on the question of contributory negligence witness was asked:

"Did you cause your own fall in any way? A. No; I did not; I was just as careful walking as I could be."

In disallowing defendant's exception Associate Justice Allen in his opinion said:

"*Phifer v. R. R.*, 122 N. C. 940, is authority for the position that the latter part of the answer is objectionable as an expression of opinion, but the later cases and the trend of authority elsewhere are that it is competent as a statement of a fact. *Taylor v. Security Co.*, 145 N. C. 385; *Britt v. R. R.*, 148 N. C. 40; *State v. Leak*, 156 N. C. 647; 3 Wig. Ev. § 1938; *McKelvey, Ev. § 220*"

—and quoted with approval from Prof. Wigmore, vol. 3, § 1949, as follows:

"This topic is one of the few upon which there has never existed in the English precedents any foundation for doubt. The subject of the testimony in question is manifold; sometimes it is whether proper care was taken, sometimes whether action was reasonable, sometimes whether sufficient skill was shown, sometimes whether a place or a machine was safe; but all the forms seem reducible to a general one, namely, whether a certain standard of conduct was observed. Looking first at the orthodox practice in England, it is clear there is not, and never has been, any real question as to the propriety of such testimony. The morbid and doctrinaire theory of cautiousness which is the foundation of the American rulings has never been known at the English bar."

He speaks of the rule of the exclusion as a "modern excrescence on the common law" and concludes that such evidence is competent.

In the present instance the witness was an experienced electrician who spoke from personal observation of the relevant conditions presented. He saw that plaintiff in climbing the pole had to pass the traction wires of one of the defendants and attach the telephone wires to the poles, doing his work just above the traction wires. He saw that these traction wires carrying a heavy voltage were exposed just below the pole where they ran through a sycamore tree, and affording conditions that rendered contact between two sets of wires highly probable. He saw conditions that threatened immediately on the other side of the pole where plaintiff was working and received his injury, and with these facts in his possession it was strictly within line of correct principles and directly in accord with our decided cases that this witness was allowed to testify that the conditions presented and personally observed by him were not safe. In my opinion as stated, the testimony was clearly competent, and, if otherwise, it should be disregarded as not amounting to reversible error.

CLARK, C. J., concurs.

(181 N. C. 221)

LOGGINS v. SOUTHERN PUBLIC UTILITIES CO. et al. (No. 359.)

(Supreme Court of North Carolina. April 20, 1921.)

1. Trial ⇨165—Evidence considered most strongly for plaintiff on motion for nonsuit.

On motion for nonsuit, the evidence must be considered most strongly in favor of the plaintiff.

2. Carriers ⇨320(2)—Whether boy, when struck by automobile after having descended from street car, was a passenger, held for the jury.

In action for death of boy struck by automobile after having descended from a street car and taken one step at transfer point, where he was to have transferred to another car of defendant railroad on transfer ticket given him as a passenger on the car on which he had been riding, after he had once before descended from such car and had re-entered car to get basket he had left therein, whether he was a passenger at time of his death held for the jury.

3. Carriers ⇨247(4)—Rule as to when "passenger" loses his status as such stated.

A passenger on alighting from a street car at the end of his journey loses his status as a passenger when he has stepped from the car to a place of safety on the street or on the highway, the question depending, not on number of steps he has taken, but on the circumstances and conditions under which he alights.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

4. Carriers ⇨303(1)—Street car passenger entitled to be safely discharged.

Street car passenger is entitled to be discharged in a proper manner and at a time and place reasonably safe for that purpose.

5. Appeal and error ⇨997(2)—Conflicting testimony or credibility of witnesses not considered on appeal from nonsuit.

The Supreme Court, when considering a judgment of nonsuit, will not pass upon conflicting testimony and consider its credibility, but will limit its inquiry to the sufficiency of the evidence to warrant a verdict for the plaintiff; a credibility of the testimony being exclusively for the jury.

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Forsyth County; Webb, Judge.

Action by L. A. Loggins, administrator, against the Southern Public Utilities Company and others. From judgment of nonsuit as to the named defendant, plaintiff appeals. Reversed.

Civil action to recover damages for an alleged negligent injury and killing of plaintiff's intestate, a boy between eight and nine years of age.

There was evidence for the plaintiff, tend-

ing to show that on July 10, 1919, L. A. Loggins, a carpenter, and his infant son, took passage on a street car of the Southern Public Utilities Company, near Twenty-Third street in the city of Winston-Salem and paid their fares to East Winston where plaintiff lived. In order to make this continuous trip, over the defendant's lines, it was necessary to ride down Liberty street in said city, to a point near its intersection with Fourth street, and there to transfer to another car bound for East Winston.

Before reaching this regular transfer point, the conductor gave the plaintiff and his son transfer tickets which were to be used on the East Winston car as soon as it reached the junction. They left the initial car at the usual stopping place, which is in "the center of the business part of town, where passengers ordinarily transfer from one car to another, and there is a great deal of traffic and congestion about this corner."

The father had his arms and pockets full of carpenter's tools and was carrying some tools on his shoulder. Just as he reached the sidewalk, the boy being several feet from the curbing out in the street, he remarked: "Son, where is our basket?" The basket, containing their lunch, had been left on the car. Almost instantly, the boy turned and ran back into the street car to get the basket. He entered at the front door, and the motorman closed the door behind him. After finding the basket, he came back to the front platform. The motorman then opened the door to let the boy out, and just as he stepped off the car to the street an automobile driven by Louisa Holland ran over him and killed him. The boy "turned as he stepped off in the street and his back was to the automobile. He turned and she hit him. People were getting off and on the street car at the back end at the time she passed. The automobile ran over him just as he got off the car and got one step."

At the close of plaintiff's evidence, defendant moved for judgment of nonsuit as to the Southern Public Utilities Company, which motion was allowed. Plaintiff appealed.

J. C. Wallace and Raymond G. Parker, both of Winston-Salem, for appellant.

Manly, Hendren & Womble and Swink, Korner & Hutchins, all of Winston-Salem, for appellee Southern Public Utilities Co.

STACY, J. [1, 2] Considering the evidence most strongly in favor of the plaintiff, which we are required to do on a motion to nonsuit, we think it sufficient to carry the case to the jury.

The following may be stated as reasonable inferences from the testimony appearing in the record:

(1) Plaintiff's intestate, a boy under nine

years of age, was a passenger on one of the street cars of the Southern Public Utilities Company.

(2) In company with his father, he left this car at the usual place, for the purpose of transferring to another car which would carry them to East Winston.

(3) He had in his possession a ticket which entitled him to transfer from one car to another at this point.

(4) After leaving the car, but before reaching the sidewalk, and while passengers were still getting on and off, he returned through the front entrance to get his lunch basket, which inadvertently had been left on the car.

(5) The defendant's motorman was aware of the boy's movements and opened the door for him to disembark the second time.

(6) This happened near a corner in the center of the business part of town, where there is a great deal of traffic and congestion.

(7) Just as he stepped from the car to the street, and probably had taken one step, he was struck by an automobile and killed.

His honor granted the defendant company's motion for judgment as of nonsuit upon the theory that plaintiff's intestate was not a passenger at the time of his injury and that the defendant company owed him no affirmative duty of care.

By the clear weight of authority, the relation of passenger and carrier ordinarily ends when the passenger safely steps from a street car to the street. He then becomes a pedestrian on the public highway, and the carrier is not responsible for his safe passage from the street to the sidewalk; for once safely landed in the street, his rights as a passenger cease. *Wood v. Public Service Corporation*, 174 N. C. 697, 94 S. E. 459, 1 A. L. R. 942; *Whitt v. Public Service Corporation*, 76 N. J. Law, 729, 72 Atl. 420, 74 Atl. 568; *Clark v. Traction Co.*, 138 N. C. 77, 50 S. E. 518, 107 Am. St. Rep. 526; *Palmer v. Electric Co.*, 131 N. C. 250, 42 S. E. 604; *Smith v. City Ry. Co.*, 29 Or. 539, 46 Pac. 136, 46 Pac. 780; *Creamer v. West End St. Ry.*, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; *Keator v. Traction Co.*, 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758; *Street R. R. v. Boddy*, 105 Tenn. 669, 58 S. W. 646; *Oddy v. W. Street Ry. Co.*, 178 Mass. 341, 59 N. E. 1026, 86 Am. St. Rep. 482; *Duchemin v. Boston, etc., Co.*, 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580 and note, 1 Ann. Cas. 603.

However, the courts are not universally in accord on this subject. In *Johnson v. Washington Water Power Co.*, 62 Wash. 619, 114 Pac. 453, it is stated:

"A passenger on alighting from a street car is more or less subject to the conditions in which the carrier has placed him, and common prudence dictates that he should have a reasonable time to note the surroundings and pre-

pare to protect himself from the ordinary dangers of the street."

And in *Louisville Ry. Co. v. Kennedy*, 162 Ky. 560, 172 S. W. 970, Ann. Cas. 1916E, 996, it is said:

"When a street car stops to permit a passenger to alight, he is still a passenger until he has had a reasonable opportunity to reach a place of safety."

Again:

"It is the duty of a street car company to select a reasonably safe place for landing passengers wherever it may stop a car for that purpose." *Macon Railway Co. v. Vining*, 120 Ga. 511, 48 S. E. 232; and to like effect *Birmingham Railway Light & Power Co. v. O'Brien*, 185 Ala. 617, 64 South. 343; *Welsh v. Spokane, etc., R. R. Co.*, 91 Wash. 280, 157 Pac. 679, L. R. A. 1916F, 484; *Montgomery Street Ry. Co. v. Mason*, 133 Ala. 529, 32 South. 261; and *Melton v. Birmingham Ry. L. & P. Co.*, 153 Ala. 95, 45 South. 151, 16 L. R. A. (N. S.) 467.

See, also, 10 O. J., 627.

Ordinarily, a person would not step from a car to the street in the presence of imminent danger, or unless it were safe to do so; and safely landed in the street does not mean simply reaching the street with both feet and no more. The test could not be as to whether the passenger had actually left the car and reached the street without injury, but was it safe for him to do so, under the attending circumstances? Obviously, there is a difference between a safe landing and a landing in safety. The one has reference to the act of the passenger in stepping from the car to the street, the other to the condition in which he finds himself immediately after accomplishing this act.

[3, 4] We think a fair statement of the rule would be to say that a passenger, on alighting from a street car at the end of his journey, loses his status as a passenger when he has stepped from the car to a place of safety on the street, or on the highway. The question should not be made to depend entirely upon the number of steps which the passenger may take on leaving the car, but rather upon the circumstances and conditions under which he alights. He is entitled to be discharged in a proper manner and at a time and place reasonably safe for that purpose.

It is also held that the relation of passenger and carrier continues while the passenger is transferring from one street car to another, he having been furnished a ticket enabling him to do so, when such transfer is part of a continuous trip, or, at least, that he is entitled to the same degree of care as a passenger to insure his safety from injury by the operation of the same or other cars of the carrier, or from defects or negligence in the use of any of its appliances. *Wilson v. Detroit United Ry.*, 167 Mich. 107, 132 N. W. 762; *Citizens' Street Ry. Co. v. Merl*, 134

Ind. 609, 33 N. E. 1014; *Keator v. Traction Co.*, 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758; *Baldwin v. R. R. Co.*, 68 Conn. 587, 37 Atl. 418; *Walger v. Ry. Co.*, 71 N. J. Law, 356, 59 Atl. 14.

In *Clark v. Traction Co.*, 138 N. C. 77, 50 S. E. 518, 107 Am. St. Rep. 626, it is said:

"A person in transferring from one street car to the other is still a passenger, the transfer being but a part of the trip for the whole of which the company agrees to convey in safety."

In *Walger v. Jersey City Ry. Co.*, supra, the plaintiff was a passenger on one of the defendant company's cars. He disembarked from this car for the purpose of transferring to another, a ticket enabling him to do so having been furnished him on the car upon which he first took passage. The place at which he alighted was the regular transfer point. After getting off the car, and as he was about to cross over to the other car, or while he was doing so, the car which he had left started to go around what is described in the case as "the loop," and its rear end struck him, knocked him down, and injured him. Plaintiff testified that the accident happened immediately after he got off the car and before he had taken a single step away from it. The court held that he was still a passenger at the time he was struck, and entitled to be regarded as such.

In *Baltimore & Ohio R. R. Co. v. State, use Houser, et al.*, 60 Md. 449, the deceased was a passenger "with a ticket that entitled him to be carried safely from Hagerstown to Frederick. By the regular route and mode of carriage it was necessary for him to change cars at the Weverton Station and to cross over the intervening tracks of the defendant from one train to another. In making this transit he continued to be a passenger of the defendant, and entitled to the protection that the highest degree of care on the part of the defendant could afford, under the circumstances."

It may be that this rule has been stated too broadly in some of the cases, but it would be well-nigh impossible to couch a satisfactory limitation in general terms, for as to whether a person, under a given state of facts, would be considered in law a passenger while transferring from one street car to another, although holding a transfer ticket, must be determined ultimately by the facts and circumstances attending the transfer in each particular case.

There is another line of cases in which a passenger does not lose his rights as such, under conditions somewhat different from those above stated.

In *Tompkins v. Boston Elevated Ry. Co.*, 201 Mass. 114, 87 N. E. 488, 20 L. R. A. (N. S.) 1063, 131 Am. St. Rep. 392, it was held that a passenger, who, on account of the crowded condition, was riding on the vesti-

bule, or platform, of the car, did not cease to be a passenger by temporarily alighting for the purpose of permitting other passengers to get off the car more conveniently; the court saying:

"The necessity or courtesy which prompted his action did not terminate his status as passenger."

In *Chicago & Eastern R. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33, it was held that where a passenger on a railroad, on arriving at his destination, missed his watch and, with the consent of the conductor, remained on the train for the purpose of looking for it until he reached another station, the company occupied the same position towards the passenger as if he had paid his fare to such other station.

In *Ormond v. Hayes*, 60 Tex. 180, it was held that where a passenger, upon alighting from a train, went to the baggage car for the purpose of obtaining his baggage, and there aided the servants of the carrier in removing the baggage from the car, the relation of passenger and carrier did not cease by that act; he not holding a check for his baggage at the time.

In the case at bar, under all the facts and circumstances appearing on the record, we are of the opinion that plaintiff's intestate, while alighting from the car after getting his lunch basket, was entitled to be regarded as a passenger on defendant's car and still within the sphere of its protection as such. *Palmer v. Electric Co.*, supra. We think he was within his rights, as a passenger, in immediately returning for his basket. This was done with the knowledge and consent, or at least acquiescence, of defendant's motorman. He was permitted to take the basket into the car, without objection; and, under the same conditions, he returned to get it. Had he not been a passenger, his basket would not have been on the car at all, neither would he. What really transpired was only an incident occasioned by his mode of traveling. It was not unusual or uncommon and doubtless not altogether unexpected. The agility with which he ran back into the car, after his attention had been called to the missing article, was characteristic of boyish impulses; and his youthfulness should be taken into consideration in determining the relative rights and duties of the parties.

[5] The defendant elicited on cross-examination some evidence not as favorable to the plaintiff as that stated above, but we are not permitted to pass upon conflicting testimony when considering a judgment of nonsuit. Our inquiry is directed to its sufficiency to warrant a verdict in favor of the plaintiff. The jury alone may consider its credibility. *Shell v. Roseman*, 155 N. C. 90, 71 S. E. 86.

With the case going back for a new trial, we refrain from further comment or discus-

sion, as the defendant's evidence may show a different state of facts from what now appears.

Reversed.

WALKER and ALLEN, JJ., dissenting.

(181 N. C. 232)

DURHAM v. HAMILTON et al. (No. 395.)

(Supreme Court of North Carolina. April 20, 1921.)

1. Judgment \S 255, 256(1)—Judgment beyond the scope of facts admitted or established by verdict is irregular, and may be absolutely invalid.

An adversary judgment, which is the conclusion of the law from the facts admitted or established by the verdict, must be within the scope and purport of the facts so ascertained, and beyond that the judgment is at best irregular, and may at times be entirely invalid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment.]

2. Judgment \S 256(1)—Judgment restraining maintenance of hog or cattle pens in connection with nuisance held too broad.

In an action for damages for a nuisance caused by the improper maintenance of a slaughterhouse and aggravated by the condition of hog and cattle pens used in connection therewith, a judgment after verdict for plaintiff, restraining defendants from maintaining a hog or cattle pen on the premises for use in connection with the slaughterhouse "or otherwise," was broader than the issues as determined by the verdict, and will be modified by striking therefrom the words "or otherwise."

Exceptions and Appeal from Superior Court, Guilford County; Ray, Judge.

Civil action by P. H. Durham against T. Y. Hamilton and others. Judgment for plaintiff, and defendants except and appeal. Modified and affirmed.

The action is to recover damages for an alleged nuisance affecting the property of plaintiff, and to restrain the further continuance of same, caused by the wrongful and improper maintenance by defendants of a slaughterhouse on a stream just above plaintiff's land, and aggravated by the condition of certain hog pens, etc., as maintained in connection with said slaughterhouse and causing damage, etc. On denial of liability, the jury rendered the following verdict:

"(1) Did the defendants erect and maintain the nuisance as alleged in the complaint?"

"Answer: Yes.

"(2) What damages, if any, is the plaintiff entitled to recover?"

"Answer: \$800.00."

Judgment for amount of damages, and that defendants be restrained, etc.

T. W. Albertson, of High Point, and King, Sapp & King and Brooks, Hines & Kelly, all of Greensboro, for appellants.

R. C. Strudwick and Wilson & Frazier, all of Greensboro, and J. M. Hedgecock, of High Point, for appellee.

HOKE, J. [1] We find no error in the record affecting the determination of the issues, but the judgment, in our opinion, goes farther than the verdict warrants. As applied to the facts of this record, an adversary judgment is but the conclusion of the law from the facts admitted, or as established by the verdict, and must be within the scope and purport of the facts so ascertained and determined. Beyond that, the judgment is, at best, irregular, and may, at times, be held entirely invalid. *Holloway v. Durham*, 176 N. C. 550, 97 S. E. 625; *Hobgood v. Hobgood*, 169 N. C. 491, 86 S. E. 189; *Williams v. Williams*, 74 N. C. 1; *Whitwell v. Hoover & Emory*, 3 Mich. 84, 59 Am. Dec. 220; *State v. Muench*, 217 Mo. 124, 117 S. W. 25, 129 Am. St. Rep. 536; 15 R. C. L. p. 569, title Judgments, \S 2.

In *Holloway v. Durham*, supra, it is held:

"That an adversary judgment of the court upon matters beyond the scope of the pleadings, and which undertakes to settle and determine those entirely foreign to the controversy, is to that extent not binding, etc."

In *State v. Muench*, supra, a judgment is defined as the—

"Sentence of the law upon the record; an application of the law to the facts and pleadings."

A very proper and succinct definition is given in *Whitwell v. Hoover & Emory*, 3 Mich. 84, 59 Am. Dec. 2201, supra:

"That a judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it."

And again, in the citation to R. C. Law, it is said:

"A more precise definition is that a judgment is the conclusion of the law upon the matters contained in the record, or the application of the law to the pleadings and the facts as found by the court, or admitted by the parties, or deemed to exist upon their default in a course of judicial proceedings."

[2] On the present record, after awarding a recovery for the damages suffered, and that the further maintenance of the nuisance be restrained, the judgment proceeds as follows:

"And defendants are further ordered and directed not to use or maintain, or permit the use and maintenance on said premises, of any hog pen or cattle pen for use, in connection with said slaughterhouse, or otherwise."

The condition and manner of conducting the hog pens and cattle pens "in connection with the slaughterhouse" were very clearly shown to be a part of the nuisance, and in great aggravation of the injury, and were properly prohibited; but in extending this prohibition by the term "or otherwise," this might very well be construed and operate to prevent the defendants from using their property in the respects suggested, as required by the course of good husbandry, and in a way entirely harmless to plaintiff. To that extent we think the judgment is unauthorized by the facts established, and same should be modified by striking out the words "or otherwise." With this modification, the judgment is affirmed.

Modified and affirmed.

(181 N. C. 218)

COMBS, Adm'x, v. JEFFERSON STANDARD LIFE INS. CO. (No. 330.)

(Supreme Court of North Carolina. April 20, 1921.)

1. Insurance — 380—Facts constituting fraud in procuring lapsing of life policy.

Where insurance agent falsely represented to insured, a farmer ignorant of business of life insurance, that his policy had lapsed, and, relying thereon, insured failed to pay premiums for several years, his beneficiary on his death was entitled to recover; the insured, upon ascertaining that he had been imposed upon, immediately instituting suit for reinstatement, but dying before case was brought to trial.

2. Insurance — 380—Life company cannot retain benefit of fraudulent representation of agent that policy had lapsed.

In an action on a life policy, where plaintiff claimed that lapsing of policy sued on was procured by fraud and misrepresentation of agent, court properly instructed: "If the jury find by the preponderance of the evidence that W., as agent of the defendant, procured the lapsing of the policy by fraud and false representations, then the defendant company cannot retain the benefit of such conduct of W. and be relieved from the consequences of such fraudulent means by which such lapsing was obtained."

Exceptions and Appeal from Superior Court, Alamance County; Allen, Judge.

Action by Mrs. Anne Combs, as administratrix of the estate of A. L. Combs, deceased, against the Jefferson Standard Life Insurance Company. Judgment for plaintiff, and defendant excepts and appeals. No error.

Plaintiff sued on an insurance policy of \$3,000 held in defendant company at the time of his death, claiming that the failure to pay the two last premiums thereon was caused by false and fraudulent representations of the defendant's agent having charge of the matter. Defendant denied liability, and al-

leged that policy was forfeited for failure to pay premiums due thereon; that, if any representations were made by their agent, it was after the absolute forfeiture of policies, and agent in question was without authority in the premises. The jury rendered the following verdict:

"(1) Was the lapsing of the policy sued on procured by fraud and misrepresentation as alleged in the complaint? Answer: Yes.

"(2) If said representations were made were the same made prior to January 1, 1918—that is, before that time? Answer: Yes."

Judgment for plaintiff for amount of policy less unpaid premiums.

Brooks, Hines & Kelly, of Greensboro, for appellant.

J. J. Henderson, of Graham, and W. P. Bynum and R. C. Strudwick, both of Greensboro, for appellee.

HOKE, J. There were facts in evidence on the part of plaintiff tending to show that in 1915 plaintiff's intestate had taken out a policy in defendant company for \$3,000 at an annual premium of \$106.32, payable December 1, of each year, and with an extension privilege of 30 days; the first premium becoming due in 1915; that the policy was pledged to the company as collateral for a loan of money which had been paid off when due; the company still retaining possession of the policy; that the premiums for 1915 and 1916 were duly paid by intestate, and in 1917, the latter part of November or in December of said year, an agent of defendant company came to the home of the intestate, reminded him that his premium would soon be due or was already due, and urged the intestate not to allow the policy to lapse; that intestate in the conversation told the agent that he had developed a case of tuberculosis, and there was doubt if he could keep up the policy, etc.; thereupon the agent immediately changed position and told the intestate that he had pledged the policy to the company as security, and that the same had lapsed and become void on payment of said loan, and company would accept no more premiums on it; that the intestate was a farmer, ignorant of business of this kind, and especially of the business of life insurance; that the health of intestate had been failing for some months and was rapidly growing worse, and "his fatal malady was such as to seriously affect his nervous system, rendering him despondent, impairing his capacity for work or resisting importunity," and under the conditions presented, believing representations of agent to be true, and that the policy was no longer in force, he failed to pay the premiums for 1917-1918; that intestate was at all times ready and willing to pay said premiums, and, as soon as he ascertained that

he had been imposed upon by the false and fraudulent representation of defendant's agent, he instituted suit against the company for reinstatement, etc., but died in the early part of 1919 before the case could be brought to a trial.

[1] There was evidence of defendant in denial of plaintiff's position and tending to show that any conversation with Mr. White, their agent was in January, 1918, after the policy had become forfeited; that said agent was without power to bind the company by any waiver or stipulations other than contained in the contract. On the pertinent issues submitted, the jury have accepted plaintiff's version of the matter and on the facts, as stated, we are of opinion that her cause of action has been properly established.

[2] It is chiefly urged for error by appellant that the court in part and on the principal issue instructed the jury as follows:

"If the jury should find by the greater weight of the evidence that V. B. White, as agent of the defendant, procured the lapsing of the policy as alleged in the complaint, which I have mentioned to you, by fraud and false representations, I say, if the jury find by the preponderance of the evidence that White, as agent of the defendant, procured the lapsing of the policy by fraud and false representations, then the defendant company cannot retain the benefit of such conduct of White and be relieved from the consequence of such fraudulent means by which such lapsing was obtained, if you find that to be the fact."

There are facts in evidence on the part of plaintiff permitting the inference that the agent, V. B. White, was within the course and scope of his authority in his conversation with intestate about keeping up the policy, but assuming, as this instruction does, that the said agent acted beyond his powers in the premises, we think the charge is in accord with the approved principles. In *Tiffany on Agency*, p. 46, it is said:

"That the relationship of principal and agent is created by ratification when one person adopts an act done by another person, assuming to act in his behalf, but without authority or in excess of authority with the same force and effect as if the same had been created by appointment."

The citation, as stated, is quoted as authoritative in *Trollinger v. Fleer*, 157 N. C. 81-87, 72 S. E. 795, and the principle has been approved and applied in numerous decisions in this and other courts dealing with the question. *Bank v. Justice*, 157 N. C. 373-375, 72 S. E. 1016; *Osborne v. Durham*, 157 N. C. 263, 72 S. E. 849; *Sprunt v. May*, 156 N. C. 388, 72 S. E. 821; *Rudasill v. Falls*, 92 N. C. 222; *Reitman v. Florillo*, 76 N. J. Law, 815, 72 Atl. 74; *Whiting v. Crandall*, 78 Mo. 593; *Clough v. Dawson*, 69 Or. 52, 133 Pac. 345, 138 Pac. 233; *Heinlein v. Imp. Life Insurance Co.*, 101 Mich. 250, 59 N. W. 615, 25 L.

R. A. 627, 45 Am. St. Rep. 409; *Tabor v. Michigan Mutual Life Insurance Co.*, 44 Mich. 324, 6 N. W. 830.

As a deduction from the primary position and more directly applicable to the facts presented it is held in the *Reitman Case*, supra:

"That an innocent principal cannot assert any rights or retain any benefits upon a contract when it is procured by the fraud of his agent."

And so here. The surrender of the policy having been procured by the false and fraudulent representations of V. B. White, an agent of the company, and professing to have authority in the matter, the company cannot retain the policy and repudiate the acts of the agent by which it was obtained.

There are modifications of the doctrine required, or rather a different rule prevails when one is seeking to hold an innocent principal in an action for deceit on the part of his agent, and there are other well-recognized exceptions (*Kennedy v. McKay*, 43 N. J. Law, 288, 39 Am. Rep. 581; 2 *Corpus Juris*, p. 495), but we are clearly of opinion that the present case comes well within the wholesome principle laid down by his honor, and that the judgment for plaintiff should be affirmed.

No error.

(181 N. C. 543)

STATE v. JONES. (No. 377.)

(Supreme Court of North Carolina. April 20, 1921.)

1. Criminal law §1147—Discretion in fixing punishment under statute reviewed only if grossly abused.

Where a statute leaves the punishment for its violation within the sound discretion of the trial court, the sentence imposed will not be reviewed by the Supreme Court on appeal where the exercise of such discretion has not been grossly and palpably abused.

2. Criminal law §1213 — Sentence of two years on public roads for driving automobile when intoxicated is not cruel and unusual punishment.

Under C. S. § 4506, fixing the penalty for operating an automobile while intoxicated at a fine of not less than \$50 or imprisonment not less than 30 days, but fixing no maximum penalty, a sentence of two years on the public roads for that offense does not constitute cruel and unusual punishment.

3. Criminal law §93—Municipal court held not to have jurisdiction to try for driving automobile when intoxicated.

Under Laws 1909, c. 651, § 5, creating a municipal court and specifying the criminal offenses of which the court is given jurisdiction, the court has no jurisdiction over the offense of driving an automobile while intoxicated which was created since the Municipal Court Act by Laws 1919, c. 234, now C. S. § 4506,

except to bind over the defendant to the superior court.

4. Criminal law \S 1144(1)—Presumed on appeal that defendant was bound over to superior court; recital of fine and appeal in bond being surplusage.

Where a defendant, charged with an offense in the municipal court over which that court did not have jurisdiction, gave bond to appear and answer the charge in the superior court, it will be presumed on appeal that he was merely bound over by the municipal court to the superior court, and the recital that he had been fined and had appealed is mere surplusage.

5. Indictment and information \S 5—Plea of guilty waives indictment.

Under C. S. \S 4610, expressly authorizing waiver of indictment as to a misdemeanor which does not contain the element of fraud, deceit, or malice, a plea of guilty to charge of operating automobile while intoxicated waives the indictment.

6. Indictment and information \S 2(4)—Right to charge formulated by grand jury can be waived.

In view of Const. art. 4, \S 13, authorizing the waiver of a trial by jury in all issues of fact joined in any court, accused can waive the lesser requirement of the charge being formulated by grand jury, and C. S. \S 4610, authorizing such waiver in specified cases, is a restriction upon the unlimited right theretofore exercised of waiving an indictment.

7. Indictment and information \S 1—Indictment unnecessary on appeal from sentence in municipal court.

An indictment in the circuit court is not necessary where defendant, convicted in the municipal court of an offense over which that court had jurisdiction, appealed to the circuit court.

Appeal from Superior Court, Guilford County; Ray, Judge.

Charlie Jones was arrested upon a warrant issued from the municipal court of Greensboro to answer the charge of operating an automobile while intoxicated. He was found guilty and appealed and was bound over to the superior court to answer the charge. At the December term of the superior court of Guilford, the defendant in open court, through his counsel, entered a plea of guilty, and the judgment was pronounced. The defendant appealed; assigning as error that the sentence of two years on the public roads was cruel and excessive punishment. Affirmed.

S. B. Adams, R. C. Strudwick, and C. C. Frazier, all of Greensboro, for appellant.

The Attorney General and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. [1] The only assignment of error is that the punishment was cruel and

unusual, and this is the only proposition set out in the brief for the state and in the brief for the defendant. That point has been recently reviewed and held adversely to the contention of the defendant in *State v. Woodlief*, 172 N. C. 885, 90 S. E. 137, where it was held:

"Where a statute leaves the punishment for its violation within the sound discretion of the trial court, the sentence imposed by him will not be reviewed by this court on appeal where its exercise has not been grossly or palpably abused."

And there is nothing in the record which tends to show that such was the case.

[2] The statute (C. S. 4506) provides:

"Any person who shall while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate an automobile upon the public highways of any county or the streets of any city or town in this state, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than \$50 or imprisoned not less than 30 days, or both, at the discretion of the court."

The offense is a most serious one, and in the judgment of the General Assembly it was necessary to enact this provision for the protection of the public from the dangers incident to the operation of powerful and rapidly moving automobiles operated by persons in the condition denounced in the statute. The penalty was intended to be sufficient to deter from the commission of the crime, and the limitation prescribed a minimum, and not a maximum, punishment. The assignment of error cannot be sustained upon anything that appears in this record.

[3] At the hearing here an exception was taken for the first time that the defendant could not be punished in excess of the jurisdiction of the municipal court because no bill had been found, but this exception, if it could be taken orally, without assignment in the record, cannot be sustained. The statute creating the municipal court of Greensboro (Laws 1909, c. 851, \S 5), prescribing the criminal jurisdiction of that court, specifies the criminal offenses of which it is given jurisdiction, none of which includes this offense, which indeed was not then created; the offense having been created since by Laws 1919, c. 234, now C. S. 4506. From this it is clear that such court had no jurisdiction of this offense except to bind over the defendant to the superior court, which was done, and the defendant gave bond to appear at that court and "answer this charge."

[4] The bond is not set out in the record, but it is to be presumed that the defendant was bound over, reciting that he had been fined and appealed, but his bond was to "appear and answer the charge in the superior court," and the recital of the appeal, if made, was mere surplusage, as the municipal court

had no jurisdiction to do more than bind him over, and the trial in that court was a nullity.

[5] When the defendant, bound over to the superior court to answer this charge, in open court pleaded guilty, he waived the indictment. The waiver of the bill of indictment is expressly authorized by Laws 1907, c. 71, now C. S. 4610, as to "a misdemeanor which does not include or contain the element of fraud, deceit or malice," and it was entered "upon a plea of guilty" and "with the consent of the defendant's counsel."

[6] The Constitution (article 4, § 13) authorizes the waiver of a trial by jury "in all issues of fact, joined in any court." If a petty jury can be waived, of course the lesser requirement of the charge being formulated by grand jury could be waived, and C. S. 4610, is on its face a restriction upon the unlimited right, theretofore more freely exercised of waiving an indictment.

[7] On the other hand, if the recorder's court possessed the jurisdiction to render final judgment notwithstanding C. S. 1567 (last clause therein), upon appeal no indictment was necessary. This was held in *State v. Jones*, 145 N. C. 460, 59 S. E. 117, citing *State v. Lytle*, 138 N. C. 746, 51 S. E. 66, upon an appeal from the recorder's court of Winston where it was held:

"In the superior court, upon appeal from a conviction for a petty misdemeanor, indictment by grand jury is dispensed with."

In *State v. Jones*, 145 N. C. 460, 59 S. E. 117, it is said:

"In like manner, when a case is tried in superior court on appeal from a justice of the peace, no indictment is required. *State v. Quick*, 72 N. C. 243; *State v. Thornton*, 136 N. C. 616."

To same purport *State v. Crook*, 91 N. C. 540, and the reason is nowhere better given than by Judge Merrimon in that case and by Judge Reade in *State v. Quick*, supra, 72 N. C. 241. Whether the recorder had jurisdiction or not, the sentence appealed from is authorized by the statute and valid.

When the defendant in pursuance of the terms of his bond appeared in open court and with the consent of his counsel pleaded guilty, this was a waiver of indictment for an original offense in that court under the terms of C. S. 4610, and, if he appeared to answer the charge upon appeal, no indictment was necessary upon the authorities above cited. In either event, when the defendant pleaded guilty, there was no issue requiring a petty jury and still less any requirement of indictment. Why do an unnecessary act? In *State v. Koonce*, 108 N. C. 754, 12 S. E. 1032, Merrimon, C. J., said:

"If [the defendant] pleaded *nolo contendere*, or guilty, the court might have proceeded to give judgment."

In *State v. Warren*, 113 N. C. 683, 78 S. E. 496, the court held that, "where a defendant pleads guilty, his appeal from a judgment thereon cannot call into question the facts charged nor the regularity and correctness of the proceedings," but only brings up for review whether the judgment is legal upon the charge admitted, and accordingly in this case the sole assignment of error is that the sentence is excessive punishment, forbidden by the Constitution.

Judgment affirmed.

(181 N. C. 234)

BRADY v. HUGHES, Sheriff. (No. 398.)

(Supreme Court of North Carolina. April 20, 1921.)

1. Sheriffs and constables ⇨ 104—Giving debtor opportunity to escape does not constitute "escape," making sheriff liable.

The mere giving one under arrest for debt a chance to escape does not constitute voluntarily or negligently permitting an escape within the meaning of C. St. § 3943, making the sheriff liable for debt, interest, and costs; for such statute, being highly penal, requires strict construction.

[Ed. Note.—For other definitions, use Words and Phrases, First and Second Series, Escape.]

2. Sheriffs and constables ⇨ 104—Prisoner for debt not allowed to go at large held not to have "escaped."

Revisal 1906, § 627, does not require a debtor to be kept in close confinement, as did the former statute, and where debtor was under surveillance and restraint all the time until delivered to the sheriff, and was not permitted to and did not attempt to go at large, the sheriff is not liable for the debt for permitting an escape under C. S. § 3943, because the giving of a mere opportunity to escape does not constitute an escape, which consists of gaining liberty before being delivered in due course of law.

3. Sheriffs and constables ⇨ 104—Voluntary and willful escape of prisoner for debt not shown so as to render sheriff liable.

If it be conceded that facts show negligent escape, where the debtor was immediately retaken and imprisoned, that could be pleaded in bar of a suit for the penalty.

Appeal from Superior Court, Guilford County; Ray, Judge.

Action by Vance Brady against J. R. Hughes, Sheriff of Randolph County. The court sustained defendant's demurrer, and plaintiff appeals. No error.

Plaintiff's cause of action, briefly stated, is that defendant, sheriff of Randolph county, through one of his deputies, arrested one Robert Needham, under an execution against the person regularly issued from the superior court of Guilford county to Randolph county, in an action entitled "Vance Brady v. Rob-

ert Needham"; that after making the arrest the sheriff, by his deputy, brought the defendant in execution to Greensboro, and upon his arrival took him to the office of his (Needham's) counsel, where he (the deputy) left him for a few minutes in charge of his said counsel, so that he could attend to another matter connected with the case. The deputy sheriff returned to the office, where his prisoner remained during his absence, and took him to the jail and delivered him to the sheriff of Guilford county, according to the mandate of the writ, who confined him in prison until he was duly discharged by law.

W. P. Bynum and R. C. Strudwick, both of Greensboro, for appellant.

Brooks, Hines & Kelley, of Greensboro, for appellee.

WALKER, J. [1] It appears in this case that the prisoner was not permitted, voluntarily or negligently, to go at large, nor in fact did he go at large. He had the opportunity, perhaps, to do so, but the mere chance to do so will not constitute an escape within the meaning of our statute (Revisal, § 2823 [Consol. Statutes, § 3943]), making the sheriff liable for the debt, interest, and costs. The statute is highly penal, which would require it to receive a strict construction, or at least the construction of it should be a reasonable one in determining liability in any given case.

[2] There was no actual escape by the defendant. He did nothing himself, but at all times continued obedient to the direction and control of the deputy sheriff, who had him in custody. An escape is said by this court to take place "when one who is arrested gains his liberty before he is delivered in due course of law," or "the departure of a prisoner from custody." *State v. Ritchie*, 107 N. C. 857, 12 S. E. 251, opinion by the present Chief Justice. These definitions, as there said, were approved by Chief Justice Smith in *State v. Johnson*, 94 N. C. 924. If we test the question now being considered by either one of these definitions, there was in law no escape by the defendant, and none imputable to the officer in whose custody he was at the time. The defendant was not left in charge of the attorneys in their office at his own request, nor was any favor or liberty intended to be granted to him, but what was done by the officer was something incident to the execution of the process and in the line of his duty. The defendant remained in custody and under restraint, and it may be fairly inferred from the admitted facts that the restraint was really more effectual than it was when he was in the actual custody of the officer. The latter was absent only a few moments, and the defendant, during this very brief interval, acknowledged the control and authority of the deputy sheriff, and never once attempted to evade it, or even to ques-

tion it, if he ever, for a single moment, contemplated flight. Everything was fully accomplished as the law intended, and with the full consent and submission of the defendant to the law. He was taken to the jail of Guilford county, according to the mandate of the writ, and there delivered into the custody of the sheriff, who imprisoned him until he was discharged in due course of law. How has plaintiff lost a penny, or how was he in jeopardy of losing one? The execution and statute required the officer "to arrest the debtor, and commit him to the jail of the (proper) county until he shall pay the judgment or be discharged according to law." This has been done in exact conformity to the statute, and without the least prejudice to the rights of the plaintiff. We cannot believe that the law is so rigorous as to require that we should adopt the view taken of the case by the plaintiff.

But we find high authority for the support of our position in *Currie v. Worthy*, 47 N. C. 104. That was a case where a defendant was confined in "the debtor's room" of the jail, and was left by the jailer with the doors of the room and jail open, so that nothing prevented his escape. The court made several comments upon the evidence, which we will not quote literally, but reproduce substantially and without regard to the text, as some reference to them is necessary to a full and proper understanding of the decision. The court said that the impression of two or three witnesses that they saw Currie step from his room into the jailer's room and then back into his own room is not a fact that can be dealt with by a court. It is to be taken, therefore, that his honor was of the opinion that, if a debtor is allowed to see company in the debtor's room, the door being open and the jailer not present, or to be in the room alone with the door closed, but not locked, or to have the door of the room left open, so that nothing prevented the debtor's escape, if he desired to leave the jail, it is, in law, an escape, although the debtor does not in fact leave or go out of the debtor's room. Justice Pearson then refers to the statute of 13 Edw. I, c. 1, it being like our act (Revisal of 1905, § 2823; Consol. Statutes, § 3943), and says the act of 1795 requires that the jails of the several counties shall have an apartment for the confinement of debtors. A debtor who is not allowed to go out of this apartment and to take the benefit of prison bounds is said to be a "close prisoner." The statute, 13 Ed. I, c. 1 (Revised Statutes, c. 109, § 20), gives the creditor an action of debt against a sheriff who shall willfully and negligently suffer a debtor to escape. Our question is: What amounts to an escape, in the meaning of this statute? The acceptance of the term is "to get away from, to go out of, a place of, confinement": and in the declaration under this statute the allegation is, "and the said defendant, on," etc., "at," etc., "suffered and

permitted the said E. F., to escape and go at large; and the said E. F. did then and there escape and go at large, wheresoever he would, out of the custody of the said defendant." See form, volume 2, Chitty on Plead. 418, another form, 420, and another, 422. See a like form, Jones v. Pope, 1 Saunders' Reports, 35. In this connection he says that the attention of the court was called to Wilkes v. Slaughter, 10 N. C. 211, as the authority upon which the erroneous ruling of the superior court in Currie v. Worthy was based. He criticizes that case and virtually overrules it, and adopts the view of the dissenting judge. In doing so he says:

The court lays "peculiar stress upon the fact that the jailer had given the debtor the key of his room, so as to make the debtor his own keeper. Possibly this might furnish some ground for distinguishing that from the case now under consideration. The distinction is not substantial enough to be made the ground of a practical difference. For this reason, we prefer to put our decision on the ground that we do not concur with the two judges who decided that case, and do not admit the correctness of the doctrine of 'constructive escapes' as at all applicable to the statute under which the present action is brought. Besides the fact that the authority of that case is weakened by the dissenting opinion of the Chief Justice, the decision is inconsistent with every precedent of a declaration under the statute of Ed. I, to be met with in the books. They all contain an express allegation that the 'debtor did escape and go at large.' See precedents cited above. In all the precedents of pleas of 'fresh pursuit and recaption' it is assumed that the debtor had gone out of the jail. We are told by Lord Coke: 'One of the best arguments, or proofs, in law, is drawn from the right entries in course of pleading; for the law itself speaketh by good pleading; therefore Littleton here sayeth, "it is proved by pleading," etc., as if pleading were *ipsius legis viva vox*.' Code Lit. 115b. We think 'it is proved by pleading' that no constructive escape can make a sheriff liable to the penalty imposed by the act, Ed. 1st. Upon an examination of the cases relied on by" the court in that case, "we find there is not any one case cited in which the debtor had not in fact 'left the jail and gone at large'; and we are satisfied that the two very learned judges were misled by the 'cunning and curious learning' which they met with in Plowden, applicable to the state of the ancient law."

The court then considers the question more nearly analogous to the one upon which this case must turn, and says:

"How it can be said that a debtor 'did escape and go at large,' when, in point of fact, he never went out of the room in which it was the duty of the sheriff to keep him, is beyond the reach of our comprehension. We know of

no rule in the construction of a statute which subjects the sheriff to the payment 'of all such sums of money as are mentioned in the said execution and damages for detaining the same,' as a penalty for suffering a debtor to escape, by which we are at liberty to hold that an opportunity to go out of the debtor's room is the same, in legal effect, as if the debtor had, in fact, gone out of the room."

It will be seen that the court in that case emphasized the fact that the prisoner was not permitted "to go at large," either willfully, voluntarily, or negligently, nor given perfect freedom of action, and that he did not actually escape, though given full and free opportunity to do so. The former statute required that the debtor should be kept in the prison and in close confinement, while the present statute has no such provision, but requires only that he be committed to the jail of the county until he shall pay the judgment or be lawfully discharged. Revisal, § 627. Under the former statute requiring "close confinement," this court held that leaving the debtor in his room, with the doors of the prison open to him, during the absence of the jailer, was not an escape on the part of the latter. In this case the debtor was under surveillance and restraint all the time until he was delivered to the sheriff of Guilford county, and was not at any time permitted "to go at large," nor did he attempt to do so. We cannot, therefore, believe that a case such as this one was within the intention of the Legislature, or within the meaning of the statute.

[3] If we should concede that the facts show a negligent escape, the debtor was immediately retaken and imprisoned, as plaintiff's counsel admitted could be done, when the escape was merely negligent, and that it could be pleaded in bar of a suit for the penalty. It surely cannot be characterized as a voluntary or willful escape. No one can complain of a second arrest or recapture but the party himself. Ames v. Webbers, 8 Wend. (N. Y.) 545.

It is best always for sheriffs and other such officers to follow strictly the mandates of their writs, but here, if there was any departure, it was formal, and not substantial, and not the least prejudice to the plaintiff resulted from it, but he got everything to which the law entitled him. It would be a reproach to the law if upon so slight a ground, if any ground at all, we should hold the defendant to the payment of so heavy a penalty.

Even the most technical refinement would fail to bring the case within the language of our statute.

No error.

(181 N. C. 219)

UNION GUANO CO. v. MIDDLESEX SUPPLY CO. (No. 355.)

(Supreme Court of North Carolina. April 13, 1921.)

Process ⇨ 128—Statute making summons in superior court returnable before clerk does not apply to Forsyth county court.

C. S. §§ 476, 505, 509, restoring the original procedure, in effect previous to the so-called "Batchelor Act," whereby summons in the superior court was made returnable before the clerk in order to expedite business, has no application to the county court of Forsyth, created by Pub. Loc. Laws 1915, c. 520, wherein summons is returnable to the first term after service, particularly in view of C. S. § 8106, prohibiting the provisions of the compilation being held to repeal public local statutes.

Appeal from Superior Court, Forsyth County; Finley, Judge.

Action by the Union Guano Company against the Middlesex Supply Company. Judgment by default final for plaintiff. Motion to set aside denied, and defendant appeals. **Affirmed.**

The action was begun February 4, 1920, and the summons was served February 9, returnable to the February term of said court which convened February 23. The complaint, duly verified, was filed February 4, and on February 12, three days after service of the summons, the president of the defendant company came to Winston for the purpose of making compromise with the officials of the plaintiff company; but, his offer of 50 per cent. not being accepted, he wrote a letter which appears in the record and was received by the plaintiff February 20, three days before the court convened, in which he agreed to send a check for the full amount on his return home. The following day the defendant's counsel wrote the plaintiff's counsel a letter which was received on the day court met, and in reply the plaintiff's counsel notified the defendant that, if the answer was not filed during the term, judgment by default on the verified complaint would be demanded. The answer was not filed, and the court did not extend the time to file the answer. On the last day of the term and just before the adjournment of the court, judgment by default final, as appears in the record, was signed. The defendant at the next term of said court moved to set aside the judgment upon two grounds:

(1) For excusable neglect under C. S. 600. The court held that there was no evidence of excusable neglect.

(2) Upon the ground that Laws 1919, chapters 156, 277, and 304, C. S. 476, applied to

the county court of Forsyth, and that, the summons in this case not having been made returnable in accordance with said statutes, the judgment based thereon was void. Judge Starbuck refused the motion on this ground also. On appeal to the superior court, this judgment was affirmed, and the defendant appealed to this court.

Hastings & Whicker and E. F. Cullom, all of Winston-Salem, for appellant.

Swink, Korner & Hutchins, of Winston-Salem, for appellee.

OLARK, C. J. It was properly held that there was no evidence to justify setting aside the judgment on the ground of excusable neglect. The only question presented is on the second ground as to the service of the summons.

C. S. 476, requiring the summons to be served within 20 days, upon its face applies only to summonses "signed by the clerk of the superior court having jurisdiction to try the action." The county court of Forsyth was created by Public Local Laws of 1915, chapter 520.

The county of Forsyth was and is in the Eleventh judicial district, one of the largest in the state, and the judges presiding in that district are assigned 48 weeks of court out of the 52. Forsyth county is one of the most populous counties in the state, having in it the largest city in the state, and is allowed only 19 weeks in the superior court. The pressure of business was so serious, and it appears that the docket had become so congested, that a litigant was fortunate to have his cause tried under three or four years. At the instance of the bar and the people of that county, the Forsyth county court was created in 1915, with an exclusive jurisdiction in contract and tort up to \$1,000, concurrent, however, with the justice of the peace to the limit of their jurisdiction. Since that time the jurisdiction of the court in contract and tort has been extended to \$2,000. Section 4 provides for a term of that court once every month and oftener if the judge shall find it necessary to convene an extra term. Section 7 provides:

"That all actions shall be commenced in said court by summons, running in the name of the state and issued by the clerk of [said] court, returnable to the first term after service: Provided, the service shall be had in ten days before such term."

In section 9 it is provided that process of the court, while exercising jurisdiction which is concurrent with that of the justice of the peace, shall not run outside of Forsyth county, but, "in all other cases its process shall run as process issuing out of the superior court," which evidently merely authorizes service, in such cases, outside the county.

The defendant's contention is that the words, "in other cases, its process shall run as process issuing out of the superior court," means that the subsequent Act of 1919, now C. S. 476, restoring the former system of civil procedure by which summonses in the superior court were again made returnable before the clerk, applies also to the county court of Forsyth, especially because section 11 of the act creating this court authorizes rules of practice and section 17 provides that—

"The procedure of Forsyth county court, except that hereinbefore provided, shall follow the rules and principles laid down in the chapter on Civil Procedure in the Revisal . . . in so far as the same may be adapted to the needs and requirements of the said Forsyth county court."

The Public Local Act creating the county court of Forsyth provides that its process shall be made returnable to the terms of the court, and the restoration of the procedure in the superior court to conform to the original Code of Procedure, by which process in the superior court is made returnable before the clerk, by its terms has no reference to any other process except summonses signed by the clerk of the superior court. The statute, chapter 304, Laws 1919 (now C. S. 476) provides:

"The summons in all civil actions in the superior court shall be made returnable before the clerk at a date named therein."

Besides, C. S. 8106, especially provides:

"The Consolidated Statutes shall not have the effect to repeal any public local statute, any public statute which effects only a particular locality," etc.

Nor is there anything in the history of the legislation restoring the original provisions of the Code of Civil Procedure as to the service of summons which requires its application to any summons other than those in the superior court. *Campbell v. Campbell*, 179 N. C. at page 416, 102 S. E. 737. Many people in this state were very much involved pecuniarily as one of the results of the great Civil War and instead of expediting, at that time, the decision of litigation, there was a general desire to delay judgments in civil cases, and consequently what is known as the "Batchelor Act" (Laws 1868-69, c. 76) was passed by which summonses were made returnable to the terms of the court. This continued until the congestion of business in the superior courts became so serious that the "Crisp Act" of 1919, now C. S. 476, 505, 509, etc., was enacted restoring the original procedure by which summonses in the superior court was made returnable before the clerk in order to expedite business.

There is nothing in the language of that statute which extends it beyond the superior court, and in addition to C. S. 8106, prohibiting the provisions of the C. S. being held to repeal public local statutes, the mischief to be remedied does not justify such extension by judicial construction unless clearly expressed.

As county courts of Forsyth are held 12 times a year and oftener, the summons in those courts are served much more promptly and business is greatly expedited by the procedure there in force. Consequently there was no delay which required expediting the return of process as in the superior court, and indeed the application of that statute to the county court of Forsyth, instead of expediting, would retard and delay in many instances the procedure in that court.

The experience of the bar and the people with the county court of Forsyth, operating in one of the most populous counties, including as it does the largest city in the state under its efficient and able presiding officer, has been so satisfactory that no amendment has been asked in the statute creating that court and there has been no legislation which requires the application of the general statute in regard to service of processes in the superior court to the county court of Forsyth.

We therefore think that the judgment of that court was properly affirmed on appeal by Judge Finley in holding that the service of process in this case was regularly made and that there was no ground upon which the judgment by default could be set aside as irregular.

Affirmed.

(181 N. C. 546)

STATE v. JESSUP. (No. 407.)

(Supreme Court of North Carolina. April 27, 1921.)

Criminal law \S 508(3)—Testimony by coindictes as to intent held wrongfully excluded.

In a prosecution for the theft of an automobile, it was error to exclude the testimony of one indicted jointly with defendant as to his knowledge that the automobile had been stolen, where it appeared that the defense of such coindictes was that in taking the alleged stolen car he mistook it for a car of the same model belonging to his brother-in-law which he was instructed to take.

Appeal from Superior Court, Richmond County; Ray, Judge.

Dennis Jessup was convicted of larceny, and appeals. New trial.

The defendant was indicted jointly with one Maner for the larceny of a Ford automobile, the property of one H. H. Anderson, and there was a count for receiving. The

plea was not guilty. On the trial the defendant, in order to show that he had no felonious intent and really did not steal the car, proposed to inquire of the defendant Maner, who was a witness in his own behalf, as to any knowledge he had that the Ford car had been stolen, and the evidence was excluded, the defendant noting an exception. There was evidence that on a Saturday night Maner, Jessup, and Shaw drove from Fayetteville to Rockingham in a Lexington car belonging to Maner, and, after spending a part of Sunday in Rockingham, they drove at night to Hamlet, six or seven miles away, and at about 8 o'clock the same night Jessup and Shaw drove back to Fayetteville from Hamlet in the Lexington car belonging to Maner, and later in the night Maner followed them to Fayetteville in the Ford car belonging to Anderson, which he found on the street in front of a moving picture house. When he arrived at Fayetteville he left the Ford car in front of his boarding house until morning and then placed it in front of the Jessup garage. An extra tire and some other minor equipment were taken from the Ford car and left in the garage.

There was evidence offered, but rejected by the court, that there had been an agreement between Maner and his brother-in-law, Jim Dleykan, that Maner should take Dleykan's car to Fayetteville and sell it, and that Maner made a mistake in taking the Anderson car for the Dleykan car, as the two looked very much alike, both being Ford's of the same model, and that there was no intention of stealing the Anderson car. Defendant was convicted and appealed.

W. C. Downing and McCormick & Clark, all of Fayetteville, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). Notwithstanding the exclusion of the evidence as to intent, the court charged the jury as to one of the contentions of the defendant being that the agreement had been made with Dleykan, and that the Anderson car was taken by Maner through error as to its identity and ownership, because of its similarity to the Dleykan car, explaining to the jury that, as defendants therefore contended, there was no felonious or dishonest intent in taking the Anderson car, but by his previous ruling he had left the defendant Jessup without the evidence to support this contention and also without the evidence to show that he had no knowledge that the Anderson car had been stolen. If we concede that there was evidence for the jury to the contrary of Jessup's contention—that is, such as would tend to show his guilty knowledge and felonious intent—it was error to exclude the evidence and thus disarm him so that he

could not defend himself against the charge of the state.

It was manifestly competent to show by the defendant himself, if testifying in his own behalf, not only the absence of guilty knowledge that the car had been stolen, if it had been, but also the absence of Maner's intent to steal it. This court has expressly ruled upon this question of guilty knowledge, guilty motive or intent, in *Phifer v. Erwin*, 100 N. C. 59, at page 65, 6 S. E. 672, at page 675, where Chief Justice Smith said, citing and quoting from *State v. King*, 86 N. C. 608:

"The test of the admissibility of the evidence of motive or intent is the materiality of the motive or intent in giving character to the act, and when they must, as separate elements, co-exist to constitute guilt or produce a legal result. When, as distinct facts, each must be alleged and proved, the inference to be deduced may be met and repelled by the direct testimony of the party as to their being entertained by him."

See 1 Wharton on Evidence, § 482.

This is direct, instead of circumstantial, evidence as to guilty intent or knowledge or motive. In the *Phifer* case the plaintiff, on his own behalf, was allowed, after objection, to state that he knew nothing of any understanding between the parties to the mortgage that the mortgagor was to remain in possession, when the goods were delivered to him, nor of any purpose on the part of either to defraud the mortgagor's creditors, and this upon the question of plaintiff's fraudulent knowledge or intent. This was held to be admissible.

There are several assignments of error as to other rulings, but they may not be presented again, and we will not consider them.

There was error in the rulings, as indicated above, because of which the defendant Jessup is entitled to another jury.

New trial.

(181 N. C. 559)

STATE v. DIGGS et al. (No. 408.)

(Supreme Court of North Carolina. April 27, 1921.)

Conspiracy ¶48—Instruction that one of several charged with conspiracy to murder could not be convicted held erroneous.

Where the indictment charged that defendants conspired amongst themselves and with others to assault and murder a third person, a charge that a verdict of guilty could not be returned against one of the defendants singly, and that all should be acquitted unless as many as two were convicted, is erroneous; for, while a conspiracy cannot be committed by one person alone and requires the confederation of at least two and may include more, the jury might have found that none of those indicted save one conspired, and that he conspired with the others not named.

Appeal from Superior Court, Anson County.

Frontis Diggs and 14 others were convicted of conspiring to assault and murder W. H. Watkins, and they appeal. Reversed, and remanded for new trial.

The evidence tending to show an unlawful conspiracy among the defendants was equally as strong in establishing that others, not named in the bill, participated in what took place and aided and abetted the present defendants, or some of them.

Upon the question as to what verdict might be rendered, his honor charged the jury as follows:

"Gentlemen of the jury, you may return a verdict of guilty as to any two or more of the defendants or you may return a verdict of not guilty as to one or all of the defendants. You cannot find one alone guilty, because it is necessary that at least two combine in order to form a conspiracy. So your verdict may be guilty as to any two or more or all, or not guilty as to one or more or all, as you may find and are satisfied from the evidence."

Defendants excepted.

The court directed a verdict of not guilty as to seven of the defendants. Two were acquitted by the jury, and the remaining five, to wit, Frontis Diggs, Alex. Douglass, Watt, Frank, and Ben Robinson, were convicted, and from the judgments pronounced they appealed.

McLendon & Covington, of Wadesboro, and R. B. Redwine, of Monroe, for appellants.

J. S. Manning, Atty. Gen., and F. Nash, Asst. Atty. Gen., for the State.

STACY, J. The defendants were tried jointly, and rightly so. But we think his honor erred in charging the jury that a verdict of guilty could not be returned against one of the defendants singly, and that all should be acquitted unless as many as two were convicted. It is true the crime of conspiracy cannot be committed by one person alone. It requires the confederation of at least two, and, of course, it may include more. *State v. Christianbury*, 44 N. C. 46; *State v. Younger*, 12 N. C. 357, 17 Am. Dec. 571. But the bill charged that the defendants conspired among themselves and with others. Hence the jury might have found that only one of the defendants participated in the alleged offense with another or others not on trial. The instruction would have been correct had there been no evidence tending to incriminate others along with the present defendants, or had the indictment not been cum multis aliis. *State v. Tom*, 13 N. C. 569. Under the instant circumstances, however, we think the charge, as given, was prejudicial to the defendants, entitling them to a new trial.

There are other exceptions, appearing on the record, worthy of consideration; but, as the case goes back for another hearing, and as they may not occur again, we refrain from further comment.

New trial.

(181 N. C. 274)

AMERICAN FERTILIZING CO. v. THOMAS. (No. 412.)

(Supreme Court of North Carolina. April 27, 1921.)

1. Evidence \S 383(4), 519—Under contract and statute, purchaser of fertilizer could not contradict state chemist's analysis.

Under Pub. Laws 1917, c. 143, as amended by Laws 1919, c. 120, making the certificate of a state chemist prima facie evidence of the constituents of fertilizer when the analysis is made, according to the statute, and under a contract with the purchaser of fertilizer "with guaranty only of analysis on the sack, and not of results of said fertilizer," and providing that the certificate of analysis by the state chemist or his testimony should be the only and conclusive evidence of the contents of fertilizer, the purchaser was not entitled to give evidence of failure of crops in a manner indicating presence of borax, denied by the analysis, or to give expert testimony denoting the presence of borax.

2. Agriculture \S 7—Evidence held not sufficient to carry to the jury the question of fraud in sale of fertilizer.

In an action for the price of fertilizer, evidence held insufficient to warrant submission to jury of question of fraud.

Appeal from Superior Court, Moore County; Ray, Judge.

Action by the American Fertilizing Company against D. J. Thomas. Judgment for plaintiff, and defendant appeals. No error.

This action was brought by the plaintiff to recover the price of fertilizer goods sold and delivered by the plaintiff to the defendant in March, 1919, under a contract previously made.

The defendant admitted in his answer that he made the contract, and that exhibit A attached to the complaint is a true copy thereof.

The plaintiff alleged that it delivered to defendant, under the terms of said contract, fertilizer to the value of \$2,547.46, nearly all of the fertilizers being Bone and Peruvian C. S. M. (cotton seed meal) 8—2 goods; that is to say, the guaranteed analysis appearing on the bags was 8.00 per cent. available phosphoric acid, 2.00 per cent. ammonia (equivalent to 1.65 per cent. nitrogen) and 2.00 per cent. potash.

The defendant admitted in his answer that the plaintiff delivered the quantities set out in the exhibit, attached to the complaint, but denied that the goods delivered were accord-

ing to contract, and alleged that they were worthless and contained borax and other harmful ingredients, and denied that he owed the plaintiff anything, admitting, however, that he had paid plaintiff nothing.

Defendant then set up a cause of action or counterclaim for damages for results from use, alleging that the plaintiff wrongfully and fraudulently included borax and other harmful ingredients in the fertilizers sold and delivered to him, and that he used a part of them on his crops of corn, cotton, and tobacco, and that he was damaged thereby \$1,500.

The plaintiff replied to the counterclaim and denied the allegations of the answer as to the presence of borax or other harmful ingredients, and for further reply alleged:

"That samples were drawn from said fertilizers, sold and delivered by plaintiff to the defendant, and known as 'American Bone and Peruvian C. S. M.,' and which defendant claims had done the damage to his crops, and said samples were submitted to the state chemist for analysis as provided by law, and were duly analyzed by him, at the request of the defendant, a copy of said certificate of analysis by the state chemist being attached, and as appears therefrom the result of the analysis was that the value of the guaranteed ingredients was equivalent to \$38.05 per ton, whereas, the ingredients found by analysis were equivalent to \$39.20 per ton, and that said analysis showed no borax or other deleterious substances, and the plaintiff is advised that a copy of said analysis was furnished to the defendant, and that at the request of defendant, the state chemist made a special analysis with a view to ascertain whether said fertilizer contained borax as claimed by the defendant, and that the state chemist, under date of July 15, 1919, wrote to the defendant as follows: 'We have made examination of the sample of fertilizers, the American Bone and Peruvian Cotton Seed Meal, manufactured by American Fertilizing Company, of Norfolk, our number 4211, sent in by you, for borax and do not find borax to be present.'"

The plaintiff also pleaded, as a bar to recovery by the defendant of any damages, the written contract between the parties, and especially paragraph 10 thereof, and the provisions of chapter 143 of the Public Laws of 1917, as amended by chapter 120 of the Public Laws of 1919. These acts are brought forward as sections 4690 to 4703 of Consol. Statutes.

The plaintiff offered in evidence the contract between the parties, being Exhibit A attached to the complaint, which is as follows:

"It is further agreed that all deliveries under this contract are made with guaranty only of analysis on the sack, and not of results from use of said fertilizers, or otherwise; and before using these fertilizers samples should be drawn and submitted to the state chemist (or other authorized state official) for analysis as provided by the law of the customer's state, and if any

claim shall be made for inferiority or deficient analysis, the certificate of analysis by the state chemist (or other authorized state official) or his oral evidence shall be the best and only competent evidence of the contents of the goods, and shall be conclusive. If it shall appear from the said certificate, or test, that the goods do not come up to the guaranteed analysis, then the customer shall be entitled to recover the difference between the contract price and the actual value of the goods, as shown by the analysis made as above provided, which difference shall be ascertained, fixed and determined by the state chemist (or other authorized state official); and no other damage shall be recoverable for deficient analysis, or inferiority; provided, if damages for defective analysis or inferiority shall have been, or shall be assessed and paid as provided under State statute, then no other or further damage shall be collectible under the contract. A failure to draw this sample and submit it to the state chemist (or other authorized state official) as above provided, shall be a full waiver on the customer's part of any claim for deficient analysis or inferiority hereunder. As soon as these fertilizers are received, the customer shall examine them, and in case of any shortage in weight, or count, error in tagging or other objection to the goods, the customer shall notify the company within ten days, giving the company opportunity to make inspection and correction before the fertilizers are used, otherwise any claim for damage under this analysis, as above stated, is hereby waived, and it is further agreed that the company shall not be liable, for or required to make good, to the customer, any deficiency or claim for deficiency made or presented by any person purchasing from the customer."

The plaintiff next offered in evidence a verified itemized account of the goods sold and delivered; and also offered in evidence the certificate of analysis by the state chemist, attested by the seal of the Department of Agriculture, of a sample of the fertilizers drawn from the lot in the hands of the defendant, which is as follows:

"The official sealed sample of fertilizer received from the Commissioner of Agriculture has been analyzed, with the results as stated below:

"The fertilizer proves to be: Name: American Bone and Peruvian, C. S. M. Manufactured by: American Fertilizer Co. Address: Norfolk, Virginia. Drawn from lot in hands of D. J. Thomas, Carthage, N. C. (R. F. D. No. 2). The guaranteed percentage appearing on bags are: Available phosphoric acid, 8.00 per cent.; nitrogen, 1.65 per cent.; potash, 2.00 per cent.

"Result of Analysis.

"Available phosphoric acid, 8.80 (including soluble and reverted phosphoric acid).

"Nitrogen, 1.65.

"Potash, actual K. O. soluble in water 1.96.

"Note: Does not contain borax.

"The relative value of the guaranteed ingredients at the factory per ton of two thousand pounds is equivalent to \$38.05. The relative

value of the ingredients found by analysis, per ton of two thousand pounds, is equivalent to \$39.20, using in each case the following figures: Available phosphoric acid, 7 cents per lb.; nitrogen, 45 cents per lb.; and potash, 30 cents per lb. These figures are based on the wholesale prices of the fertilizers or fertilizer materials (bagged) at factory."

The guaranteed percentages were: Available phosphoric acid, 8.00, nitrogen 1.65 per cent. (equivalent 2.00 per cent. ammonia), 2.00 per cent. potash. The analysis showed available phosphoric acid 8.80, nitrogen 1.65, potash 1.96. No borax. The value of the guaranteed ingredients was equivalent to \$38.05, while the value of ingredients found by analysis was \$39.20. These figures are based on the wholesale prices of the materials at factory, as required by Consol. Statutes, § 4695. In other words, the fertilizers delivered had \$1.15 in value of plant food per ton more than the goods contracted for, and yet the defendant alleged the goods were worthless. The acid phosphate was above the guaranty .80 per cent., the nitrogen or ammonia was just in accordance with the guaranty, while the potash was .04 per cent. below the guaranty. Experience has shown that it is impossible, in mixing fertilizer materials, always to have the ingredients in exactly the guaranteed percentages, and the statute provides that, if the deficiency is 5 per cent. below the guaranteed value in plant food, the manufacturer is penalized, and it is further provided that—

"Any excess of any ingredient above the guaranty shall not be credited to the deficiency of any other ingredient if the deficiency is more than fifteen per cent." Consol. Statutes, § 4695.

The deficiency of potash was much less than 15 per cent.; in fact, only 2 per cent. At the time the sample was drawn from these 8—2—2 goods, in the hands of the defendant, he was claiming that they contained borax, and the analysis was made at the request of the defendant, for the purpose of ascertaining whether borax was in fact present, as the defendant claimed, and this accounts for the following notation on the analysis: "Does not contain borax."

All of the evidence which the defendant offered at the trial was for the purpose of showing that these 8—2—2 goods, from which the sample had been drawn and analyzed, did contain borax. The defendant himself testified that he had used these 8—2—2 goods, purchased from the plaintiff, on his crops of corn, cotton, and tobacco, and then he offered to show that he made poor crops and how the plants were affected. This was excluded. The defendant next proposed to show by a number of his neighbors, who had purchased from him the 8—2—2 goods of plaintiff, and who had used this fertilizer on their crops, that they made poor crops.

This was excluded. The defendant next propounded to Prof. Wolf, a botanist connected with the Experimental Station, a hypothetical question purporting to be based upon the excluded testimony, as to the condition of the crops where the 8—2—2 goods were used, and asked him, if the jury should find the facts to be as set forth, whether he had an opinion satisfactory to himself as to what caused this condition of the plants. The witness would have answered that these conditions were the symptoms of injury by borax. This is all the evidence the defendant offered.

It thus appears that all of the proffered testimony on the part of the defendant was directed to showing that the 8—2—2 goods contained borax. These were the goods the plaintiff sold the defendant, and which the defendant had caused to be officially analyzed by the state chemist for the express purpose of determining whether they did, in fact contain borax, and this analysis showed that the goods did not contain borax. The court excluded this proposed testimony in view of the statute applicable and the admitted contract between the parties and the decided cases. The statute provides as follows:

"The Department of Agriculture shall have the power at all times and at all places to have collected by its inspector samples of any commercial fertilizer or fertilizers material offered for sale in the state, and have the same analyzed; and such samples shall be taken from at least ten per cent. of the lot from which they may be selected; provided, that no sample shall be drawn from less than ten bags of any one brand."

The statute then provides in detail for the drawing of samples, and concludes as follows:

"In the trial of any suit or action wherein there is called in question the value or composition of any fertilizer, a certificate signed by the state chemist and attested with the seal of the Department of Agriculture, setting forth the analysis made by the state chemist of any sample of said fertilizer drawn under the provisions of this article, and analyzed by him under the provisions of the same, shall be prima facie proof that the fertilizer was of the value and constituency shown by his said analysis. And the said certificate of the state chemist shall be admissible in evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions. The department shall refuse to analyze any sample of commercial fertilizer that is not drawn and forwarded to the department [of agriculture] in accordance with the regulations which it may adopt for the carrying out of this article; provided, that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the Department of Agriculture that the manufacturer of said fer-

tilizer in question has, in the manufacture of other goods offered in this state during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the department of agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods. Nothing in this article shall impair the right of contract." Consol. Statutes, vol. 2, § 4697.

This statute was passed in 1917 and slightly amended in 1919 as to the method of drawing samples, and the statute expressly provides that "nothing in this article shall impair the right of contract." Acting under the provisions of this statute, the plaintiff and defendant entered into the contract set out above.

H. F. Seawell, R. L. Burns, L. B. Clegg, and U. L. Spence, all of Carthage, for appellant.

J. Crawford Biggs, of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). [1] It will be observed that the contract provides that—

"The certificate of analysis by the state chemist, or his oral evidence, shall be the best and only competent evidence of the contents of the goods, and shall be conclusive."

The certificate shows affirmatively that the contents of the goods are phosphoric acid 8.80, nitrogen 1.65, and potash 1.96, and that they do not contain borax. The parties have agreed that the analysis by the state chemist should be the best and only competent evidence of the contents of the goods, and conclusive; and it would seem that the evidence which the defendant proposed to offer to show that the goods contained borax, or, in other words, the contents of the goods were different from that shown by the analysis, was clearly incompetent.

A chemical analysis by a disinterested competent expert, such as the state chemist, is the best method of ascertaining the contents of fertilizers, and infinitely better than the method proposed by the defendant. "The best evidence is the analysis by the Agricultural Department," said Clark, C. J., in *Fertilizer Works v. McLawhorn*, 158 N. C. 274, 73 S. E. 888. In *Carter v. McGill*, 168 N. C. 507, 84 S. E. 802, the court said:

"The seller and the buyer of fertilizers can protect themselves by proper warranties, at the time of purchase, if they see fit to do so. The seller may restrict it, while the buyer may require that it be enlarged, according as their interests may dictate. Unless they do so, they must abide by the contract as made by them."

This was said in a case where the seller had not protected himself, as in the case at bar.

When *Carter v. McGill*, supra, was before

the court on a rehearing, reported in 171 N. C. 775, 89 S. E. 28, the court said:

"It is proper, in this connection, to suggest that the plaintiff, and others in the fertilizer trade similarly situated, can protect themselves against too great a hazard in respect to the loss of crops by a provision in their contracts to the effect that they are not to be liable for any results from the use of the fertilizer, or for any loss of crops, as was done in the case of the contract which was the subject of the controversy between the parties in *Guano Co. v. Live Stock Co.*, 168 N. C. 442, where we held such a stipulation to be valid.

"Our attention has been called to a case recently decided in South Carolina, *Germofert v. Cathcart*, 88 S. E. 535, in which, upon careful examination, we find the court construed a contract almost identical in language with the one which was under consideration in *Guano Co. v. Live Stock Co.*, 168 N. C. 442, and it held, as we did in the latter case, that the express warranty, and the restrictive clause therein as to nonliability for results, excluded the evidence as to failure of crops. See, also, *Allen v. Young*, 66 Ga. 617, which was cited for that position in *Guano Co. v. Live Stock Co.*, supra, at page 448. In the *Germofert* Case, supra, the court said that 'the defendant cannot be allowed to avail himself of a method of defense that he has agreed not to use.' And again 'the defendant had agreed not to 'hold payee responsible for practical results of said fertilizer on crops.' The evidence and the charge responding to it was in direct violation of the agreement.' And so we said substantially in *Guano Co. v. Live Stock Co.*, supra, the rule of damages having been fixed by the terms of the contract itself.

"While cases must be decided according to the rules of law, as well stated by Justice Hoke in *Tomlinson v. Morgan*, 166 N. C. 557, the strict enforcement of the rule may in some cases bear harshly upon a litigant, and it might do so in this class of cases. It is therefore expedient and proper that the dealer should be allowed to shield himself against possible injustice by adequate provision in the contract of sale. If he acts in good faith, he should not be unfairly dealt with; and it is not unusual, as the cases will show, to insert such a clause in contracts of this kind."

In *Guano Co. v. Live Stock Co.*, 168 N. C. 442, 84 S. E. 774, L. R. A. 1915D, 875, the contract provided that "the fertilizer is furnished with the guarantee of analysis printed on the sack, but not of results from its use," and the court held this was a valid stipulation and that the guano company could not be held liable for any results from the use of the fertilizer, and the jury could consider the evidence as to the effect of the fertilizer on the crops, only for the purpose of showing the absence of the guaranteed ingredients or the represented quantities of each and not at all for the purpose of assessing damages either directly or indirectly, because of any loss or diminution of the crops, as the measure of damages depends upon quite a different principle. The extent of the

recovery must be restricted to the difference, not necessarily between the price and the value of the article purchased, but to the difference between the article delivered under the contract of warranty and its value or market price if it had been such as it was warranted to be. The court then said:

"We have mentioned this subject for the purpose of showing that no part of the recovery, under this contract, should be assessed for the failure of crops, as there is an express stipulation that plaintiff should not be held liable for any results from the use of the fertilizer." *Guano Co. v. Live Stock Co.*, supra, at pages 450, 451 of 168 N. C., at page 777 of 84 S. E. (L. R. A. 1915D, 875).

This was said in a case where the stipulation was that the fertilizer company only guaranteed the analysis on the bags, and was not liable for results from use, but there was no stipulation, as in the case at bar, that the analysis should be the best, only and conclusive evidence as to the contents of the goods. Nor was there a provision that when the goods were analyzed, the state chemist should determine the relative value of the guaranteed ingredients and those found on analysis as in this case. The state chemist did analyze the goods and found that those delivered exceeded in value the guaranteed goods sold by \$1.15 per ton.

The recent case of *Fertilizer Works v. Aiken*, 175 N. C. 398, 95 S. E. 657, seems to be decisive of this case. There the earlier cases are reviewed and the court held that an express warranty guaranteeing a specified analysis, but not as to results on the crops, will protect the manufacturer or vendor from damages claimed for loss or diminution of crops, because the goods were not fitted for the purposes for which they were bought, this being a warranty ordinarily implied in such contracts, citing *Carter v. McGill*, 168 N. C. 507, 84 S. E. 802; s. c., 171 N. C. 775, 89 S. E. 28; *Guano Co. v. Live Stock Co.*, 168 N. C. 443, 84 S. E. 774, L. R. A. 1915D, 875; *Germofert v. Cathcart*, 104 S. C. 125, 88 S. E. 535; *Allen v. Young*, 62 Ga. 617.

In the *Aiken* Case, the fertilizer company sued for the fertilizers sold under a contract, in the following terms:

"I hereby acknowledge I have received and used the above fertilizer without any guarantee on the part of Armour Fertilizer Works, or its agents, as to results from its use, and which have been inspected, tagged and branded under and in accordance with the laws of this state; and I hereby waive all claims, damages, and penalties in case of deficiency, except claim for the actual commercial value of deficiency when, and only when, ascertained and determined by the state chemist from samples taken in the presence of seller, or seller's authorized representative, from fertilizers for which this note is given."

The defendant alleged in his answer that the fertilizer was utterly worthless. In referring to the contract, this court said:

"In this contract it will be noted that the stipulations in protection of the vendor go much beyond those appearing in the case just referred to. [168 N. C. 443.] * * * In its terms and purpose it is broad enough to exclude and does exclude any and all evidence as to the effect of the fertilizer on the crops, the agreement being as shown that the purchaser waives all claims except those for the 'commercial value of the deficiency' from the stipulated standard, and this only 'when ascertained and determined by the state chemist from samples taken from the fertilizers sold and in the presence of the seller or his authorized agent.' We are of opinion that such a stipulation is in every way a reasonable one, well calculated to promote and insure fair and safe dealing in this important matter and not only not opposed to any public policy prevailing with us, but the same is in accord with direct suggestion of this court in *Carter v. McGill*, supra, and fully recognized and approved in our latest legislation on the subject. Laws 1917, c. 143."

The contract in this case is, in its terms, very similar to the one in the *Aiken* Case. It provides, among other things:

"If any claims shall be made for inferiority or deficient analysis, the certificate of analysis by the state chemist shall be the best and only competent evidence of the contents of the goods and shall be conclusive. If it shall appear from the said certificate that the goods do not come up to the guaranteed analysis, then the customer shall be entitled to receive the difference between the contract price and the actual value of the goods as shown by the analysis, which difference shall be ascertained by the state chemist, and no other damage shall be recoverable for deficient analysis or inferiority."

The court, referring to the statute which had just been passed, Laws 1917, c. 143 (now *Consol. Statutes*, §§ 4690 to 4703, as amended in 1919, as to method of sampling), said:

"The statute in question, repealing sections 3945 to 3956 of *Revisal*, inclusive, makes elaborate and minute provision with the view of insuring a correct analysis of these important commodities and in protection both of the manufacturer and vendor and of the purchaser and consumer; directs the employment of sufficient chemists and assistants; provides for an analysis at the instance of the purchaser or by its own agents when necessary; provides, further, that samples for the purpose shall be taken always in the presence of the agent, seller or dealer or some representative of the manufacturers or if none of these can be present or if they refuse to act, then in the presence of two disinterested witnesses, etc. That no suit for damages shall be brought for results in use except after chemical analysis showing deficiency of ingredients unless the dealer has been selling goods that are outlawed by the

statute or has offered for sale during the season dishonest or fraudulent goods. Having thus dealt very fully with the subject, recognizing as sound the principle of selecting the samples in the presence of the manufacturer or dealer, section 7 of the act concludes with the proviso that 'nothing in this act shall impair the right of contract,' showing the clear intent and purpose of the Legislature to allow to either party the privilege of making further stipulations in reasonable protection of their interests and in accord with established principles of law. In *McLawn v. Fertilizer Works*, 158 N. C. 274, * * * decided intimation is given that this is the true public policy and the correct interpretation of our former statute on the subject and undoubtedly it should prevail under the present law."

The court further said, with reference to that language, that it was much stronger for the protection of the manufacturer than is that used in the case of *Guano Co. v. Livestock Co.*, supra, and we now say that the language of the contract in this case is, if anything, much more restrictive of the customer's right to question the truth and accuracy of the statements contained in the official (and also in this case contractual) analysis of the state chemist. The parties were free to enter into a contract with regard to the matter, and to bind, and even conclude, themselves, and each one of them, by its stipulations. They made for themselves in their dealings a contractual rule of evidence, each being at arm's length with the other, there was nothing in it contrary to public policy, and therefore they must be held as subject to its terms and their rights and obligations must be determined accordingly.

But the defendant contends that there was fraud, in that the plaintiff had mixed borax with the other ingredients of the fertilizer, and his crops were damaged thereby, as it was the opinion of his expert witness, who was a botanist, that borax was injurious to the crops, and their appearance indicated symptoms showing that they had been poisoned by borax. But the full and complete answer to all of this contention is that it has been shown by the analysis of the state chemist (the party to whom the law, and the parties by their contract, referred the matter for a final decision, which should bind them "conclusively") that there was no borax in the fertilizer. There is no allegation, or suggestion, that there was any fraud practiced by the chemist in making his decision or award, or even by the plaintiff in preventing an honest report; but, on the contrary, and as far as appears, the certificate of the analysis was fairly and honestly made, without even any hint at fraud or collusion. We do not say that fraud would not be sufficient to set aside a false certificate of the facts, as to the value and potency of the fertilizer, but it has not been

shown in this case, or attempted to be shown. The defendant, himself, requested the state chemist to make the analysis, and, besides, he solemnly agreed that it should bind and conclude him. If he had any doubt of its correctness, or even if he did not have such doubt, and wished to be assured of its correctness, he could then have retained another chemist of his own choice and possessing greater skill and expertness, if he thus appraised him. In the absence of such a showing of fraud the certificate must stand as conclusive evidence that the analysis is correct. It certainly cannot be impeached by the opinion even of the crop indicated symptoms of borax poisoning. If we should hold otherwise, it an expert botanist that the appearance of would impair very seriously the efficacy of the statute, and annul the contract of the parties, the execution of which is not assailed for fraud.

[2] There is no sufficient evidence of fraud for the jury. The most that can be said in behalf of defendant's position is that the opinion of the botanist formed by a mere inspection of the crop, as to the presence of borax in the fertilizer, is too uncertain, conjectural, and unreliable to be received as proof, and can hardly be of the least probative force if admitted, when considered in the light of the statute and the stipulations of the parties, by which it has been excluded as unfit for the purpose of establishing the alleged fact of fraud. It has been agreed, and the law so declares, that the only evidence shall be the certificate of the analysis as made by the state chemist, and that shows "conclusively" that there was no borax in the formula by which the fertilizer was made. The report of the analysis by the chemist, both impliedly and expressly, declares that there was no borax or other deleterious substance in the fertilizer, and, as we have said, there is nothing to impeach that finding for fraud or other reason; therefore the opinion of the botanist must be discarded. If we should admit such evidence, instead of the certificate being an absolute protection for the manufacturer or dealer in fertilizers as we have said it was intended to be by the law and the contract, it would be little more than a delusion and a snare.

In the case of *Germofert Mfg. Co. v. Cathcart*, 104 S. C. 125, 88 S. E. 535, the court passes upon this very question in the following language:

"There was no attempt made to analyze the fertilizer. Ample provision is made by law to secure a reliable analysis. The defendant had agreed that the test of value should be made by analysis. No man can look at a crop (dead or alive) and tell what per cent. of ammonia or potash or other substance it contained. They did not pretend to do so. The defendant

had agreed not to 'hold payees responsible for practical results of said fertilizer on crops.' This evidence, and the charge responding to it, was in direct violation of the agreement. It cannot be said that test of value by analysis is an unlawful contract, because the statutes recognize a test by analysis. The defendant signed a perfectly lawful contract, with ample protection afforded by law. The defendant cannot refuse to adopt the protection approved by law and offered by his contract and be allowed to avail himself of a method of defense that he has agreed not to use. Some substances may kill because they are true to analysis."

There was a dissenting opinion in the case, but we most respectfully think that it completely missed the real question in that case, and is based entirely upon a misconception of the point involved. The majority opinion stated the point and the pertinent principle correctly, placing the decision upon the clause discharging the seller from all responsibility for "results upon the crops."

We must hold, therefore, that there is no reason shown why the judgment of the superior court should be disturbed.

No error.

(181 N. C. 303)

In re JOHNSON'S WILL. (No. 397.)

(Supreme Court of North Carolina. April 27, 1921.)

1. Wills \S 96—No particular form required.

No particular form is required for the disposition of property by a will, and letters, when properly executed, may be valid.

2. Wills \S 96—Paper writing must show it was written "animo testendi."

That a will may be valid it must appear that the paper writing offered for probate, whatever its form, was written animo testendi, meaning not that the maker intended thereafter to make a will on the terms of the paper, but that it was his intention that the paper itself should operate as the disposition of his property to take effect after his death.

3. Wills \S 96—Letter held not a will.

Letter written by testator held not his will as showing on its face that it was not his intention the paper should operate itself as a will but merely that he had in contemplation the preparation of a will by the addressee, whereby the final disposition of his property should be made.

Appeal from Superior Court, Guilford County; J. Bis Ray, Judge.

Proceeding for the production and probate of the will of J. Vestal Johnson. From an adverse judgment, the proponents appeal. Affirmed.

This is a proceeding for the production and probate of a certain paper writing as the will of J. Vestal Johnson. At the hearing his

honor found the following facts, to which all parties agreed:

"(1) That J. Vestal Johnson died in the county of Guilford, state of North Carolina, after an illness of one week, on June 17, 1918, possessed of real and personal property.

"(2) At the time of his death, and some time prior thereto, he had been renting part of his dwelling to the husband of Mrs. Bettie Brintle, and the Brintle family was living in said dwelling house, the deceased reserving a room for his own occupation.

"(3) That some few days after his death, Mrs. Bettie Brintle, while engaged in cleaning up the room formerly occupied by the deceased, found a pasteboard box, such as is usually used by clothing merchants in which to deliver clothes when sold to customers. That this pasteboard box was in his room, and he usually kept his suits of clothes therein, and same was usually kept in his trunk, and he kept his valuable papers in his trunk. That the said Mrs. Brintle took his clothes out to air, and from the pocket of one of his coats which he had been wearing there fell a stamped envelope, sealed and addressed to 'Mr. Joe Sechrest, High Point, N. C.'

"(4) That said envelope, with its contents, was sent by Mrs. Brintle to the said Sechrest, and opened by the said Sechrest, and found by him to contain a letter as follows:

"High Point, N. C., June 10, 1918.

"Dear Joe: You know that we was talking about my will. I want you to write my will for me, and also I want you to bury me in a steel gray casket, and a steel gray case, which can be locked so water can't get to me, and want you to put nice tombs to my grave. You pay \$200.00 for the tombs. And I want to give little Junita Franklin \$100.00 and little Pauline Lambeth \$100.00; and I want to give Mrs. Brintle my home house and lot, and the rest of my property to be equally divided among my people. Joe, you please do this favor for me, and I will pay you what you charge for your trouble. I will be up town as soon as I get able. I don't feel good to day. I will close. Joe, you copy this with ink for me.

"As ever, your friend, J. Vestal Johnson."

"5. That said paper writing was not delivered by the decedent to the said Sechrest to whom it was directed, nor delivered by him to any one, but that it was kept by him from its date, to wit, the 10th day of June, 1918, until his death on the 17th day of June, 1918, and was not out of his possession, although it was sealed and stamped."

All of said paper was in the handwriting of the said Johnson. His honor held that said paper was not a will, and entered judgment accordingly, and the propounders excepted and appealed.

L. B. Williams and C. C. Barnhardt, both of High Point, for appellants.

E. D. Steele, of High Point, and King, Sapp & King, of Greensboro, for appellees.

ALLEN, J. [1] No particular form is required for the disposition of property by will.

and in the application of this principle it has been held frequently that letters were valid as wills, when properly executed. In *re* Ledford, 176 N. C. 612, 97 S. E. 482.

[2] It must, however, appear that the paper writing offered for probate, whatever its form, was written *animo testendi*, by which is meant, not that the maker intended thereafter to make a will on the terms of the paper, but, that it was his intention that the paper itself should operate as a disposition of his property, to take effect after his death.

In the *Bennett Case*, 180 N. C. 5, 103 S. E. 917, the court refused probate of a letter offered as a will because it did not appear that it was the intention then to make a will, and among other things says:

"A will may take the form of an assignment, or of a deed, or of a power of attorney, or of a letter, or of a promissory note, or of an order, etc., say the authorities. It may assume the form of any instrument, or be absolutely informal. This principle is well settled, and numerous examples of such wills are to be found in the law books and decisions of the courts here and abroad (*Gardner on Wills* [1st Ed.] pp. 36 to 43), and the courts have gone very far to support such documents as valid wills; but at the same time they have required sufficient certainty and assurance as to the intention to presently, or at the time the particular document comes into existence, make a will, and as to that paper being the very will he intended to make. *Gardner*, at p. 40, says: 'So a letter written by a testator to a friend authorizing him to take charge and dispose of the testator's property, and to sell and convey the same as his executor, properly attested, sufficiently evidences the testator's intention to dispose of his property, and may be probated as a will. But a letter, like any other instrument, to take effect as a will, must be executed in compliance with the requirements of a statute, and must express a genuine and not merely an anticipated testamentary intent.'"

And again:

"In the case of *In re Estate of C. B. Richardson* (appeal of *Nina R. Hardee*), 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635, the court held that a letter which merely expressed a desire that his sister and her children get everything he owned, but containing words indicating that they should take it by a formal will, or by one he would make, was not testamentary in character, but only the expression of a desire; it clearly not being the intention that the letter should be so construed as to become his last will."

[3] Following these precedents it must be held that the paper writing offered for probate is not the will of *J. Vestal Johnson*, because it shows on its face that it was not the intention of the deceased that the paper should operate as a will, but merely that he had in contemplation the preparation of a will by which final disposition of his property should be made. He says, "I want you to write my will for me," indicating a clear purpose to have a will prepared and that he

was simply outlining the contents of a will. Again, "I want you to give," etc., which is simply an instruction for the preparation of a will. "I will pay you what you charge for your trouble," which was for the preparation of the will.

There is nothing in the paper to show a present purpose that it should be the final disposition of his property, to take effect after his death, and, on the contrary, the whole letter gives indication that he was giving instructions for the preparation of a will, and the fact that he retained the paper instead of mailing it furnishes evidence that he had not fully determined what he would do with his property.

The refusal to submit an issue as to the intention of the deceased was not erroneous, as this intent must be gathered from the letter and the surrounding circumstances; and a finding of the jury contrary to the language used in the letter could not be sustained.

Affirmed.

(181 N. C. 478)

ALSTON v. WILLIAMS. (No. 102.)

(Supreme Court of North Carolina. March 9, 1921.)

Appeal from Superior Court, Warren County; Lyon, Judge.

Action by *Lizzie Alston*, executrix of *T. N. Alston*, deceased, against *R. E. Williams*. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover the value of certain cotton, which the plaintiff alleges the defendant received as agent and failed to account for. There was a verdict and judgment for the plaintiff, and the defendant appealed.

T. T. Hicks, of Henderson, for appellant.

Frank H. Gibbs, of Warrenton, for appellee.

PER CURIAM. An examination of the record creates the impression with us that the plaintiff has probably recovered more than the defendant ought to pay, but we find no error which would justify disturbing the verdict and judgment.

No error.

(181 N. C. 490)

BUCKHORN LAND & TIMBER CO. v. YARBOROUGH. (No. 108.)

(Supreme Court of North Carolina. March 9, 1921.)

Appeal from Superior Court, Chatham County; Bond, Judge.

Action by the *Buckhorn Land & Timber Company* against *J. A. Yarbrough*. Judgment for defendant, and plaintiff appeals. No error.

Civil action to recover two tracts of land, consisting of 110 acres and 7½ acres, respectively. Upon issues joined, the following verdict was rendered by the jury:

"(1) Was E. J. Yarborough, at the time she executed the deed to J. A. Yarborough for the 110-acre tract described in the amended complaint, the tenant of the company from and under whom plaintiff Land & Timber Company claims title?

"Answer: No.

"(2) Is the plaintiff Land & Timber Company the owner and entitled to the possession of the lands described in the amended complaint?

"Answer: No."

Judgment on the verdict in favor of defendant. Plaintiff appealed.

A. A. F. Seawell and Hoyle & Hoyle, all of Sanford, and Siler & Barber, for appellant.

Baggett & Mordecai and Ross & Salmon, all of Lillington, and A. C. Ray and W. P. Horton, both of Pittsboro, for appellees.

PER CURIAM. This case was before the court at the Spring term, 1920, and reported in 179 N. C. 335, 102 S. E. 630. The same questions there presented and discussed are raised again on this appeal. We deem it unnecessary to reiterate what was said on the former hearing.

Upon trial in the superior court, the case was made to turn on the character of E. Jane Yarborough's possession of the locus in quo. Plaintiff contended that she occupied and held the lands as a tenant of plaintiff's predecessor in title. This was denied by the defendant, and upon issue joined there was a verdict adverse to the plaintiff's contention.

The case also involved a question of estoppel and a plea of the statute of limitations; but, after a careful examination of the record and plaintiff's exceptions, we think the verdict and judgment should stand.

No error.

(181 N. C. 480)

SPRUILL v. BONNER. (No. 176.)

(Supreme Court of North Carolina. March 9, 1921.)

Appeal from Superior Court, Pamlico County; Bond, Judge.

Action by Jas. Spruill against W. S. Bonner to recover the price of a carload of Irish potatoes. Judgment for defendant, and plaintiff appeals. No error.

D. L. Ward, of New Bern, and Z. V. Rawls, of Bayboro, for appellant.

F. C. Brinson, of Bayboro, and Ward & Ward, of New Bern, for appellees.

PER CURIAM. This was a controversy over an alleged sale of 177 barrels of Irish potatoes. Upon issue joined, the jury found that the potatoes in question were not purchased by the defendant, W. S. Bonner, but that plaintiff sold the same to one M. P. McCann. This was a question of fact, which the jury has answered in favor of the defendant.

We have carefully examined the record, and find no sufficient reason for disturbing the verdict and judgment.

No error.

BRADLEY et al. v. CALHOUN. (No. 10603.)

(Supreme Court of South Carolina. April 18, 1921.)

1. Judgment \S 951(2), 958(2)—Record of decrees concerning disposition of land held admissible in action for partition.

In an action for partition of land by persons claiming under a will as remaindermen, the court did not err in admitting in evidence, for what they were worth, equity records of decrees concerning the land in so far as the tract of land, the subject of the controversy, was concerned, but, after they were admitted in evidence, the court should have submitted the question as to whether plaintiffs were parties or not to the proceedings in which such decrees were entered.

2. Judgment \S 17(1)—No one bound unless cited to appear and afforded opportunity to be heard; "day in court."

No one shall be personally bound by a decree until he has had his day in court; that is, he must be cited to appear and afforded an opportunity to be heard.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Day in Court.]

3. Judgment \S 490(1), 501—Void judgment subject to collateral attack, but not voidable judgment.

If a decree is void and the parties not served, there is a fatal defect without proof, but, if a decree is voidable and there is a hidden infirmity which can only appear by proof, the infirmity cannot be shown in a collateral manner, but only by a direct proceeding instituted for that purpose.

4. Judgment \S 710—Decree putting fee in life tenant not binding on remaindermen not parties to proceeding.

A decree of a chancellor simply putting the fee in the life tenant, thus destroying the purpose of a will, was an absolutely void act, where remaindermen were not before the court in the proceeding by person, privies, or class, or some competent person to represent them.

5. Executors and administrators \S 335—All persons in esse necessary parties in proceeding to sell land.

In proceeding to sell land left to life tenant and remaindermen, all persons in esse who have any special interest in the property, without reference to what may be the precise character of that interest, should be made parties.

6. Executors and administrators \S 388(1)—One purchasing land sold as absolute estate of decedent acquired only such title as he had.

One purchasing land sold in probate proceeding as the absolute estate of a decedent acquired only such title as such decedent had, where such purchaser had notice that decedent was only entitled to a life estate and was only legally holding the land as trustee for remaindermen.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Allendale County; I. W. Bowman, Judge.

Action by J. R. Bradley and others against Belle Bradley Calhoun. Judgment for defendant, and plaintiffs appeal. Reversed, and new trial granted.

Hendersons, of Aiken, and Brown & Bush and Harley & Blatt, all of Barnwell, for appellants.

Holman & Boulware, of Barnwell, for respondent.

WATTS, J. This is an action for partition of what is generally known as the John W. Bradley home place, said place contains 148 acres or 153 acres. Appellants contend that they are the children and grandchildren of John W. Bradley, deceased, and as such are entitled to seven-eighths undivided interest in said land, under the will of William Cave. They concede one-eighth undivided interest is in the respondent, who was the only daughter of said John W. Bradley, by a second wife, Julia R. Bradley.

The answer of the respondent denied title in the appellants and claims absolute title in herself as sole heir at law of Julia R. Bradley, the second wife of John W. Bradley; it being contended that the said Julia R. Bradley acquired title to said tract of land by sale by the probate judge of Barnwell county in the year 1877 under proceedings instituted to sell said property of John W. Bradley for payment of his debts. Respondent also sets up proceeding, under which it is claimed said sale took place and the deed of probate judge to Julia R. Bradley as res adjudicata of the question of title which is at issue in this section, and a further plea of res adjudicata, of said title under certain proceedings in the old court of equity, and also sets up statute of limitations, presumption of a great and adverse possession and a general denial.

Appellants claim title to land in dispute under the will of William Cave, dated May 11, 1849, and probated in the county of Barnwell November 16, 1855. The cause was tried before Judge Bowman and a jury at February term, 1920, and he directed a verdict for the defendant. Plaintiffs appeal, and by six exceptions allege error. Exceptions 1, 2, 3, and 4 will be considered together. They complain of error on the part of his honor in admitting in evidence the alleged equity records, because it appears affirmatively in said records there was nothing to show that the plaintiffs were ever parties to that proceeding, and there is nothing to show in any paper produced in these records that their names were ever mentioned. The records not even mentioning the remaindermen by name, and there is nothing therein by which it could be presumed that they were parties to that suit.

[1, 2] We do not see any error on the part

of his honor in admitting in evidence for what it was worth the record, in so far as the tract of land, the subject of this controversy, is concerned. But after they were admitted in evidence his honor should have submitted the question as to whether they were parties or not to these proceedings; for, if they were not parties, then the decree of Chancellor Johnstone and Chancellor Ingalls did not preclude them from asserting their rights as remaindermen under the will of William Cave. No one shall be personally bound until he has had his day in court; he must be cited to appear and afforded the opportunity to be heard.

"A judgment against a party not named in the complaint nor any part of the record is void. We cannot presume that one who does not appear to have been a party had his day in court." Freeman on Judgments (2d Ed.) § 141.

"If the judgment or decree is silent upon the subject of service of summons and the service shown by the return upon the summons is not such as will give the court jurisdiction, no doubt the judgment is void." Freeman on Judgments, § 133.

[3] If the decrees are void and the parties not served, that is a fatal defect without proof. If it is a voidable judgment and a hidden infirmity which can only appear by proof, in the latter case the infirmity cannot be shown in a collateral manner, but only by a direct proceeding instituted for that purpose. Turner v. Malone, 24 S. C. 404.

The contention of the appellants here is that the record does not show they were parties; that by reason of that the judgment is void; that it is not a voidable judgment, but a void judgment. In Finley v. Robertson, 17 S. C. 438, the minors accepted service. Judge Hudson held that could not be done, and says:

"The record of this inferior court fails to show the law has been complied with in that action, either in making the infants parties, or in the appointment of guardian ad litem; on the contrary, it shows proper steps not taken."

In that case Judge Hudson sustained the judgment as to the adults, and only avoided it as to the infants. Justice McGowan, in delivering the opinion of the court, says:

"There was no proof offered that contradicted the record, and this case may also be considered as coming within the category of those where the mere exhibition of the record disclosed the fatal infirmity, and, to that extent, made the judgment void." 24 S. C. 406.

Justice Jones, in Clark v. Neves, 76 S. C. 484, 57 S. E. 614, 12 L. R. A. (N. S.) 298, says:

"When it appears affirmatively on the face of the record that an infant has not been served with summons, the infant is not bound by the proceedings. Bailey v. Bailey, 41 S. C. 337, 19 S. E. 669, 728, 44 Am. St. Rep. 713. If the

record is silent as to such jurisdictional matters with respect to a court of general jurisdiction, it will be presumed that what ought to have been done was done; but where the record discloses the manner in which service on the infants was attempted to be made, there is no presumption that they were served in any other way. *Rice v. Bamberg*, 59 S. C. 505," 38 S. E. 211.

The Cave will created a trust. By his will Cave gave the real estate to his executors in trust for his grandchildren, to be equally divided amongst them. The land in specie belonged to the life tenant and the remaindermen. He provided that, if partition was impracticable equally and fairly, the property should be sold and the proceeds invested in other real or personal property by the executors for the use of the life tenants and the remaindermen. This was a trust with implied powers, to be executed in a specific way by partition in kind, and, if that was impracticable, by sale, and a specific declaration that the proceeds of the sale were to be reinvested.

[4] Now, the respondent presents the decrees of Chancellors Johnstone and Inglis to the court, and insists that these decrees show that the fee to the land in controversy went into John W. Bradley. The Johnstone decree put the land in dispute into John W. Bradley for life, in accordance with the terms and limitations of the will of Cave, and effectually completed what the executors were empowered to do. But the Inglis decree, a new proceeding, reverses the status entirely, and declares it invested in the life tenant, John W. Bradley, in fee simple, and does not require the executors, as required by the will in the trust created, to reinvest the proceeds, and takes from the remaindermen entirely their right to the land, and in no way orders a sale for the purpose of reinvestment. The trustees made no sale, although authorized to sell, but the decree simply put the fee in John W. Bradley without any words of inheritance. The decree of Chancellor Inglis did not direct a deed to be made, but simply put the fee in John W. Bradley. The effect of the Inglis decree destroys the purpose of the will of Cave, and, unless the appellants were before the court when it was passed, by person, privies, or class, or some competent person to represent them, then what was done, as far as their rights are affected, is an absolutely void act. In *Dumas v. Carroll*, 112 S. C. 296, 99 S. E. 804, Mr. Justice Hydrick says:

"It has been held by this court, in cases too numerous to mention, that the courts have no power to make or modify deeds or wills made according to law. If the right, which is deemed by most people a very sacred one, of disposing of one's property as he may see fit, is to be preserved in this state, the judges must resolutely set their face against a practice, which is said to be too common, of destroying

trusts created by will or deed, or interfering with the testator's or grantor's disposition thereof by consent decrees, especially where the rights and interests of infants or contingent remaindermen are affected. Where the parties are *sui juris* and their rights alone are affected, they may, of course, do as they please. But where the rights of infants or unborn remaindermen who are only constructively before the court are to be affected, the court should see to it that theirs are not injuriously affected. It is the duty of the courts to preserve and not destroy or allow the parties in interest to destroy or alter trusts and other dispositions of property, where the same have been made and created according to law, and violate no rule of law; otherwise the *jus disponendi* is of no value.

"It must not be understood that the courts should exercise such power over trust estates, which is a well-recognized feature of equitable jurisdiction, as may be necessary to prevent them from going to waste, or to make necessary improvements for the maintenance of the beneficiaries, or to change investments, and the like. But even these powers are to be exercised with great caution, and generally so as to preserve rather than to destroy trusts and other dispositions of property."

[5] In *Mauldin v. Mauldin*, 101 S. C. 1, 85 S. E. 60, a family settlement was agreed on to obviate a family litigation between the members of the family some of whom were dissatisfied with some of the provisions of the will, and a consent decree was taken, carrying out the proposed settlement. This court reversed the decree on the ground, among others, that it disturbed the testator's disposition of his property, which cannot be done without cogent reason therefor. Again, in *Cagle v. Schaefer et al.*, 115 S. C. 89, 104 S. E. 321, it is held:

"A guardian *ad litem* is bound to look after the infant's interest and to act for him in all matters relating to the suit as the infant might act if of capacity; and the mere filing of a formal answer submitting the infant's rights to the protection of the court is not a sufficient compliance with the guardian's duty. * * * Where a court of equity has before it all the parties in interest who are in esse, it may for protection of an estate order the sale of lands, which are subject to remainders, etc., and a possible trust, but the power cannot be exercised save in case of a reasonable necessity."

All persons in esse who have any special interest in the subject-matter, without reference to what may be the precise character of that interest, should be made parties. So in the present case these appellants, as remaindermen, under their great-grandfather's will, should have been made parties to any suit that affected their special interests.

The law provides for the manner in which all records in judgment rolls are to be kept, and we have both criminal and civil statutes providing a penalty for any officer allowing them to go out of his possession. The viola-

tions of these wise statutes by the officers and attorneys are to be deplored.

As we have said before, the records or parts of them produced and where they come from should be admitted in evidence for what they are worth, but the question should have been submitted to the jury as to whether or not these appellants' rights had been adjudicated by the Johnstone and Inglis decrees, or whether, notwithstanding these decrees, they are to be entitled to assert their rights as remaindermen, under the will of William Cave, and recover. All presumptions one way or the other should be solved by a jury, under proper instructions of law, by the court.

[8] The exceptions raising the questions passed on are sustained. Exception 5 is sustained for the reason that, if John W. Bradley only had a life estate in the land, nothing else was sold, and his widow only purchased and acquired such title as he had. If it should turn out the fee was in him, then she purchased that, but there is testimony in the case that John W. Bradley frequently asserted that he only had a life estate, and that his widow knew that, and should be charged with that notice when she purchased at probate court's sale. In *Sullivan v. Latimer*, it is held, 35 S. C. 422, 14 S. E. 933:

"Where one purchases * * * land sold as the absolute estate of A., knowing at the time that A. held it only as a trustee for his sister and her children, the purchaser takes the land subject to the trust, and becomes himself the trustee, and cannot, while retaining possession, acquire title by prescription, or hold it under the statute of limitations, without clear proof of adverse possession. The mere retention of possession of land, subject to a trust, is not adverse to the cestuis que trust, nor are they barred by laches from asserting their rights because of their nonaction for the space of 20 years."

All questions of ouster, adverse possession, the minorities of the appellants, affecting the different periods of possession, whether of adverse possession, statute of limitations, or presumptions of grant are disputed questions, and should be submitted to the jury.

The record in the probate court does not show that the title was adjudicated other than such title as John W. Bradley had in the land ordered sold, and it was not an adjudication against the appellants.

Judgment reversed, and a new trial granted.

GARY, C. J., and FRASER, J., concur.

COTHRAN, J. (dissenting). I dissent from the judgment in this case and will endeavor to make clear my reasons therefor.

I fully concur in the conclusion that the plea of *res adjudicata* under the alleged equity record of 1861 cannot be sustained, for the reason that it does not appear affirmatively as it should that the Bradley re-

maindermen were parties to that proceeding. I think that for that reason the record should have been excluded. It is not only useless, but improper, to submit to a jury evidence the admissibility and efficacy of which depends upon an issue of law, which the circuit judge sooner or later in the trial must decide.

The decree of Chancellor Johnstone in the partition proceeding of Robert Bradley et al. v. Marion Cave et al., dated February 12, 1856, distinctly adjudges that the 153-acre tract, the subject of this litigation, be allotted to John W. Bradley, subject to the limitations contained in the will of William Cave.

Both of these equity proceedings may therefore be eliminated from the case.

My difficulty in concurring arises from my conception of the effect of the proceedings in the probate court under which this land was sold in aid of assets to pay debts.

The probate proceedings: It is conceded, and may well be, that under the will of William Cave, after the real estate had been partitioned and a portion allotted to John W. Bradley, the 153 acres so allotted, the subject of this litigation vested in John W. Bradley for life, with remainder at his death to such child or children as he might leave living at the time of his death. This partition took place in 1856, William Cave having died in 1855, and John W. Bradley went into possession of the 153-acre tract, as tenant for life, so recognized his tenure, and continued in possession until his death in 1875. He left surviving him seven children by his first wife, Wm. H. (26), Elizabeth (24), Martha (22), J. R. (18), B. F. (17), Caroline (14), Mary (10), and one by his second wife, the defendant, Belle B. Calhoun (4), and a widow, Julia R. Bradley. It will be noted that at the instant of his death the title vested in the children above named in fee.

In 1877 William H. Bradley, the oldest son and the administrator of the estate of John W. Bradley, instituted an action in the court of probate for Barnwell county for the sale of the real estate of John W. Bradley, in aid of the personal property to pay debts. The above-named heirs at law of John W. Bradley were made parties. The "case" states that they were all properly served. At that time three of the children were of age Wm. H. (28), Elizabeth (26), and Martha (24). The others J. R. (20), B. F. (19), Carolina (16), Mary (12), and Belle (6) appeared in said action by guardian ad litem, who answered denying knowledge of the matters set forth in the complaint, claiming such interest in the premises as they might be entitled to, and submitting their rights and interests to the protection of the court. The complaint alleged that at the time of his death John W. Bradley was "seized in fee simple" of the 153-acre tract, describing it. It does not ap-

pear that there were any answers filed or served by any of the parties except the minor defendants by guardian ad litem. On March 20, 1877, the probate judge granted a decree of sale. Thereafter, and before sale, the widow claimed and was assigned as dower 33 acres of the 153 being surveyed and allotted to her under regular proceedings, which were duly confirmed on November 10, 1877. The sale was ordered for December 3, 1877; the dower of Mrs. Bradley, life estate in 33 acres allotted to her, being excepted by the order of the sale. The sale was duly advertised and had on December 3, 1877, at which the property was bid off by Mrs. Bradley at \$115. She complied with the terms of the sale, and on December 4, 1877, received from the probate judge a conveyance of said premises, duly recorded on December 31, 1877, a fee-simple title. It appears that she continued in possession of the property, some of the stepchildren and her own child living with her for a while and at various times, until her death in 1910, after which the defendant Mrs. Calhoun appears to have been in possession claiming this property as sole heir at law of her mother and through the deed of the probate judge. There is some testimony to the effect that John W. Bradley frequently recognized the interests of the remaindermen; that Mrs. Bradley knew of this, and after the deed of the probate judge to her did the same thing; and that her possession was by the sufferance of the remaindermen who acquiesced in the arrangement of a home for her as long as she lived.

There are two very important questions which arise in connection with the foregoing statement:

(1) What was the effect upon the rights of the remaindermen of the proceedings in the probate court?

(2) If those proceedings did not conclude the rights of the remaindermen, should the question of the title of Mrs. Bradley by adverse possession, statute of limitations, and presumption of a grant have been submitted to the jury?

It is clear that, if those proceedings did conclude the rights of the remaindermen, the second question need not be considered; if they did not, the claim of the defendant that the mother had acquired the title by adverse possession, statute of limitations, or presumption of a grant would still be open for adjudication, unless it appears that there is no evidence at all to support it.

The first question: The probate court had unquestioned jurisdiction, under section 45 of the Code, to entertain the proceeding for the sale of the "real estate of such deceased person," in aid of the personal property, to pay the debts of the deceased. The pleadings appear to have been in proper shape, and "all persons interested in such estate," including the widow and the children named

above, were duly subjected to the jurisdiction of the court by the service of summons. The minor defendants were represented by a guardian ad litem, duly appointed, who filed an answer in their behalf, formally confiding their interests to the protection of the court. The decree of the probate court was duly promulgated, directing a sale of the real estate, described in the complaint as the property in fee simple of the intestate at the time of his death. The sale was duly advertised and consummated. The widow bought the land, paid the purchase price, and received a conveyance therefor from the probate judge of the fee-simple title to the property excepting her dower interest, a life estate in 33 acres, and had the deed recorded. Every legal step necessary appears to have been regularly taken to transfer to the purchaser every interest which the intestate had in the tract of land.

The remaindermen, however, contend that John W. Bradley, the intestate, had only a life interest in the land, and that, although they were parties to the proceeding, they are not now estopped, by the adjudication therein, from setting up their claim to the fee-simple title to said land.

That presents a very interesting question, to which I have given my most earnest consideration, realizing the far-reaching effect of this decision upon titles depending upon such proceedings as this in the probate court.

There is much in this case of a sentimental nature calculated to affect the judgment of a court in its interpretation of the cold principles of the law. The court is naturally reluctant, if it can possibly be avoided consistent with the settled principles, to sanction the destruction of the rights of the remaindermen, certainly vested upon the death of the life tenant, by a proceeding blunderingly consummated in violation of these rights. For fear that such considerations might affect my judgment, I shall first discuss the effect of the probate court proceedings as if an entire stranger had become the purchaser of the land for a full price.

It is of the utmost importance that the faith of the people in the efficacy of titles under judicial sales shall not be shaken. The courts owe it to themselves as the guardians of the law that this shall not lightly be. It is of greater moment than relief from an isolated instance of hardship.

If it be the law that the probate court has no power to do anything but sell the interest of the intestate in the real estate described in the petition, that it has no power to entertain an issue of title affecting that real estate, and that those who come and who are brought into that court alleging and admitting title in the intestate may afterwards repudiate the adjudication and recover upon their own title, we may have this instance presented: John Doe owns a life

estate only in a tract of land. He dies owing debts which his personal assets are insufficient to pay. He leaves a widow and children all of age. One of his sons is appointed administrator of his estate. He brings an action in the probate court for the sale of the land, alleging that his father owned the fee-simple title thereto. The widow and the children are made parties defendant. They answer, admitting all of the allegations of the petition, including the allegation that the father owned the land in fee simple and join in the prayer of the petition. The decree of sale is made. The sale is had, and Richard Roe purchases for a full price, pays his money, takes his deed, and records it. The proceeds of sale are applied to the debts of the intestate. The children who were in fact the remaindermen of the estate after the falling in of the life estate of the father come into court, repudiate their answers, repudiate the solemn adjudication of the court, repudiate its conveyance, claim that the court only sold the interest of the life tenant, which of course at his death was nothing, and recover the land from the innocent purchaser, for value, who relied upon their solemn admission and the judgment of a lawful court.

So far as the validity of the probate court decree is concerned, it does not make a particle of difference that there was no answer filed by the adult defendants, or that five of them were minors answering by guardian ad litem. They were all served, properly before the court, and its judgment in the matter confided to it was the solemn act of the law, if within the purview of its jurisdiction.

That the probate court had jurisdiction to try in the first instance the issue of title which might have been raised, is conclusively shown by the case of *Gregory v. Rhoden*, 24 S. C. 90. There the court says (construing the very section of the Code which gives the power of sale):

"It seems to us that in such cases this provision necessarily gives the right to determine, at least in the first instance, what is 'the real estate of such person deceased,' subject, of course, to the right of appeal to the court of common pleas, where a trial by jury may, if desired, be demanded. Any other construction would tend to make the whole jurisdiction nugatory."

The case of *Faust v. Bailey*, 5 Rich. 107, involved the question here presented. Although it was an action for partition in the old court of ordinary, the disposition of the question is interesting and fairly apposite to this discussion. It was there held that, where one of the parties to the action claims adverse title in himself, the ordinary had jurisdiction to decide the issue of title. It was contended that the court of ordinary did not possess either the jurisdiction or the ma-

chinery to try the issue, but the court held otherwise, that it was the duty of the court of ordinary, in the first instance, to decide that as well as all other issues in the case; that the right of trial by jury upon the issue of the title was preserved by appeal to the court of common pleas where it could be demanded. The court reaffirms the decision in the case of *Gates v. Irick*, 2 Rich. 593, where it was held that, where one of the parties in partition claims the exclusive title to the property, "the ordinary must decide upon the title." "He is considered to be competent to decide all questions of law and fact which, in the cases within his jurisdiction, are involved in the main inquiries: Shall partition be made between these parties? How? And in what proportion? The title to land is necessarily involved in every such case, whether the decision be made upon default or after contest had." The court further held that the right of trial by jury upon the issue of title was preserved by appeal.

The appellant contends that the case of *McLaurin v. Rion*, 24 S. C. 407, is conclusive of the position assumed by them that the sale carried only the interest of John W. Bradley, which was nothing, and that they are not bound by the adjudication of their title. That case is complicated and abounds with differentiating circumstances. It appears to me that the intimation of the court (it is not a decision to that effect) that, if the probate court had ordered the land sold as the property of one person, where certain of the parties before him were claiming it as the property of another, the sale would have carried only the interest of the first person, and that the adverse interests would not have been concluded, is based upon the assumption that the proceeding was one in rem, and that no parties were necessary; an assumption which is directly opposed to the section of the Code and to the case of *Gregory v. Rhoden*, in the same volume, p. 90, in which the opinion was written by the same learned judge. If the case requires interested parties to be before the court and the foregoing decisions justify the conclusion that the probate court was authorized to entertain the issue of title, and if the decisions to be cited hold that, if the adverse interests are not set up, they are waived, it is difficult to see how the proceeding can be considered one in rem. 23 Cyc. 1406.

I am convinced by the foregoing authorities that the probate court had the authority to try the issue of title between the estate of John W. Bradley and the appellants, who were parties to that action, that it was their duty to set up their title in that proceeding, that an adjudication of sale was an adjudication of title in John W. Bradley, and will endeavor to show that by not setting it up they are now estopped from claiming it.

I may say at the outset of this discussion

that, while most heartily approving the declaration of this court cited in the opinion prepared by Justice Watts, in reference to the duties of a guardian ad litem, particularly in the Schaefer Case, I do not think they are pertinent to the main question under discussion, for the reason that, whatever may have been the delinquencies of the guardian ad litem in the probate proceedings, they cannot be inquired into in a collateral attack upon the judgment rendered therein.

We have here the possession by Mrs. Bradley of the land from 1877 to 1910, 33 years; a deed from the probate judge to her of the fee-simple title, duly recorded in 1877; a sale by the proper officer after due advertisement; a decree of a court having jurisdiction of the subject-matter; all the persons interested in the estate parties to the action duly served, and guardian ad litem appointed and answering; a complaint alleging ownership in fee simple by the intestate.

We next have an action commenced in 1918, 41 years after the sale and 8 years after the death of Mrs. Bradley, by the persons who were parties to the probate proceeding, claiming that John W. Bradley did not own the fee-simple title and that it is in them.

The main question is: "Are they bound by the adjudication in the probate proceedings?"

In *Ruff v. Doty*, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709, the court quotes with approval the following from Freeman on Judgments:

"An adjudication is final and conclusive, not only as to the matter actually determined, but as to any matter which the parties might have litigated, and had decided as incident to or essentially connected with the subject matter of the litigation, and every matter coming within the legitimate province of the original action, both of claim and defense"

—approved in *Ryan v. Association*, 50 S. C. 185, 27 S. E. 618, 62 Am. St. Rep. 831. See also, 23 Cyc. 1295; *McDowall v. McDowall*, Bailey, Eq. 324; *Kenner v. Caldwell*, Bailey, Eq. 149, 21 Am. Dec. 538; *Faust v. Faust*, 31 S. C. 576, 10 S. E. 262.

We have seen by the authorities above cited that the probate court had jurisdiction in the first instance to determine the question of title; that it was the duty of that court to do so should the issue be raised; that the question of the intestate's title was necessarily involved in the proceeding; and that it was the duty of the adverse claimants to set up their title in that proceeding.

In *Haddon v. Lenhardt*, 54 S. C. 88, 31 S. E. 883, the widow and children of the intestate had a homestead interest in his land. An action was instituted in the probate court to sell the land in aid of the personalty to pay debts. The widow and children were parties to that proceeding. A decree of sale

was made and the sale had; the defendant became purchaser and received a conveyance from the probate judge. The widow and children then had their homestead laid off and brought suit to recover the land. The court refused to allow a recovery, saying:

"We are unable to see why persons who are made parties to an action are not as fully concluded by a judgment the necessary effect of which is to destroy their right of homestead as they would be in any other case."

The precise point had been decided by the court in *Culler v. Crim*, 52 S. C. 574, 30 S. E. 635, where the court said:

"The order of the probate court to sell the land in aid of assets was binding upon all who were made parties to that proceeding. The necessary effect of that order was to destroy the right of the parties to that proceeding to claim the homestead in the land ordered to be sold."

If the decree would be conclusive upon a right guaranteed by the Constitution, it is difficult to see why it would not be conclusive upon a title which accrued by virtue of a will. See the dissenting opinion of Chief Justice McIVER in *McMaster v. Arthur*, 33 S. C. 512, 12 S. E. 808, where he announces the same principle, but felt bound by the case of *Ex parte Strobel*, 2 S. C. 309, which latter case is expressly overruled in *Hadden v. Lenhardt*, supra. See *Miller v. Sherry*, 2 Wall. 237, 17 L. Ed. 827.

In *Gates v. Irick*, 2 Rich. 598, it is held that, the ordinary having the power to decide the issue of the title raised by one of the parties in partition, his adjudication of sale is conclusive upon the party raising this issue, although the ordinary expressly declared in his decree that the rights of such adverse claimant should not be affected by the decree. The court says:

"No stronger cause against a partition could be shown than an exclusive title in one of the persons summoned. If this, or any other sufficient cause which might have been shown, be neglected by a person summoned, where the applicant makes those circumstances appear which are essential to the jurisdiction of the Ordinary, the rule is applicable to this which necessarily applies to all other judicial proceedings—matters which might have been investigated must be taken to have been adjudicated no less than those which were investigated."

In *Faust v. Bailey*, 5 Rich. 107, the above case is reaffirmed, the court declaring:

"When called upon to show cause why partition should not be made, though it might be a suit involving his title to the land, yet, failing to make his defense at the proper time, such a judgment, I submit, would conclude him. * * * As a judgment between the parties upon the same subject-matter, if it did not constitute a bar to such a claim, everything appertaining to such titles may be regarded as unsettled and uncertain."

In *Smith v. Smith, Rice*, 232, the precise point was decided as in the two preceding cases. The court declares:

"The defendant here, when served with the summons, had the opportunity of setting up his title and making his full defense. He was called upon to show cause why the partition should not be made of the premises, as the estate of Jesse Smith, deceased. It was a suit involving his title to the land, and he cannot be allowed to make now the defense which he omitted to make then. The order for the sale is conclusive, as the judgment of a court upon the same subject-matter and between the same parties."

In *Jefferies v. Allen*, 34 S. C. 189, 13 S. E. 365, the court says:

"This 82-acre tract of land constituted a part of a tract which, in fact, belonged to Harriet Allen, and not to her husband; but inasmuch as she had assented to, or rather acquiesced in, an order of sale of this land as a part of the estate of her husband, and all of it except the 82 acres had been sold as such, it had been previously adjudged in these proceedings that Harriet Allen was estopped from claiming the said tract of land as her separate estate."

In *Bulow v. Witte*, 8 S. C. 308, the court held:

"If we stretch the obligation of purchasers at judicial sales beyond the mere duty of ascertaining whether the court had jurisdiction in the matter in which it claimed to act, and whether all the parties to be bound are before it, in the language of Lord Redesdale in *Bennett v. Hamill*, 2 S. & L. 577, 'we shall introduce doubt on sales under the authority of the Court, which would be highly mischievous.' Something is certainly due to the purchasers at these sales from the confidence which the public reposes in the judgments of the courts of the country. They must be upheld, at least so far as they operate on the title of parties to the proceeding, and if the title, though of infants, is thus alienated by the sale, the conveyance of the officers of the court operates as an estoppel to the same extent, and in the same manner that the proper deed of an adult conveying his title would bar him from asserting it against the grantee"

—approved in *Trapier v. Waldo*, 16 S. C. 282.

In *Trapier v. Waldo*, 16 S. C. 276, it is held:

"It is well settled that a purchaser at a judicial sale is bound to make inquiry as to the jurisdiction of the Court which ordered the

sale, and whether all proper parties were before it, but beyond that he is in no way responsible for irregularities in the proceeding."

See, also, *Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829.

It would be remarkable that purchasers at probate sales only be required to investigate possible adverse claims by parties to the proceeding.

It follows inevitably that the remaindermen, having been properly made parties to the proceeding, and having failed to set up their adverse claim to the land, are bound by the decree ordering the land to be sold as the property in fee simple of John W. Bradley.

Notwithstanding the conclusion that the legal title to this property was in Mrs. Bradley, the important inquiry remains to be determined whether or not by her conduct she became the trustee of a constructive trust in the property for the benefit of the remaindermen.

The case of *Sullivan v. Latimer*, 35 S. C. 422, 14 S. E. 933, cited by Mr. Justice Watts, is clear upon the question, and it is possible that the remaindermen may upon trial of the equitable issues bring themselves within the principle of that case, as to which no opinion is expressed.

If they should be able to establish a constructive trust in the land, the defendant would be entitled to show in reply that the trust was dissipated by such unequivocal acts on the part of Mrs. Bradley, repudiating the trust as would give a starting point to adverse possession, the statute of limitations, or the presumption of a grant, which, if continued for a sufficient length of time and under the circumstances required by the law, would perfect her title.

It is to be regretted that the verdict upon the legal issue of title was not followed up by a decree settling the equitable issues as well, in which event this court would have been in a position to determine the whole case and end the controversy. As it is, this appeal is not from any judgment of the court, but from a verdict upon the legal issue of title.

In my opinion the verdict upon the legal issue of title was rightly directed in favor of the defendant, and that the case should be remanded to the circuit court for the determination of the equitable issues in the case.

(116 S. C. 33)

NEWTON et al. v. McLAURIN. (No. 10605.)

(Supreme Court of South Carolina. April 13, 1921.)

1. **Will** \Rightarrow 524(6)—Income on hand at life tenant's death held to go as provided for surplus income, and not to remaindermen.

Under a will giving property to two daughters of the testatrix for life, and providing that if the income should exceed enough to comfortably support them, or if one of them died, or married, the excess or surplus should be equally divided among the other living children, and that if either died or married the other should have the use of so much of the estate as was necessary to support her, any balance of the income coming into the hands of the surviving life tenant's executor should be distributed among the living brothers and sisters to the exclusion of the heirs or assignees of deceased brothers and sisters entitled to share in the remainder.

2. **Will** \Rightarrow 564(3)—Rent for year in which life tenant died held to go as provided for surplus income.

Under a will giving property to two daughters of the testatrix for life and providing that any surplus income beyond what was needed for their comfortable support should be divided among the other living children, where the surviving life tenant had leased land for the year in which she died, taking a note maturing after her death, such rent was income to be paid to the living brothers and sisters.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Marlboro County; Edward McIver, Judge.

Suit by Mrs. Elizabeth Newton and others against Julian G. McLaurin, administrator, with the will annexed of Mary Gibson, deceased. From a decree construing the will favorably to the petitioners, the defendant appeals. Affirmed.

Mary Gibson died many years ago, leaving certain real estate, and sons and daughters, some of whom are parties hereto. She also left a will, which is copied in the case. Penelope Gibson outlived Miranda Gibson, dying March 8, 1917, neither of them having married. After her death, as stated in the complaint, the respondents and others, heirs at law of the testatrix, brought suit for the sale of the land and the division of the proceeds among them and the other heirs of the testatrix and their assigns, which was accordingly granted by the court. The land had, however, before the death of Penelope, been rented out for 1917, the lessee having given the appellant a note for the rent, due November, 1917, in the amount of \$1,900, which was paid at maturity. The funds in the hands of the administrator at the death of Penelope Gibson, and received by him after that time, are correctly stated in the

return of the respondent. As appears from the returns filed by the administrator, his commissions of \$95 were taken from the gross sum in his hands, as were also the taxes on the land, which would amount to \$33.06, and stamps on deed, amounting to \$29.

The question was whether the surviving brothers and sisters of Penelope Gibson would take all of the funds, including the entire rent for 1917, or whether the remaindermen and their assigns (among whom were, of course, such survivors) would take the proportionate part of the rent for 1917 determined by the time of the death of Penelope Gibson. The case was heard by Hon. Edward McIver, circuit judge, by consent, on a rule issued against the appellant. Due notice of intention to appeal was given.

The following is the will of Mary Gibson: State of South Carolina, Marlborough County.

Know all men by these presents that I Mary Gibson of the state and county aforesaid being weak and feeble but of perfect mind and memory do make and ordain this my last will and testament in the manner and form as follows, viz:—1st. after all my just debts are paid I will and bequeath to my daughters Miranda Gibson and Penelope Gibson the use of all my property both real and personal during their natural lives, provided they never marry. If both my daughters should marry, whose names are above written, it is my will that my estate both real and personal be equally divided between my children and the heirs of their body share and share alike. It is my will that should the income from my estate exceed enough to comfortably support my daughters Miranda Gibson and Penelope Gibson or one of them, should one of them die or marry the said excess or surplus I will to be equally divided among the rest of my children then living, it is my will that if either of my daughters Miranda Gibson or Penelope Gibson should die or marry the remaining single one have the use of my estate or so much of it as is necessary to support her during her natural life provided she remain single. I do hereby appoint my trusty friend and nephew Raiford Gibson executor to this my last will and testament, hoping and confiding in him that he will carry the same into effect according to the intent and meaning. This 23d day of June in the year of our Lord one thousand eight hundred and seventy-seven.

The following is the circuit court decree:

[1] The above-stated matter comes on to be heard before me by agreement of all parties. The right of either party to have the same heard by Judge Townsend, who issued the rule, being expressly waived. After due consideration of the petition and the return thereto and full argument by counsel for both sides, I am clearly of the opinion that it was the intention of the testatrix, Mary Gibson, that all income accruing from her estate should be applied primarily to the comfortable support and maintenance of her two daughters, Miranda and Penelope, during the lifetime of the sur-

vivors, and that any balance of the fund coming into the hands of the executor or his successors for that purpose should upon the death of the survivor of the two be distributed among their surviving brothers and sisters to the exclusion of the heirs at law or assignees of those brothers and sisters who predeceased Penelope, the survivor of the two prime beneficiaries.

[2] I hold that the rent which was paid or secured to the executor for the year 1917 was income in the hands of said executor dedicated by the terms of the will to the support and maintenance of Miranda and Penelope, and that the same, together with any balance from previous years, must be distributed among the petitioners, the four surviving brothers and sisters, pro rata, in accordance with the plain direction of the will, and it is so ordered, adjudged and decreed.

McColl & Stevensen, of Bennettsville, for appellant.

Townsend & Rogers, of Bennettsville, for respondents.

WATTS, J. For the reasons assigned by Hon. Edward McIver, circuit judge, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and FRASER, J., concur.

GARY, C. J. (concurring). Sections 3633 and 3634 of the Code of Laws 1912, are as follows:

3633. "If any person shall die after the first day of March in any year, the crop on the lands which were in the occupation of the deceased shall be assets in the executors' or administrators' hands, subject to debts, legacies, and distribution, the taxes and expenses of cultivation of such crop being first paid."

3634. "The emblements of such lands which shall be severed before the last day of December following, shall, in like manner, be assets in the hands of the executors or administrators; but all such emblements growing on the lands on that day, or at the time of the testator's or intestate's death, if that happens after the said last day of December and before the first day of March, shall pass with the lands."

The will of Mary Gibson provides that—

"After all my just debts are paid, I will and bequeath to my daughters, Miranda Gibson and Penelope Gibson, the use of all my property, both real and personal, during their natural lives."

This provision of the will, standing alone, shows that as Penelope died after the 1st day of March, 1917, the crops of that year belonged to her and did not pass with the land. *Newton v. Odom*, 67 S. C. 1, 45 S. E. 105. But the foregoing must be construed with the following provision:

"It is my will, that should the income of my estate exceed enough to comfortably support my daughters Miranda Gibson and Penelope

Gibson, or one of them, should one of them die or marry, the said excess or surplus I will to be equally divided among the rest of my children, then living."

As Penelope died after the 1st day of March, 1917, she had an interest, in the crops of that year, to the extent of a comfortable support, until her death. Having reached this conclusion, it necessarily follows that the excess, or surplus income of 1917, must be equally divided among the children of the testatrix living at the time of Penelope's death.

It cannot be successfully contended, that there was not a surplus, or excess, of income in 1917, on the ground that the income of previous years, in the hands of the administrator at the time of Penelope's death, rendered unnecessary a resort to the rents collected in 1917 for the comfortable support of Penelope. The answer of the defendant relative to this question is as follows:

"Since the death of the said Miss Penelope Gibson, by reason of this suit and the cost of the burial expenses, and other accounts for supplies and merchandise furnished her, he has paid out the sum of \$1,167.65. That if this is charged against the amount which was on hand at the time of the death of the said Miss Penelope Gibson, there is left the sum of \$316.68, and respondent is informed, and believes, that the major portion of the amount on hand with him is income which has arisen since the death of Miss Penelope Gibson, and to which it is contended she had no right, but under the will it goes to the owners of the soil from which it was accrued, and *that the only part of the rent paid for the year 1917, that would be applicable as income accrued during the life of Miss Penelope Gibson would be such proportionate part of the entire rent as the period of the year before March 8th bears to the whole year, and that the relators and the surviving brother mentioned in the said proceedings are not entitled to take over the fund on hand with him, to the exclusion of the other children of the testatrix, their heirs or assigns.*"

The words which we have italicized show that the defendant does not dispute the fact that Penelope was entitled to a part of the income of 1917. Therefore, under the express provisions of the will, the children of the testatrix living at the time of Penelope's death were entitled to the surplus income of that year. Furthermore, the \$316.68 hereinbefore mentioned represented the surplus or excess of income during previous years, and was not applicable to the debts of Penelope, but those of the children of the testatrix living at Penelope's death were entitled to it.

For these reasons, I concur in the opinion of Mr. Justice WATTS.

COTHRAN, J. I do not concur in the conclusion arrived at by a majority of the court for the following reasons:

Mary Gibson, late of Marlboro county, died some years ago, leaving a will by which she

devised to her two unmarried daughters, Miranda and Penelope—

"the use of all my property, both real and personal, during their natural lives, provided they never marry."

The will further provided that if either of these daughters should die the survivor should—

"have the use of my estate or so much of it as is necessary to support her during her natural life, provided she remain single."

It is further provided that should the income from the estate be more than enough to comfortably support the daughters, or the survivor, under the conditions named above—

"The said excess or surplus I will to be equally divided among the rest of my children then living."

The executor is charged by the will with the duty of carrying it into effect according to its intent and meaning. The daughter Miranda predeceased Penelope, and the latter died on March 8, 1917. At that time the administrator had on hand from the income of the estate the sum of \$1,484.33, of which he applied \$1,167.55, to a judgment and other expenses incurred on account of the support of Penelope, leaving in his hands \$316.68 as a surplus, distributable under the will.

After the death of Penelope, the lands and personal property were partitioned among the heirs, without reference to the deaths of certain of the children prior to the death of Penelope. In November, 1917, the administrator collected \$1,900 on account of rent of the lands for the year 1917, a note therefor having been given by the tenant to the administrator in the early part of that year for that amount. At the death of Penelope there were four living children of the testatrix; several of the children, neither the names nor number being set out in the case predeceased Penelope some of whom it appears have assigned their interests in the estate to strangers. One of the four children is not made a party to this proceeding; none of the heirs or assignees of those who died before Penelope are made parties. The matter comes up upon a petition by the respondents in this appeal and the return of the administrator to a rule to show cause, setting up the claims of the representatives in interest of the children who predeceased Penelope, and as stated in the circuit decree, was heard "by agreement of all parties."

I assume that the petition was filed in the court of common pleas.

Unless this court is prepared to render a decision in favor of the representatives of the children who predeceased Penelope, simply for the guidance of the administrator, assuming that they will not object to a decision in their favor, it seems to me that it is but "rolling empty barrels about" to attempt to conclude the interests of parties not before the court. The relators as they are styled, three of the four living children, contend that they are entitled each to one-fourth of the \$316.68, the surplus above referred to (as to which there appears to be no contest) and also to the same proportion of the \$1,900 rent of 1917. The administrator suggests that they are not so entitled, "to the exclusion of the other children of the testatrix, their heirs and assigns." In other words, the point at issue is whether the \$1,900 rent of 1917 should be considered a part of the surplus of income after providing for the support of Penelope and distributable as such under the will to the four living children or as intestate property of the estate, distributable to all the heirs.

In view of the provisions of the will, and of the death of the daughter Miranda, Penelope surviving, the devise may be considered as in this form:

"I devise to my daughter Penelope the use of all of my property, both real and personal, or so much of it as may be necessary to support her during her natural life; the surplus from the income of which shall be divided equally among the rest of my children then living."

It seems to me that the bare statement of this provision is a sufficient demonstration of the conclusion that Penelope did not take a life estate in the property of the testatrix, but that it was simply a charge upon the property for her comfortable support; that this charge was fully satisfied when, as it appears, there was at her death in the administrator's hands a surplus of \$316.68, over and above what was required for her comfortable support, and that what income was received after that time belonged to the estate, and was distributable as interstate property. *Jackson v. Jackson*, 56 S. C. 346, 33 S. E. 749.

Upon the death of Penelope there was already a surplus of income over expenditures; that income subsequently received could scarcely be considered surplus when no part of it was needed for her support and five-sixths of it was earned after her death.

(116 S. C. 41)

SIMS v. ELEAZER et al. (No. 10607.)

(Supreme Court of South Carolina. April 13, 1921.)

1. Highways §175(1)—Statute does not require vehicle to keep to right when not meeting others.

The statute requiring a vehicle in meeting and passing another vehicle to keep to the right does not require a person to keep on the right side of the road at all times, but only to avoid interference with some one coming from the opposite direction.

2. Highways §175(1)—Driver must violate traffic rules if necessary to avoid collision.

Where a collision with a person who is violating the traffic rules is imminent, a vehicle driver must exercise due care such as an ordinarily prudent person would exercise under similar circumstances to avoid causing the injury, even though to do so he must technically violate a traffic rule, provided in so doing he does not injure any one who is traveling where he has a right to be.

3. Highways §184(3)—Fact that defendant driver was on left side does not conclusively show negligence and freedom from contributory negligence as matter of law.

The fact that the driver of a vehicle was traveling on the left side of the road at the time of collision does not conclusively show his negligence as a matter of law, but only raises the presumption in favor of the man traveling on the right side of the road, nor does that fact show as a matter of law that the other person is free from contributory negligence, but all the circumstances in evidence explanatory of the situation are to be considered in determining whether the position of the parties is capable of explanation.

4. Trial §252(8)—Correct requested instruction properly refused if not applicable to facts.

In an action for the death of a pedestrian struck by an automobile, it was not error to refuse a requested instruction directly stating the statute regulating the speed of vehicles under certain conditions, where that statute was not applicable to the facts.

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; Edward McIver, Judge.

Action by J. G. Sims, as administrator of the estate of Laura Bell Sims, against W. P. Eleazer and J. Albert Eleazer. Judgment for defendants, and plaintiff appeals. Affirmed.

Plaintiff's sixth exception was to the refusal of the court to give his second request to charge that—

"The laws of this state require a party operating a motor vehicle, upon approaching a crossing of intersecting public highways, or a bridge, or a sharp curve, or a steep descent, to have his machine under control and operating at a rate of speed no greater than six

miles an hour, and in no event greater than is reasonable and proper, and having regard to the traffic then on the highway and the safety of the public."

In refusing the charge, the judge stated:

"I do not charge the second request, although it is good law—practically just a copy of the statute; still I do not think it is applicable to this case."

The eighth exception was to the denial of plaintiff's motion for a new trial based on grounds raised by exceptions 1-6.

The evidence showed that plaintiff's intestate started on foot across the highway from the gate in front of her home and was struck by defendant's car, which was proceeding up a slight grade.

D. W. Robinson, of Columbia, for appellant.

C. S. Monteith and Nettles & Tobias, all of Columbia, for respondents.

WATTS, J. This was an action for damages for the negligent, willful, and wanton killing of the plaintiff's intestate by an automobile driven by the defendants. The cause was tried before his honor Judge Edward McIver and a jury at the February term of court, 1920, for Richland county, and resulted in a verdict in favor of the defendants, upon which judgment was entered, and plaintiff appeals.

Exceptions 1, 7, and 9 raise the contention that his honor was in error in not directing a verdict for the plaintiff as asked for; that from all the evidence adduced at the trial no inference could be drawn of unavoidable accident, or no negligence on the part of the defendant, or of contributory negligence on the part of plaintiff's intestate.

[1] The plaintiff's contention is that the automobile, at the time of the accident, was on the left side of the road, where it had no right to be, under the statute law of this state defining how the traveling public shall travel on the highways of the state, and that the automobile was not under control.

The wording of the statute does not require that in meeting and passing another a vehicle shall keep to the right. The statute does not contemplate that at all times a person traveling shall strictly comply with the terms of the statute. A person traveling a highway has the right to travel on either side of the road when no one is coming in the opposite direction, and he does not interfere with the traveling of another coming from the opposite direction, and in no manner impedes or obstructs the rights of others coming from an opposite direction. If he is meeting and passing, he must bear to the right and comply with the terms of the statute. In passing any one in front of him going in the same direction, he must pass

him on the left, giving the one in front of him the benefit of bearing to the right. Any one passing him going in the same direction must pass on his left.

[2] While these are the general rules that must be observed, yet, if any one, even though violating the rules of traffic, is about to be injured, in person or property, by a collision between them, he must exercise due care, such as an ordinary prudent person would exercise under similar circumstances, to avoid injury to any one, even though he violate the traffic rules, provided in so doing he does not injure any one being where they have a right to be under the law regulating traveling.

If a person traveling in the manner provided for by law meets any one traveling in a manner in violation of the statute and sees a collision is inevitable, unless he violates the rule, and by a violation of it he can avoid a collision without danger to himself or property, he must do so, even though he technically violate the law. He must exercise the ordinary instincts of human nature to avoid being injured or inflicting injury on another. He must exercise the ordinary care that an ordinary person would exercise under similar circumstances of the case.

[3] A person, being on the wrong side of the road, cannot, as a matter of law, be injured by one traveling on the right side of the road. This only raises a presumption in favor of the man traveling on the right side of the road, and being where he had a right to be, that he did not intend to injure the other. Neither can it be said that a person, being on the wrong side of the road, and injuring another, as a matter of law is absolutely liable. While it raises a strong presumption of law that he is, it does not as a matter of law make him absolutely liable. It depends upon all of the facts and circumstances of the situation at that particular time, the positions of each, whether on the right or wrong side of the road, whether the circumstances are capable of explanation. There were circumstances detailed in evidence explanatory of the situation at the time of the unfortunate killing, of the automobile being on the wrong side of the road, and that it was under control, sufficient to carry the case to the jury, and we see no error in his honor's failing to direct a verdict for the plaintiff, and these exceptions are overruled.

Exceptions 2, 3, and 4 are overruled. His honor's charge, as a whole is a complete exposition of the law applicable to the case, and nowhere did he commit any error that was at all prejudicial to the appellant.

Exception 5 complains of error in charging the law of contributory negligence. The answer set it up as a defense. There was testimony along that line, and it was a proper issue to be left to the jury. We see no error

as complained of, and these exceptions are overruled.

[4] Exceptions 6 and 8 are overruled for the reasons stated by his honor. All exceptions are overruled, and judgment affirmed.

GARY, C. J., and COTHRAN, J., concur.

FRASER, J. I dissented in Walker v. Lee, 106 S. E. 682, but this case goes further than Walker v. Lee, and I dissent again.

(116 S. C. 77)

OLIVEROS v. HENDERSON (two cases).

TERWILLIGER v. HENDERSON.

(No. 10611.)

(Supreme Court of South Carolina. April 16, 1921.)

1. Judges \S 49(1)—Judge not disqualified for bias by attending church meeting considering law violations.

In an action for slander and libel by parties prosecuted for violation of the Sunday law, *held* that a presiding judge, who was present at a church meeting, where it was determined to enforce such law, but who refused because of his official position to be placed on committees or take any active part therein, was not disqualified.

2. Pleading \S 214(4)—Demurrers to complaint admit facts, but not inferences drawn therefrom.

Demurrers to a complaint admit facts alleged therein, but do not admit inferences drawn by plaintiffs from such facts, and it is for the court to determine as to whether or not such inferences are justifiable.

3. Libel and slander \S 19—Words used must be given ordinary popular meaning, unless defendant has made them mean otherwise.

In determining whether words are libelous or slanderous, they must be given their ordinary popular meaning, unless the defendant, at the time such words were used, so modified or explained them as to give them a different meaning.

4. Libel and slander \S 1—"Libel per se" and "libel per quod" distinguished.

A "libel per se" is one actionable on its face; a "libel per quod" is one not actionable upon its face, but which becomes so by reason of the peculiar situation or occasion upon which the words are spoken or written.

5. Libel and slander \S 48(1)—Fair criticism of juror's work, without attacking character, reputation, or motives, is not defamation.

While jurors performing their duty are entitled to full protection from unwarranted attacks upon their character, reputation, or motives by persons disgruntled or dissatisfied by any verdict, yet fair and just criticism of their work in discharge of duty is in the interest of the administration of justice and of sound public policy, and when such criticism is fair and just and confined to their work,

and does not attack their moral character or integrity, there is no defamation.

6. Libel and slander ¶123(8)—When criticisms of jurors cease to be fair and honest and become libelous is usually a jury question.

The question whether criticisms and statements about jury men ceased to be fair and honest and become libelous is usually a question for the jury, and can rarely, though occasionally, be decided on a demurrer.

7. Libel and slander ¶42(1), 81—Publication regarding jury's action held not libelous, and complaint held to state no cause of action.

A published article, alleged to cast aspersions on the verdict of a jury, signed by several citizens for the announced purpose of giving the public the facts in a prosecution for violation of the Sunday law, held not libelous per se, and, where the complaint failed to allege any extrinsic matter making the publication libelous, no cause of action was stated.

8. Libel and slander ¶42(1)—Statement that plaintiffs were "outlaws" construed to mean only that they were violating Sunday law.

A published account of a criminal trial for violation of Sunday closing law, containing a statement of a witness that plaintiffs were outlaws, an outlaw being one excluded from the benefits of the law and deprived of its protection, which, while standing alone, might be libel per se, held, in connection with the account of the trial, to mean no more than that plaintiffs were violating the law, and not to constitute libel.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Out-law.]

9. Libel and slander ¶38(4)—Testimony of a party held privileged.

The testimony by defendant in a libel suit, when a witness in a criminal prosecution and on cross-examination, was privileged.

10. Libel and slander ¶42(1)—A private individual may publish court proceedings.

A private individual has the same right as a newspaper to publish the proceedings of courts, but such report must be accurate, fair, and impartial, not garbled, added to, or taken from, nor used to injure the reputation or business of another.

11. Libel and slander ¶51(3)—Publication of court proceedings over party's objection not malicious libel.

If defendants, in an action for libel, had a right to publish court proceedings, the fact that defendants published such proceedings over the objection of the plaintiffs is insufficient to fix a charge of malicious libel on the publishers.

12. Libel and slander ¶101(4)—No presumption of malice from the publication of court proceedings over party's objection.

A publication of court proceedings over objection of a party is prima facie not libelous, and there is no presumption of malice therefrom.

13. Libel and slander ¶9(7)—Publication that Red Cross received tainted money from plaintiffs held not libelous.

In a civil action for libel, a publication, alleged to have injured plaintiffs in business and reputation, stating that the Red Cross does not knowingly accept tainted money, held not intended by the signers of the article to charge the plaintiffs with being engaged in any corrupt, reprehensive, or illegal avocation, or contrary to morality, where it stated that plaintiffs had paid the proceeds from business done on Sunday to the Red Cross, and where plaintiffs admit that such money was made or earned contrary to and in violation of Sunday closing law (Cr. Code 1912, §§ 698, 699), there is no cause of action.

14. Sunday ¶7—Sales of ice cream and cigars not work of charity, though profits are given to charity.

Sales of ice cream or cigars are neither a work of necessity nor charity, within Cr. Code 1912, § 698, nor are they excused where the money received therefrom is devoted to Red Cross or other charitable work.

Appeal from Common Pleas Circuit Court of Aiken County; H. F. Rice, Judge.

Actions by L. M. C. Oliveros, by Louis D. Oliveros, and by William Terwilliger against C. K. Henderson for slander and libel. Judgment in each case for the defendant, and the plaintiffs appeal. Affirmed.

The following is the decree of the trial Judge:

The above-stated causes are actions for slander and libel, instituted by the plaintiff against the defendant Henderson.

In the cases of Terwilliger and Louis D. Oliveros two causes of action are set out. In the other four cases only one cause of action is set out in the complaint.

The matter came before me at the summer term of court for Aiken county, 1920, upon demurrer by the defendant to all the causes of action set out in the complaints, upon the ground that the same did not state facts sufficient to constitute causes of action.

In the month of February, 1920, Louis D. Oliveros and William Terwilliger were operating an ice cream parlor and cigar store in the city of Aiken, and were tried before magistrate W. B. Raborn upon a warrant, which complaint alleges was sworn out by C. K. Henderson, charging them with violation of sections 698 and 699 of the Criminal Code of South Carolina.

The case was tried by a jury, and resulted in the acquittal of the defendants. Thereafter, the complaint alleges, there was published in one of the newspapers of the city of Aiken what was purported to be an account of the trial and matters connected therewith. When the cases were called for hearing, it was suggested by counsel for the plaintiffs that the court was disqualified to hear the cases, upon the grounds that the now presiding judge was present at a meeting at the Baptist Church in which the matter of prosecuting the violators of the Sunday law was discussed, and

that the court had participated in said discussion and meeting. The said grounds will be more fully disclosed by an affidavit filed along with the record in this case and made by W. M. Smoak, one of the attorneys.

The attorneys for the defendant insisted strenuously that there be no delay in the hearing of the causes, and that there was absolutely no grounds for the claim of the plaintiffs that the presiding judge should declare himself disqualified. As a matter of fact, on the occasion in question the now presiding judge was present at the Baptist Church in the city of Aiken, at one of the regular Sunday services, and, after the usual sermon and other exercises were over, but the congregation still sitting in their seats, and before being dismissed, the matter was brought up by either the minister or some member of the church—exactly who I cannot recall—and the matter was discussed while the presiding judge was sitting in the same seat in which he had listened to the sermon, and it was suggested by one of the deacons of the church that the now presiding judge should serve as a member of a committee to be appointed to look into the matter of the observance of Sunday law in the city of Aiken.

[1] The now presiding judge plainly and unequivocally refused to have his name put upon any such committee, and stated openly and plainly that on account of his official position he could have nothing to do with any such movement. He took no part whatsoever in the discussion, either for or against it, or in any other way.

Neither of the plaintiffs nor the defendant have ever been in any sense intimate with the present presiding judge, nor have any of them been connected with him in business or any other way; all of them are friends of the presiding judge, but none of them no more than any of the others. So far as he can recall, not one of them has ever been in his home, with the exception of Mr. L. M. C. Oliveros, who was there on one or two occasions on business; nor has he, the presiding judge, ever been, so far as he can recall, in the home of any one of the parties to said cause, and he has lived in the city of Aiken now for more than 16 years.

After a full consideration of the whole proposition he felt, and still feels, that there was absolutely nothing in the suggestion that he might be disqualified, and to refuse to hear these demurrers would be to shirk a plain duty which he was under oath to perform, unpleasant though it might be to undertake to decide differences among men all of whom he looks upon as his friends.

I have given this matter considerable study, and have endeavored to apply the law to the cases.

[2] The demurrers admit the facts alleged in the complaint, but do not admit the inferences drawn by plaintiffs from such facts, and it is for the court to determine as to whether or not such inferences are justifiable; that is, to determine if the language used in the publication can fairly or reasonably be construed to have the meaning attributed to it by the plaintiff.

[3] Libelous or slanderous matter, spoken or written, belongs to one of two classes—per

se and per quod. In determining whether words are libelous or slanderous, they must be given their ordinary, popular meaning, unless, however, the defendant, at the time such words were used, modifies or explains the meaning which he gives them to mean something other than their ordinary, popular meaning.

[4] A libel per se is one which is actionable on its face. A per quod libel, however, is one not actionable on its face, but becomes so by reason of the peculiar situation or occasion upon which the words are spoken or written.

As stated in 13th Ency. Pleading and Practice, and adopted in Hubbard v. Furman University, 76 S. C. 510, 57 S. E. 478:

"If the alleged defamatory words are not actionable on their face, but derive their defamatory import from extrinsic facts and circumstances, such extrinsic facts and circumstances must be set forth and connected with the words charged by a proper averment."

[5] We will first consider the cause of action of the plaintiffs J. Conrad Dobe, Joseph P. Logan, and Arthur M. Weeks. The publication complained of, and which the said plaintiffs claimed is libelous, is set out, in part at least, in the complaints in the said cause. Dobe, Logan, and Weeks were three of the jurors that tried the aforesaid cause in the magistrate's court. An examination of the publication will show that it can hardly be said that it is a criticism of the conduct of the said jurors. It is certain that nowhere in the said publication is there any direct criticism of these jurors, and certainly no direct charge that they were actuated in any degree by any improper motive in returning the verdict which they did. Therefore, if it can be construed a criticism of their work as jurors, it can be done so only by inference, but if it be construed as a criticism, then the question, which is a very far-reaching, important one, comes squarely up before the court as to whether or not the public has a right to criticize the verdict of a jury.

Jurors do not voluntarily assume their duties, but are required by the law to serve. This being so, there can hardly be two opinions about the proposition that in performing their duty they are entitled to full protection from unwarranted attacks upon their character, reputation, or motives by persons disgruntled or dissatisfied by any verdict which they might render; but are they, by virtue of their positions as jurors, to be held free from all criticisms, no matter how unjustifiable their verdicts may be? I find it impossible for an instant to entertain the affirmative of this proposition. If a circuit judge commits error or does a legal wrong, there is a higher court to set the matter right, but when a petit jury goes wrong by freeing a criminal against all the evidence and the law there is no remedy save by an indignant public opinion, such as may tend to prevent a repetition of such verdict.

I want it distinctly understood at this point that neither directly nor by insinuation do I mean to apply the word "criminal" to either of the young men who were tried in the magistrate's court, nor do I intend any language used above in reference to verdicts of jurors generally to be applied to the verdict rendered

by the jury in the magistrate's case above referred to. Young Louis Oliveros I have known practically all of his life and I hold him in the highest regard. Terwilliger I have known for only a short time, but have never heard aught against his character. Fair and just criticism of a juror's work in the discharge of his duty is in the interest of the administration of justice and a sound public policy, and when such criticism is fair and just, then there is no defamation.

As is said in *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 448, quoted in the dissenting opinion of Mr. Justice Watts in the case of *Black v. State Company*: "So long * * * as the criticism is confined to a man's work, and does not attack the moral character or professional integrity of the individual, and is fair and reasonable, there is no libel because there is no defamation of the man himself. But, when the comments or criticism of a man's work becomes an attack on his private or business character, then the element of malice comes in and stamps the language as libelous."

[6] It may be true, as stated in *Black v. State Co.*, supra, 98 S. C. at page 475, 77 S. E. at page 54 (Ann. Cas. 1914C, 989) that "the question when criticism and statements cease to be fair and honest, and become libelous is usually for the jury and can rarely be decided on demurrer," but in the instant cases I do not think this can apply, and if this be the law with reference to criticism of the verdicts of jurors, then it is dangerous indeed to make any criticism whatsoever upon a juror's work, where the speaker or writer does not approve of it, because, no matter how honest or lacking in malice such criticism or comment may be, any one making any such comments will be liable to an action for slander or libel, and be put to the expense and trouble of defending such action before a jury.

[7] We should not forget, too, as is set out in *Mayrant v. Richardson*, 1 Nott & McC. 347, 9 Am. Dec. 707. "That freedom of speech is the necessary attribute of every free government."

In the dissenting opinion of Mr. Justice Watts in *Black v. State Company*, supra, we find the following taken from *MacDonald v. Sun Printing & Publishing Association*, 45 Misc. Rep. 441, 92 N. Y. Supp. 37, and I think this language, which was applied to public officers, also applies with equal force to jurors: "The people are not obliged to speak of the conduct of their officials in whispers or in bated breath in a free government, but only in despotism. On the contrary, they have a right to speak out in open discussion and criticism thereof, the only test being that they make no false statement. And this is the great safeguard of free government and of pure government. This is fundamental among us;" and again, "while an officer's public acts may be criticized, the publication must not contain a charge against his person or moral character."

And again in *Mayrant v. Richardson*, supra, we find the following as to freedom of speech: "That among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with awful reverence, and would approach with the most cautious circumspection, there is no one

of which the importance is more deeply impressed on the public mind."

Again, 5 A. L. R. page 1352: "The foundation for an action of libel must be that the words are defamatory or bear a defamatory meaning."

In *Hubbard v. Furman University*, supra, the court says: "If the publication is not libelous per se, bad motive or malicious purpose to injure the plaintiff is not enough without an allegation that it effected the evil purpose by conveying to those to whom it was sent, a charge injuriously affecting the character or business of the plaintiff."

It is true, indeed, as stated by counsel for the plaintiffs on the argument: "That a citizen is as much entitled to the protection of the court for his good name as for his property."

If any difference should be made, it ought to be made in favor of the former; but, while the courts should be prompt in protecting the citizen's good name, they should be careful, also, before proceeding, to be sure that the complaint in an action of this kind does not set out that an attack has been made upon the reputation of such citizen.

The publication in question is as follows:

"To the Citizens of Aiken City and County:

"As is well known, some of the citizens of the city have been earnestly striving for a better observance of Sunday, an effort being made to have the laws of the city conform rather than conflict with the laws of the state.

"To this end a committee from the various churches of Aiken appeared before council, which not only refused this petition, but passed an ordinance which only required closing for two hours on Sunday (10:30 a. m. to 12:30). So that the city was more wide open on this day than in the past.

"Consequently, the only course open was an appeal to state law. The law was published in the city and county papers. As a result, all places of business were closed for two succeeding Sundays, and then, in open defiance of the state law, one or two opened up, and continued so to do. After due warning had been given, and disregarded, warrants were issued for one of the firms violating the law, and the case was heard before Magistrate Raborn's court.

"We herewith present the full stenographic report of that trial in order that all the people may know the facts. The defendants admitted the violation of the law, every witness testified to the fact of its violation, and yet in face of all the law and all the evidence the jury brought in a verdict of 'Not guilty.'

"The defendants pleaded that they gave the profits to the Red Cross and exhibited receipts as proof.

"The committee knows full well that the Red Cross, which the people love and to which they gladly contribute with splendid generosity, does not knowingly accept tainted money or money made in their name by violators of the laws, and we believe that all money so received will be returned, if it has not already been returned.

"The defendants made a strong plea of the fact that they kept closed for two hours, 10:30 to 12:30, as provided by city law; but this is wholly foreign to the issue, as the question

was state law, and this absolutely forbids business houses opening on Sunday, drug stores excepted, and that only for sale of medicine to relieve sick and suffering humanity.

"In conclusion * * *

"In view of the law and clear, undisputed evidence, and the admissions of the defendants that they had violated it, does it not seem strange that this jury (of which this plaintiff was a member) should bring in a verdict against all the law and all the evidence—a verdict of 'Not guilty'?"

"Let the people of our city and county read the record of this trial, form themselves into a jury, and render a verdict in accordance with the law and the evidence. [Signed] C. K. Henderson. Dr. H. H. Wyman, Sr. Rev. O. M. Abney. Rev. P. J. McLean. Rev. John E. Henderson. Rev. John Ridout. G. Cushman. J. T. Shuler. W. E. Shuler. E. C. Cushman. I. N. Eubanks. C. L. Holley. D. M. George. E. L. Shealey. J. E. Seigler. J. Milton Allen. G. E. Owens. E. C. Barrett."

Applying the foregoing principles to the cases of the three jurors, a bare inspection of the complaint is sufficient to show that the publication is not libelous per se. There is no "charge injuriously affecting the character or business of the plaintiff."

The said report of the proceedings purports to be full and complete, and neither in the argument nor elsewhere was it charged by the plaintiff that such report is unfair, garbled, added to, or taken from. The expressed purpose of such publication was that "all the people may know the facts." The complaints show that defendant, along with 17 other citizens of the city of Aiken, signed the publication. A fair and reasonable construction of such publication reveals the fact that the signers thought that the defendants in the said trial should have been convicted. But nowhere do they say that any member of the jury returned a dishonest verdict, or that any moral turpitude of any sort prompted their action.

It is true that the plaintiffs have seen fit to construe said publication as charging them with almost every manner and form of moral obliquity described in five subsections of paragraph 9 of the complaint by a battery of adverbs, but these are only the inferences of the pleader, and they are not such inferences as are fairly and reasonably deducible from the language used. Neither do the pleadings set out any facts outside of the publication which would make the same libelous. The Code does not in the latter case relieve the pleader from setting out the facts which he relies upon to make a cause of libel when there is no libel per se. *Hubbard v. Furman University*, supra, 76 S. C. 512, 57 S. E. 478.

There is therefore no cause of libel or slander, either per se or per quod, set out in the complaints, and the demurrers in each of these cases are sustained, and the complaints dismissed; and it is so ordered.

The plaintiffs, Louis D. Oliveros and William Terwilliger, each sued on two causes of action. In their first cause of action they say that each of them were branded as an outlaw by defendant publishing in a newspaper the account of the trial in the magistrate's court, or at least a part of it set out in the complaint, and that

said statement of defendant published was given while a witness in said trial.

[8] It will be observed from an examination of the complaint that this suit is not based upon defendant's statement on the street, but upon the statement made while a witness, and the subsequent publication of such evidence in a newspaper published in the city of Aiken.

The suit of L. M. C. Oliveros has for its basis the same statement charged against the defendant, and made at the same time, so that the first cause of action in the *Louis D. Oliveros* and *William Terwilliger* cases and the one and only cause of action in the *L. M. C. Oliveros* case will be considered and determined together.

The publication complained of, as set out in the complaint, is of considerable length and need not be set out here. It purports to be a stenographic report of the evidence taken at the trial heretofore mentioned. Nowhere has it been charged, either in the argument or in the complaint, that so much of it as is set out in said complaint is unfair, garbled, added to, or taken from. It must be assumed, therefore, that as it appears in the complaint the said publication referred to, so far as it goes, is an accurate account of what took place in the magistrate's court.

The portion of the proceedings referred to above disclose the fact that defendant, upon the insistent cross-examination of counsel, did make the statement referred to. The plaintiffs deny such statements as false, and a willful, malicious, wanton, etc., defamation of plaintiffs. Webster's New International Dictionary defines outlaw to mean: "A person excluded from the benefits of the law or deprived of its protection." Standing alone and unexplained, such charge might be a libel per se, but no reasonable person, it seems to me, can read the account of the trial as set out in the evidence, made a part of the complaint, and say that defendant meant any more than to charge that plaintiffs were violating the law by opening their place of business and selling goods on Sunday.

[9, 10] I do not deem it necessary to quote authority for the proposition that what was said by defendant as a witness, and on a cross-examination by the counsel for the then defendants, was privileged. As I recall, this was admitted by counsel for the plaintiffs, and it only remains to discuss the point as to whether a later publication of the testimony taken at the trial was also privileged. There is a great deal of authority on this subject. It seems to be settled beyond question that a private individual has the same right as a newspaper to publish the proceedings of courts—no more and no less. All the authorities seem to agree, also, that either an individual or a newspaper has the right, with some exceptions, to publish the proceedings of our courts of justice. "The reason for this rule is that the public have a right to know what takes place in a court of justice, and unless the proceedings are of an immoral, blasphemous or indecent character, or accompanied with defamatory comments, the publication is privileged." Judge Freeman in *Holmes v. Clisby*, 104 Am. St. Rep. 130, 131. The authorities all agree, however, that if such report is published it must be accurate, fair, and impartial, not garbled, added to, or taken from. No one has a right to take advantage

of the privilege, allowed to make comments injurious to the reputation or business of another. Some authorities seem to hold, also, that even if the report be accurately published, the publisher is liable if it be done with an intent to maliciously injure another. If the last-mentioned rule be followed strictly, then it seems to me that the plaintiff should be required to allege more than the bare statement that the publication was made with a malicious intent to injure, but should set out, also, the facts upon which such charge is based. Otherwise no newspaper or private individual would be safe in publishing a report of the proceedings of a court, no matter how fair, accurate, or impartial such report might be, without subjecting himself to an action for libel.

To repeat what was said above from *Hubbard v. Furman University*, supra: "If the publication is not libelous per se, bad motive or malicious purpose to injure the plaintiff is not enough without an allegation that it affected the evil purpose by conveying to those to whom it was sent a charge injuriously affecting the character or business of the plaintiff."

In *R. C. L. vol. 17, p. 829*, the law is stated to be: "The question whether or not a communication is privileged is primarily a question of law for the court, where the facts and circumstances surrounding the publication are not disputed by the parties."

For the purpose of the demurrers, the facts and circumstances set out in the complaint are admitted by the defendant. It is therefore for the court in the instant cases to determine whether or not such matters and facts constitute any basis for the action brought by the plaintiffs.

[11, 12] Applying the foregoing principle to the cases before us, the only fact set out to sustain the charge of malice is that the publication in the newspaper was over the protest of the plaintiffs, Louis D. Oliveros and William Terwilliger. I have found no authority which holds that if a person has a right to publish the proceedings of a court that an objection to such publication by some one interested will be sufficient to fix a charge of malicious libel on the publisher. Prima facie, such publication is not libelous, and there is no presumption of malice therefrom.

Again, what is there in the publication "injuriously affecting the character or business of the plaintiff?" Is it not so plain that he who runs may read that defendant, in speaking of plaintiffs on cross-examination as "outlaws," only meant to convey the idea that plaintiffs were selling goods on Sunday in violation of the state laws, and no more?

See *Shcut v. McDonald*, 3 Brev. 38, 5 Am. Dec. 536. And was this not said while defendant was a witness, and on insistent cross-examination by the same attorney who is now the attorney for the plaintiffs in these cases, and who was then the attorney for the defendants, Louis D. Oliveros and William Terwilliger, in the magistrate's court?

The latter in their second cause of action admit selling ice cream and cigars on Sunday, and can they now be permitted to come into court and claim that their business is being injured because the plaintiff (?) published in the newspaper that they were doing this? Even though the publication be not privileged, can it be fairly and reasonably inferred from

the language used that either of these two young men are guilty of any moral obliquity? However, from a somewhat extended examination of the authorities dealing with the subject, I am forced to conclude that the publication is privileged, and that therefore the complaints of Louis D. Oliveros and William Terwilliger in their first cause of action, and the complaint of L. M. C. Oliveros, do not state any cause of action against the defendant, and the demurrers interposed in each of said cases should be sustained; and it is so ordered.

[13] The second cause of action in the Louis D. Oliveros and William Terwilliger cases alleges that plaintiffs have been damaged in their business and reputation by a statement in the same publication in the following language:

"To the Citizens of Aiken City and County:

"As is well known, some of the citizens of the city have been earnestly striving for a better observance of Sunday, an effort being made to have the laws of the city conform rather than conflict with the laws of the state.

"To this end a committee from the various churches of Aiken appeared before council, which not only refused this petition, but passed an ordinance which only required closing for two hours on Sunday (10:30 a. m. to 12:30). So that the city was more wide open on this day than in the past.

"Consequently the only course open was an appeal to state law. The law was published in the city and county papers. As a result, all places of business were closed for two succeeding Sundays, and then, in open defiance of the state law, one or two opened up, and continued so to do. After due warning had been given, and disregarded, warrants were issued for one of the firms violating the law, and the case was heard before Magistrate Raborn's court.

"We herewith present the full stenographic report of that trial in order that all the people may know the facts. The defendants admitted the violation of the law, every witness testified to the fact of its violation, and yet in face of all the law and all the evidence the jury brought in a verdict of 'Not guilty.'

"The defendants pleaded that they gave the profits to the Red Cross and exhibited receipts as proof.

"The committee knows full well that the Red Cross, which the people love and to which they gladly contribute with splendid generosity, does not knowingly accept tainted money or money made in their name by violators of the laws, and we believe that all money so received will be returned, if it has not already been returned.

"The defendants made a strong plea of the fact that they kept closed for two hours, 10:30 to 12:30, as provided by city law; but this is wholly foreign to the issue, as the question was state law, and this absolutely forbids business houses opening on Sunday, drug stores excepted, and that only for sale of medicine to relieve sick and suffering humanity.

"In conclusion * * *

"In view of the law and clear, undisputed evidence, and the admissions of the defendants that they had violated it, does it not seem strange that this jury (of which this plaintiff was a member) should bring in a verdict against all the law and all the evidence—a verdict of 'Not guilty?'

"Let the people of our city and county read the record of this trial, form themselves into a jury, and render a verdict in accordance with the law and the evidence. [Signed] C. K. Henderson. Dr. H. H. Wyman, Sr. Rev. O. M. Abney. Rev. P. J. McLean. Rev. John E. Henderson. Rev. John Ridout. G. Cushman. J. T. Shuler. W. E. Shuler. E. C. Cushman. I. N. Eubanks. C. L. Holley. D. M. George. E. L. Shealey. J. E. Seigler. J. Milton Allen. G. E. Owens. E. C. Barrett."

A casual examination of said publication discloses the fact that the words "does not knowingly accept tainted money" is not intended by the signers of the article to charge the plaintiffs, Louis D. Oliveros and William Terwilliger, as being engaged in any "corrupt, reprehensible, or illegal avocation, or contrary to morality," but such words, when taken together with the part of the article set out in the complaint, evidently and plainly meant that the money contributed by said plaintiffs to the Red Cross was earned by said plaintiffs in doing something that was contrary to law.

In the third paragraph of the complaints the plaintiffs allege that each of them engaged in the operation of an ice cream parlor and cigar business.

[14] In the fourth paragraph of said complaint they allege that during the months of January and February, 1920, they did keep open and operate their said place of business on each Sunday in each of said months, and contributed the proceeds of such sales to the American Red Cross Association and the Odd Fellows' Orphanage at Greenville, S. C. The said plaintiffs, therefore, while denying that the said moneys contributed to the Red Cross and orphanage was made or earned contrary to law, in said paragraph 4 admit this to be so. It is clear that, no matter what may have been done with the profits, such sales on Sunday were plain violations of sections 698 and 699 of the Criminal Code of this state.

I presume that the said plaintiffs construed the exceptions in section 698 to permit them to sell on Sunday if the proceeds of such sales were devoted to charitable purposes, but, if so, they were in error.

The section plainly prohibits the exercise of any work or business of a person's ordinary calling on Sunday except works of necessity or charity, and from a legal standpoint the sales of ice cream or cigars are neither a work of necessity nor charity.

I desire to be distinctly understood, however, that I do not intend in any degree to cast any reflections on either of the young men referred to. The laws which they were charged with violating, and which in their complaints they admit, have in many parts of the state been honored more in the breach than in the observance, with the tacit consent and approval of the public.

Now, this has been the case until quite recently in the city of Aiken. It was not wrong in itself, but wrong because the law prohibited it. There are few smokers who would hesitate to purchase cigars or cigarettes on Sunday if they happened to need them and had the opportunity to do so.

From the foregoing facts of the case and the law applicable thereto, I cannot escape the conclusion that the said complaints in their second

cause of action state no cases against the defendant.

The demurrers in each of said second causes of action must be sustained; and it is so ordered.

In addition to the authorities cited above see also: *McGregor v. State Co.*, 114 S. C. 48, 103 S. E. 84, *Starkie on Slander and Libel* (Amer. Ed.); *Smith v. Bradstreet Co.*, 63 S. C. 525, 41 S. E. 763; *Kee et al. v. Armstrong, Bird & Co.*, 75 Okl. 84, 182 Pac. 494, 5 A. L. R. 1349; *Lawson's Rights and Remedies*.

John Edwin Stansfield, of Aiken, and Geo. B. Trimmerman, of Lexington, for appellants. Hendersons, of Aiken, for respondent.

WATTS, J. For the reasons assigned by his honor, Judge Rice, in circuit decree, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and FRASER, and COTH-RAN, JJ., concur.

(116 S. C. 64)

Ex parte LUMMUS COTTON GIN CO.

SAVANNAH GUANO CO. v. SANDERS et al.

(No. 10610.)

(Supreme Court of South Carolina. April 13, 1921.)

1. Appeal and error \S 704(2)—Finding that creditor had no notice of homestead proceeding not disturbed when record on which exception tried not before the court.

Where a judgment creditor's exception to proceedings to set off the judgment debtor's homestead was tried on the record, and it is not before the Supreme Court, the finding that such judgment creditor had no notice of the proceeding cannot be disturbed.

2. Homestead \S 199—Proceedings to set off not binding on judgment creditor without notice.

A proceeding to set off an execution debtor's homestead is not binding on a judgment creditor who had no notice of the proceeding.

3. Homestead \S 202—When excess over exemption not paid within 60 days, proceedings still open, and judgment creditor entitled to require reassessment.

Under Civ. Code 1912, \S 3713, relative to setting off an execution debtor's homestead when property is worth more than \$1,000 and cannot be divided without injury, where the excess over \$1,000 was not paid within 60 days as required by that section, but with the permission of the execution creditor was paid from time to time until paid in full, the assignment of the homestead was not complete, and it was not too late for another judgment creditor to object and require a reassessment.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Allendale County; I. W. Bowman, Judge.

Action by the Savannah Guano Company against T. O. Sanders and Annie D. Sanders. Judgment for plaintiff. From an order sustaining the exceptions of the Lummus Cotton Gin Company to proceedings to set off defendants' homestead, defendants appeal. Affirmed.

R. P. Searson, of Allendale, for appellants.
H. L. O'Bannon, of Barnwell, for respondent.

FRASER, J. The Savannah Guano Company on 4th January, 1916, obtained a judgment against the appellants herein for \$1,554.26 and issued execution therefor. The Lummus Cotton Gin Company obtained judgment against the appellants on April 10, 1917, but the record fails to show that they issued execution therefor at the time. In July, 1917, the sheriff took proceedings to set off the appellants' homestead. In November, 1917, the appraisers filed their return with the sheriff, in which they assessed the real property of appellants at \$2,750. The sheriff then served the required notice on appellants to pay the surplus of \$1,750 into his office within 60 days. Further time was given the defendants in execution by the judgment creditor, and they paid it along from time to time until the senior judgment was paid in full on November 13, 1919. On November 17, 1919, the Lummus Cotton Gin Company filed the homestead proceedings in the office of the clerk of the court, and on November 19, 1919, filed exceptions on the ground that it had received no notice of the homestead proceedings and asked a trial de novo. Other exceptions and some affidavits were filed, but were subsequently withdrawn; so this case stands upon the one exception.

[1] The case was tried on the record and his honor, Judge Bowman, who had the record before him, found as a matter of fact that no notice had been given the Lummus Cotton Gin Company, and, as the record is not before us, we cannot disturb this finding.

[2] There being no notice given to the judgment creditor, Lummus Cotton Gin Company, they are not bound by the proceedings. See *Nixon Grocery Co. v. Spann*, 108 S. C. 329, 94 S. E. 531.

[3] Besides this, the appraisers valued the land as exceeding the homestead by \$1,750. Of this due notice was given to the judgment debtor. Section 3713 provides that the excess must be paid within 60 days, and only when the excess is paid "within the time limited" shall the sheriff refrain from selling; "that if, after notice, the party claiming the homestead pays, or causes to be paid, the surplus over one thousand (\$1,000.00) dollars, he shall, upon recording the return and receipt of the sheriff for such surplus, indorsed on said return, as provided in preceding section of this chapter, hold the property so appraised and set off, freed and discharged

from all debts," etc. It is thus seen that the assignment of homestead was not complete. The matter was still open, and the respondent was in time to object and require a reassessment.

The order appealed from is affirmed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. I do not concur in the affirmation of the order appealed from in this case, and think that it should be reversed.

At the risk of unnecessary repetition, in order that my position may be clearly understood, I will restate the basic facts of this controversy. The Savannah Guano Company obtained a judgment against the defendants Sanders on January 4, 1916, issued execution, and lodged it with the sheriff. The Lummus Cotton Gin Company did likewise, their judgment being dated April 10, 1917, but no execution was issued thereupon. In July, 1917, the sheriff, acting under section 3711, vol. 1, Code of Laws 1912, instituted proceedings to cause a homestead in certain real estate belonging to the defendants to be set off. I assume he caused the appraisers therefor to be appointed as directed by the statute. In November, 1917, the appraisers made and filed with the sheriff their return, valuing the property at \$2,750. Thereupon the sheriff served upon the defendants the notice provided for in section 3713 that, unless they paid to him the surplus of the appraised value over and above \$1,000, to wit, \$1,750, within 60 days thereafter, the premises would be sold under the execution in his hands. By agreement between the defendants and the Savannah Guano Company, plaintiff in the execution, indulgence was granted to the defendants, who from time to time made payments upon the execution until November 13, 1919, at which time the execution was paid in full, returned to the clerk as paid, and the judgment marked satisfied. The return of the appraisers, though lodged with the sheriff, had not at this last-named date been filed by him with the clerk of court for record as required by the statute; but on November 7, 1919, the Lummus Cotton Gin Company, a week prior thereto, procured the return from the sheriff's office and filed it with the clerk of court, and on November 19, 1919, filed with the clerk exceptions to the return. The notice in which the exceptions are stated requires special attention. It states that the gin company was a judgment creditor of the defendants on July 28, 1917, when the warrant was issued to the appraisers in homestead, and particularizes the grounds of exception to be: (1) That no notice was given the gin company of the homestead proceedings and no opportunity was offered it to be heard therein; (2) that the appraisal was far below the value of the property, which was at least \$6,000. The notice then concludes with a prayer, not that the home-

stead proceedings be "vacated and set aside" (as the circuit judge ordered), but "that the question of the value of said land be tried de novo, upon testimony taken in open court, under the provisions of section 3711 of the Civil Code of this state."

The matter came up for trial before Judge Bowman at Allendale February 6, 1920, in open court. The gin company abandoned the second exception above stated, and withdrew certain affidavits which had been served upon the defendants, I assume affidavits supporting this second exception. Counsel agreed to submit the matter to the presiding judge upon the first exception and the record of the homestead proceedings, which showed no notice to the gin company nor any opportunity afforded it to be heard in said homestead proceedings.

The circuit judge passed an order vacating and setting aside the homestead proceedings and directed the sheriff to proceed to set off the homestead according to law.

I think that the notice and the exceptions clearly show that the gin company had no thought of contesting the validity of the homestead proceedings. It did propose, in the outset, to contest the return so far as the appraised value of the property was concerned, and evidently incorporated the matter stated in the first exception, relating to want of notice, for the purpose of establishing its rights at that time to raise the real issue tendered, the inadequate valuation of the property, which it set up in the second exception. The prayer of the notice is conclusive of this fact. In this position the gin company was quite right, for, the return not having been filed with the clerk "for record," as required by the statute, the time within which a creditor should file exceptions thereto had not begun to run, and it was within the law when it filed exceptions within 30 days from the time the return was filed. The gin company also recognized the validity of the return by taking it out of the sheriff's office and filing it with the clerk, which it evidently did for the purpose of filing exceptions thereto. At the hearing the gin company abandoned the second exception and withdrew the supporting affidavits. This left nothing but the first exception, which contained only a justification at that time in filing exceptions to the return.

The gin company cannot come into court recognizing the validity of the proceedings, raise an issue which would be in order only under a valid proceeding, abandon that issue, and contend that the entire proceeding is invalid and should be vacated. Some consideration is due to the rights of the other party to the controversy. The orderly conduct of a trial forbids that one should be haled into court to meet one issue and be confronted with another, essentially different.

But assume for the moment that the gin

company had the right to raise the issue that because it had not been served with notice of the homestead proceedings prior to the making and lodgment of the appraisers' return with the sheriff, the entire proceedings were null and void; I do not think that its position can be sustained.

The Code (sections 3711-3720) provides for the setting off of homestead under two conditions: (1) Where process has been lodged with the sheriff; and (2) where no process has been so lodged.

Where process has been lodged, the initiative is on the part of the sheriff. He is required, before selling the debtor's real estate, to cause the homestead to be set off in a certain, specified, and detailed manner. He shall cause three appraisers to be appointed. They shall within 30 days make return to him of their action, the return to be filed "for record in the office of the clerk of court." Should there be no complaint by either creditor or debtor within 30 days after the return shall have been filed, the proceedings shall be final. Should exceptions be so filed, "the name shall be tried de novo, upon testimony taken in open court"; the court being authorized for good cause shown to order a reappraisement and reassignment of the homestead by other appraisers appointed by the court.

Where process has not been lodged, the initiative is on the part of the homesteadee. He is required to file a petition to the master (or clerk of court, if there be no master), who shall, after giving the public notice required, appoint three appraisers. They shall make return to such officer. The provisions relating to exceptions and the effect of not excepting are practically the same as in cases where process has been lodged.

There is nothing in the record showing that the gin company took the position before the circuit judge that the homestead proceedings were absolutely void for lack of notice to it prior to the return, but, as the circuit judge so holds in his order, and the respondent's attorney endeavors in his printed argument to sustain that position, I propose to consider it.

As this court holds in the case of *In re Wylie*, 63 S. C. 214, at page 217, 41 S. E. 320, the sections providing for a homestead under the conditions to which I have referred (where process has been lodged and where it has not) are statutes in *pari materia* and may be paralleled in the interpretation of either upon a contested point. For this reason I have briefly abstracted the provisions of both, as above, in the consideration of the matter now under discussion, the necessity of notice to creditors generally of the homestead proceedings prior to the return of the appraisers.

In homestead proceedings where process has been lodged, which for brevity I shall refer to as involuntary proceedings, there is

no express requirement that any creditor shall be so notified, though there is an implied requirement that the creditor in the process which has been lodged with the sheriff shall be, in the provision that one of the appraisers shall be named by such creditor, which of course could not be done until he shall have been notified of the sheriff's proposed action.

In the other class, where process has not been lodged, which I shall refer to as voluntary proceedings, there is no requirement, express or implied, that any creditor shall be personally served with such notice; the provision for "public notice by advertisement" evidently being a sufficient substituted notice to all creditors.

I am aware of the fact that this court, in the case of *Nixon v. Spann*, 108 S. C. 329, 333, 94 S. E. 531, has given expression to views upon this point not in accord with my construction of the statute. I think that that decision imposes conditions which the statute does not warrant and which are unreasonable and entirely unnecessary. In that case the return of appraisers was filed on February 11, 1915. No exceptions were filed by any creditor within the 80 days fixed by the statute. The return was recorded on March 15, 1915. No exceptions to the return were ever filed. That the complaining creditor had notice of the homestead proceedings, or at least of the return, is shown by the fact that on February 12, 1915, the day after the return was filed, he brought an action in the court of common pleas, among other things, to set aside the assignment of homestead on the grounds that the allowance was excessive and that it had been set off in fraud of creditors. By an amended complaint the additional ground was made that the creditor was not a party to the homestead proceeding, had no notice of it, and was not therefore bound by it. Upon the question of the validity of the homestead proceedings the court held that, as the appraisers had attempted to set off the real estate of the debtor subject to mortgages existing upon it, their action was absolutely null and void; and, being so, the return could be attacked in a collateral proceeding. Having so decided, it was not at all necessary to go into the question of the right of the creditor to attack the proceedings, assuming that they were not void. In reference to this matter the court declared:

"Even if the assignment of homestead had not been void, those creditors who had not been given legal notice of the proceedings to assign homestead could have excepted to the return of the appraisers, even after the expiration of 80 days from the filing of their return and within 30 days after notice thereof given to them. Notice and opportunity to be heard is essential to due process of law, and therefore essential to the binding efficacy of such a proceeding. The statute contemplates that

notice of such a proceeding shall be given to all creditors. It is the duty of the sheriff or other officer with whom process has been lodged to notify all creditors who are parties to such process; and if the debtor would make the proceeding final and binding upon all his creditors, he should see to it that legal notice is given to all others. This requirement can work no hardship upon a debtor who seeks to have a part of his property exempted from the payment of his existing debts, for he knows, or ought to know, who his creditors are. Otherwise the grossest fraud might be perpetrated upon creditors who have no notice of the proceeding to set off homestead."

If this be affirmed as the law of this state, I venture to say that there is not an involuntary homestead proceeding in the state which possesses the quality of finality which the statute expressly provides for. It declares:

"If no complaint shall be made by either creditor or debtor within 30 days after the return of the appraisers has been filed, the proceedings in the case shall be final." Civ. Code 1912, § 8711.

I imagine it will be a distinct shock to the legal advisers of this state, and to the debtors to whom homesteads have been assigned, that not one of the thousands of homesteads which have been assigned can withstand the attack of a single creditor, however small his claim may be, who can show that he did not receive "legal notice" of the proceedings prior to the return, and thereby rip up the entire proceedings and subject the debtor, confiding in the finality guaranteed by the statute, to the annoyance, trouble, and expense of a new proceeding.

No question was made in the case cited as to the right of the creditor to file exceptions to the return; he made no effort whatever to do so; and the foregoing observations of the court to the effect that notice was requisite and that a creditor who had not received notice could even after the expiration of 30 days, and within 30 days after notice, file exceptions, appear to me to be obiter dicta. They certainly do not go to the extent of holding that a creditor who has not received notice can upon that ground avoid the entire proceeding. As far as it goes, I think, is that when such is the case he has 30 days after notice within which to file exceptions. That is going farther than the statute warrants.

The cases cited by the court, in my opinion, do not sustain either the proposition that notice is requisite or that failure to give the notice avoids the proceeding:

Ryan v. Pettigrew, 7 S. C. 147: The defendant claimed possession of the real estate involved upon the ground that it had been set off to him as his homestead. Plaintiff claimed under execution sale. It appeared that the return had never been filed with the clerk. The court, of course, held that the

homestead had not been perfected. The case involves neither point under discussion.

Choice v. Charles, 7 S. C. 171: This case involves exactly the same question as was decided in the case just referred to.

Bull v. Rowe, 13 S. C. 355: This was also a case where the return was not filed and recorded in the clerk's office. The court says:

"It is not necessary that any one should know of the assignment but the levying creditor, the sheriff and the appraisers."

In re Wylie, 63 S. C. 214, 41 S. E. 320: This case, so far from sustaining the positions under discussion, points out the remedy which a creditor has of excepting to the return after it has been filed. It was contended in that case, and it is the only question decided, that the right of excepting to a return was limited to judgment creditors. This position was overruled by the court, which held that the appellant, a simple contract creditor, had the right to except within the time limited.

I think that the statute means just what it says; that when in involuntary proceedings the return has been duly filed for record with the clerk, and no one complains within 30 days thereafter by filing exceptions to the return, "the proceedings in the case shall be final"; in other words, that the filing and recording of the return as directed is notice to the world of the assignment of the homestead, just as the published notice in voluntary proceedings has that effect.

If, as stated in the Nixon Case, "the statute contemplates that notice of such a proceeding shall be given to all creditors," it would naturally be expected that the statute would also suggest some course of proceeding upon the part of the creditors to protect their interests after being so notified; yet in it I find absolutely nothing for them to do, and can imagine no step in that proceeding that they could take to stop its progress or to influence the action of the sheriff or the appraisers. It would also seem to follow that, if they received the required notice and did nothing, they would be shut off from further objection; and yet unquestionably the statute permits them to file exceptions within 30 days, regardless of whether they have failed to follow up a prior notice or not.

A further consideration which militates very strongly against the declaration in the Nixon Case is suggested: In a case of involuntary proceedings, the sheriff is the moving spirit. He is required to set off the homestead before selling. Section 3721 makes it a misdemeanor and prescribes a heavy penalty for his violation of this duty. While it cannot be denominated exactly a proceeding in invitum against the debtor, it certainly is a proceeding in which he is utterly passive. Absolutely nothing is expected of him except to name one of the appraisers, and this privi-

lege may be waived by him. In this state of the statutory provisions, how the duty not prescribed in the statute of notifying all of his creditors of the proposed action of the sheriff can be imposed upon him by judicial declaration is inconceivable to me.

Another consideration: Assume an instance of a return by the appraisers fixing the valuation of the property at \$2,750. The sheriff gives the required notice, and the debtor, within the 60 days and after the expiration of the 30 days for filing exceptions, there having been none filed, pays to the sheriff the excess over \$1,000, \$1,750. The sheriff applies this to the executions in his office. Section 3713 provides that under these conditions the debtor shall "hold the property so appraised and set off, freed and discharged from all debts and demands then existing"; and yet, under the Nixon Case, if it should appear that he has not complied with a condition not required by the statute, namely, notified all his creditors of the proceedings instituted by the sheriff, the proceedings may be set aside, a new appraisal had, a second valuation at \$2,750, and a second payment of the excess required.

But it is suggested in the Nixon Case that the creditors were entitled to notice of the institution of the proceedings, upon the ground:

"Notice and opportunity to be heard is essential to due process of law, and therefore essential to the binding efficacy of such a proceeding."

The object in requiring the return to be filed with the clerk for record was to provide a form of notice to the world, of which the creditors are assumed to be cognizant. The provision allowing exceptions to be filed by them within 30 days thereafter is ample protection to their constitutional rights.

"Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered," but a hearing or an opportunity to be heard, prior to judgment, is absolutely essential. Wilson v. Standefer, 184 U. S. 399, 22 Sup. Ct. 384, 46 L. Ed. 612.

Moreover, in the absence of legislative action conferring upon a creditor the remedy of enforcing the collection of his debt out of the property of his debtor, the creditor has no such right or remedy. The remedy is entirely the creature of the statute. It cannot be claimed as a constitutional right. It is entirely dependent upon the statute; and, if so, the legislative authority has the right to hedge it about with such limitations as it may deem expedient. It may deny it altogether or exempt any portion of the debtor's property that it sees fit, the exemption to be determined in any way it sees fit, with or without notice to the creditor. His supposed right or remedy is therefore not "property" within the "due process" clause of the Con-

stitution, unless the debt antedated the legislative limitation or exemption or machinery for its ascertainment.

It is suggested in the opinion of Mr. Justice FRASER that the failure of the defendants to pay to the sheriff the excess of the appraisement over \$1,000 renders the assignment incomplete, and that the gin company was in time to object and require a reassessment. The penalty under section 3713 for not complying with the notice of the sheriff is a sale of the property, not a reassignment of the homestead. But, as no such position was taken in the court below or in the arguments in this court, I express no opinion as to the effect of such failure upon the proceedings in this case.

(88 W. Va. 194)

MITCHELL v. CORNELL et al. (No. 4122.)

(Supreme Court of Appeals of West Virginia.
March 8, 1921. Rehearing Denied
May 10, 1921.)

(Syllabus by the Court.)

1. **Fraudulent conveyances** §249—"Laches," whereby through death of witnesses adverse party injured, bars relief in equity.

Laches is delay in the assertion of a claim which works disadvantage to another, and where it appears that by reason of such delay the adverse party would be injuriously affected because of the death of witnesses by whom the truth of the situation could be proven, or for other reasons, a court of equity will decline to give relief.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches.]

2. **Fraudulent conveyances** §249—Equitable doctrine of laches applicable to suit to subject lands held in name of another.

The equitable doctrine of laches applies to a suit brought by a creditor for the purpose of subjecting to sale lands which it is claimed by him are the lands of his debtor, but the title to which is held by another in fraud of his rights.

Appeal from Circuit Court, Wood County.

Suit by Lillian Mitchell, as administratrix, against John Cornell and others. Decree for plaintiff, and defendants S. L. Anderson, administrator, and others, appeal. Reversed, and bill dismissed.

H. B. Dodge and Marshall & Forrer, all of Parkersburg, for appellants.

William Beard, of Parkersburg, for appellee.

RITZ, P. This appeal seeks reversal of a decree of the circuit court of Wood county, which decreed to sale, in satisfaction of a judgment in favor of plaintiff's intestate against John Cornell, a tract of 16¼ acres of land lying near the city of Parkersburg

claimed by the heirs of J. A. Anderson, upon the ground that said tract of land was really the property of said John Cornell, and was concealed in the name of J. A. Anderson in fraud of plaintiff's rights.

It appears that prior to the year 1892 John Cornell was extensively engaged in the business of purchasing and manufacturing ties and other lumber, and incidentally in the general mercantile business. In that year he failed in business, and according to the allegations of the bill he has never accumulated any property since, and has never actively engaged in any business. The debt claimed by the plaintiff was contracted prior to 1892. In the year 1892 plaintiff's decedent instituted a suit in the circuit court of Wirt county to recover the amount of the debt from said Cornell. Cornell appeared to this suit and filed his plea of non assumpsit, and the same was continued from term to term until the year 1897, when, in the absence of Cornell, and without the intervention of a jury to try the issue joined, a judgment was rendered against him for the sum of \$4,200, with interest from 1892, and this judgment is the basis of the plaintiff's claim for relief.

Cornell and J. A. Anderson were brothers-in-law, Anderson having married a sister of Cornell. It appears, however, that Anderson's first wife, the sister of Cornell, died long before the institution of this suit, and he had married a second time. It is not contended that any funds belonging to Cornell went into the purchase of any land in the name of Anderson after 1892 at the time of his business failure, for it clearly appears that since that time he has had no funds or property. The basis of this suit is that about the time of his failure in 1892, or shortly prior thereto, he had conveyed away two tracts of land, and had taken from the purchasers bonds to secure the unpaid purchase money. It appears that a very small part of the purchase money was paid in cash. These bonds he assigned to Anderson, and the purchasers, failing to meet their obligations and desiring to be relieved therefrom, reconveyed the land to Anderson in consideration that they be relieved from the payment of the purchase money bonds. These deeds were taken, and the facts as above stated are recited in the deeds, and the same were recorded in the proper county clerk's office. However, before Anderson secured these deeds a creditors' suit had been brought against Cornell, and these lands involved in that suit. It appears that Anderson proved in this creditors' suit a claim for a considerable amount, and became the purchaser of the same lands at a sale by the special commissioner, as well as of another tract or two. There is some suggestion that this claim set up by Anderson in that suit was fraudulent as against Cornell's creditors. It was, however, adjudged

by that court to be a valid claim against the estate of Cornell, and it can hardly be said that its validity can be questioned in this collateral way. The suggestion is made that the transfer of the purchase money bonds above referred to was made by Cornell to Anderson without consideration, and that he intended to get this property out of his hands so as to prevent his creditors from seizing it, and this is the only substantial basis for this suit.

At the time of the purchase of these lands by Anderson as above stated there was interested with him in one piece thereof a man by the name of W. B. Dillon. It was the understanding, according to Dillon, that he was to have a one-half interest in this piece of land. The title to all of the land was held by Anderson but it appears that Dillon lived on a piece of it, and that Cornell lived with him. In 1899 this land was sold, and a tract of 288 acres was purchased in Calhoun county. Dillon claims that he still had his half interest in this 288 acres. At any rate, he and Cornell went upon this land and immediately constructed thereon a house, into which he moved his family. Cornell resided with him in the same house, he at that time having no family. Dillon and Cornell conducted timber operations upon the land. The proceeds arising from the sales of timber were deposited in the bank to the credit of Anderson, and the same paid out by Cornell upon checks signed in Anderson's name, for the expense of removing the timber and manufacturing it, and for some balance of purchase money upon the land. Dillon states that, after the timber operations had been completed, he, being unable to carry his half interest, proposed to Cornell that he would release his interest in the land in consideration of the transfer to him of certain logging equipment which they had, and which had been used in their timber operations. He says that Cornell advised him that he would see Anderson and submit his proposition; that shortly thereafter he did go to Wood county where Anderson lived, and upon his return informed him that the proposition was accepted; and that he thereupon relinquished his interest in the land and accepted the personal property therefor. This proposition of Dillon carried with it his right to remain in the house upon the land so long as Anderson owned it, and he did remain with his family in this house, and Cornell lived there with him until 1909, at which time the land was conveyed away by Anderson as a part payment upon the tract of 16¼ acres involved in this suit.

It appears that in 1909 the 16¼ acres of land in Wood county was conveyed to Anderson in consideration of \$8,750, of which consideration the Calhoun county 288 acres was taken for \$5,000. Anderson assumed a mortgage which was on the land for \$3,000,

and the other \$750 was paid in cash. The party who conducted this transaction for the former owners states that Cornell approached him in regard to the sale of the 288 acres of Calhoun county land, stating that Anderson desired to dispose of it on account of its remoteness from his residence and his inability for that reason to give it proper attention. He says that he informed Cornell that he had the 16¼-acre tract, and that if satisfactory arrangements could be made as to the price he might take the 288 acres as part of the purchase money. He informed Cornell the price at which the property could be had, and he says that Cornell told him that he would see Anderson in regard to it and let him know what determination was reached. He says that subsequently Anderson and Cornell went upon the land and examined it, and then Cornell came to his office and closed the transaction by paying \$50 in cash at that time, and subsequently by Anderson conveying the 288 acres to the former owners of the 16¼ acres, and paying \$700 in cash, and assuming the \$3,000 mortgage. It is shown that Cornell rented this 16¼ acres ever since its purchase as aforesaid, and that he lived in a room in the house upon the premises.

The bill charges that this 16¼ acres is in fact the property of Cornell upon the theory that at the time of Cornell's failure he transferred certain of his property as above indicated to Anderson, and that as a result of this Anderson procured the 288 acres in Calhoun county, which subsequently went into the 16¼ acres, and that the \$750 in cash was derived from funds of Cornell, although there is no showing whatever as to this, except that the \$50 was paid by Cornell. Cornell and Anderson were both living at the time the suit was instituted, and they each filed an answer denying all of the allegations of fraud, and asserting that the property was the property of Anderson, and Anderson also relied upon the equitable doctrine of laches to defeat the plaintiff's claim. A few months after the suit was brought, and before the plaintiff had taken any depositions, Cornell, who was then an old man, departed this life. In a very short time after the institution of the suit, and before any testimony was taken, Anderson's mind became so affected that he was never able to give his testimony in the case, and died before the same was submitted for a hearing. Plaintiff's decedent departed this life in the year 1914, two years before the suit was brought, 22 years after it is claimed the fraudulent transaction was had between Anderson and Cornell, on account of which the land is sought to be subjected in this suit.

The testimony taken on behalf of the plaintiff is almost exclusively made up of statements made by Cornell to a number of people that the 288 acres of Calhoun county land was his land, and that the 16¼ acres was

likewise his land, and of the further fact that Cornell had always lived upon the 288 acres of Calhoun county land with Dillon, and upon the 16¼ acres, ever since it was acquired, with the tenant thereof, and upon the further fact that the transfers of the purchase money notes above referred to by Cornell to Anderson were made about the time Cornell became embarrassed, and it is claimed they were without consideration, although no proof is offered upon this question.

As before stated, Cornell died before the testimony was taken, and counsel could not even intelligently cross-examine the witnesses whose evidence had been given as to the statements made by him. If he had been present it may be that the time, place, and circumstances under which these statements were made could have been developed, and their force as evidence entirely destroyed. The plaintiff, in order to prevail, must rely upon alleged fraudulent conduct which was committed nearly a quarter of a century before the institution of the suit. It clearly appears that Cornell had never had any property since 1892, and if any transfer of property to Anderson to defraud his creditors was made, it was made prior to that time. The equitable doctrine of laches by which one is denied the right to assert a claim in a court of equity, because of staleness or lapse of time, is well recognized by this court. It is quite true that mere lapse of time will not effect such a bar, but must be accompanied by some injury or disadvantage to the opposite party, or some conduct which indicates that the plaintiff had abandoned his claim, and only reasserts it because of some advantage arising under conditions brought about either by the action of the other party, by territorial development, or some other like cause. 10 R. C. L. title "Equity," § 142 et seq.; *Carter v. Price*, 85 W. Va. 744, 102 S. E. 685; *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402. Many more cases could be cited to the same effect, but these suffice to illustrate the principle.

In this case it appears that Cornell died before he had an opportunity of making any explanation of the testimony offered on behalf of the plaintiff; that Anderson's mind had become so weakened and diseased that he was denied the opportunity of making any such explanation. The transaction happened 24 years before the institution of this suit, and 27 years before the final decree was entered. It may be that if this suit had been brought within a reasonable time a full and satisfactory explanation could have been made of all these transactions. The parties might have been able to show that Anderson paid an adequate consideration for the transfer of the purchase-money notes to him by Cornell above referred to, every dollar of which was paid by Cornell to his creditors. The special commissioner who conducted the

sale of the lands of which Anderson became the purchaser is dead. The former owner of the 288 acres of Calhoun county land is dead. It appears that the plaintiff's intestate who died in 1914, 22 years after the alleged fraudulent transaction, lived in the same general neighborhood as the defendants Cornell and Anderson; that he was well acquainted with them, and that he was vigilant in trying to detect some property of Cornell's out of which his debt could be made. The records in the county clerk's office would have informed him of these deeds made to Anderson, and they would have informed him of the transfer of the purchase-money notes by Cornell to Anderson, which is all the information that the plaintiff now has upon that question. There is no reason why, if he had been vigilant, he could not have known in 1892 everything in regard to the transaction between Anderson and Cornell that is shown in this case. When a court of equity sees neglect or lack of diligence on one side, and injury therefrom on the other, it will deny relief.

[1, 2] But the plaintiff contends that the equitable doctrine of laches does not apply to a suit in equity to enforce a judgment lien, that nothing but the bar of the statute of limitations will be availing, and that inasmuch as this judgment has been kept alive by the issuance of executions she is entitled to maintain the same. This would be entirely true if she were enforcing a judgment against the lands of Cornell, but the principal object of the suit is to determine that these lands are subject to the judgment. Upon the face of the record the judgment is not a lien upon these lands, and they can only be made subject to the judgment by resorting to equity, and having them declared in effect trust property in the hands of Anderson for the benefit of Cornell's creditors. There is no more reason for denying the application of the equitable doctrine of laches to a suit brought for this purpose than there is to any other suit in equity, where it is sought to affect the transactions of parties because of fraudulent conduct. The first question presented in the case is: Who is the owner in fact of the land? If it is Cornell, then the judgment is a lien thereon, and it can be enforced. If Anderson is the owner of the lands, then the judgment is not a lien thereon, and the same cannot be enforced, and when the aid of a court of equity is sought for the purpose of determining this question the equitable doctrine of laches is as applicable as it is to any other relief that may be sought. While there seems to be no case in this state in which the doctrine has been applied in a suit by a creditor to set aside a fraudulent conveyance, the reason for its application is the same in such a suit as in any other, and it has been applied in such cases in other jurisdictions without question. 14 Am. & Eng. Enc. of Law, 282;

20 Cyc. 725; Terry v. Fontaine, 83 Va. 451, 2 S. E. 748; Mickel v. Walraven, 92 Iowa, 423, 60 N. W. 633; Herriman v. Townsend (Me.) 5 Atl. 267; De Grauw v. Mehan, 48 N. J. Eq. 219, 21 Atl. 193; Frenche v. Kitchen, 53 N. J. Eq. 37, 30 Atl. 815; Egleberger v. Kibler, 1 Hill, Eq. (S. C.) 113, 26 Am. Dec. 192; Calhoun v. Burton, 64 Tex. 510; Kinmouth v. Walling (N. J.) 36 Atl. 891; Hildebrand v. Tarbell, 97 Wis. 446, 73 N. W. 53.

Having come to the conclusion that the plaintiff's right of action is barred by the equitable doctrine of laches, it becomes unnecessary to examine the other questions presented on this appeal.

We will reverse the decree of the circuit court of Wood county and dismiss the bill.

(83 W. Va. 209)

CAMPBELL et al. v. LYNCH et al. (three cases). (Nos. 4091, 4108, 4156.)

(Supreme Court of Appeals of West Virginia. March 15, 1921. Rehearing Denied May 10, 1921.)

(*Syllabus by the Court.*)

1. Appeal and error §1097(2) — Questions adjudicated on former appeal law of case whether correct or not.

Unless for other reasons a decree must be reversed, questions adjudicated on a former appeal must be adhered to on a second appeal as the law of the case, whether or not those questions were rightly decided.

2. Appeal and error §1099(6) — Answer pleading sufficiency of bill disposed of on former appeal is mere renewal of matter adjudicated.

In so far as an answer pleads the sufficiency of the matter of a bill disposed of here on demurrer thereto upon a former appeal, the answer will be regarded as a renewal of the demurrer, and as fully adjudicated on the former appeal.

3. Equity §373 — Where respondent desires to take evidence to support answer, he should move for continuance.

If upon the filing of his answer to a bill matured for hearing, and replication of the plaintiff thereto, respondent desires time to take evidence in support of his answer, good practice requires that he should move the court for a continuance, without which he will be regarded as having waived his right and as consenting to a hearing on bill and answer.

4. Partition §22 — Agreement giving interest to one not legally entitled thereto must be clearly proven.

To be binding and effective an alleged agreement that a partition of land should include interests not legally involved therein, the agreement should be clearly proven, and it should appear that all the partitioners were parties thereto and mutually bound thereby.

5. Estoppel §80, 118 — Estoppel must be certain, and must not be taken by argument or inference.

Every estoppel, since it concludes one from alleging the truth, must be certain to every intent and is not to be taken by argument or inference; and the facts upon which it is based must be clearly proven and not capable of bearing any other construction.

6. Estoppel §95 — Mere silence insufficient; person to be estopped must have full knowledge, and must intend to mislead.

Mere silence will not work an estoppel; to be effective it must appear that the person to be estopped has full knowledge of all the facts and of his rights, and intended to mislead or at least was willing that the other party might be misled by his attitude.

7. Husband and wife §221 — Wife not necessary party to suit for accounting under reservation of oil rights by husband.

When a contract and a deed from husband and wife which sold and granted all the right and title of the grantors in land in which the husband is interested, reserved and excepted therefrom one-sixteenth part of the oil therein belonging to the husband, the wife is not a necessary party to a suit subsequently brought during his life for an accounting and division of the oil produced from the land.

8. Equity §323 — To prevent injustice, court may permit substitution of new answer during trial.

Where during the progress of a suit it appears that a position taken in an answer will work a great injustice and result inequitably to respondent in the division and partition of the oil and gas produced from the land, the court in the exercise of a sound discretion should permit respondent to withdraw his original answer and file a new one, in order to relieve him from the inequitable and unjust consequences.

Appeal from Circuit Court, Roane County.

Three separate suits by W. C. Campbell and others against Lucy J. Lynch and others and W. O. Abney and others. From the decrees W. C. Campbell and others appeal in the first suit, Lucy J. Lynch and others appeal in the second suit, and W. O. Abney and others appeal in the third suit. Reversed and remanded.

Chas. E. Hogg, of Point Pleasant, and J. W. Kennedy and J. F. Cork, both of Charleston, for appellants W. C. Campbell and others.

McClintic, Mathews & Campbell, of Charleston, for appellants W. O. Abney and others. Harper & Baker, of Spencer, and Turner & Brennan, of Parkersburg, for appellees Lucy J. Lynch and others.

H. O. Ferguson, of Spencer, for appellee John Edward Lewis.

MILLER, J. The appeal by Campbell and others, plaintiffs, in Case No. 4091, is from

the decree below of January 23, 1920, which for the second time dismissed their bill and denied them any relief. When this case was formerly before us on plaintiffs' appeal, in November, 1917 (81 W. Va. 374, 94 S. E. 739, L. R. A. 1918B, 1070), we reversed the decree of the circuit court sustaining defendants' demurrer to their bill, and remanded the cause to the circuit court for further proceedings to be had therein in accordance with the opinion and mandate thereto certified.

The appeal in Case No. 4108, by the defendants Lucy J. Lynch, James McC. Lewis, Fannie M. Simpson, Mary Lewis Good, and Enos Johnson, administrator of the estate of Mary M. Lewis, is from the decree of May 27, 1919, entered in the said cause, which settled the rights of the parties in accordance with the rules and principles of our former decree, and referred the cause to a commissioner to state and settle the accounts between the parties to the suit in accordance therewith.

The appeal in Case No. 4156 by W. O. Abney and others, heirs and personal representatives of the estate of F. W. Abney, deceased, from the decree of January 23, 1920, which dismissed plaintiffs' bill, refused to confirm the report of the commissioner, and denied them the right to withdraw their original answer and file their new answer then tendered and offered to be filed.

In addition to these several appeals there are cross-errors assigned on behalf of John Edward Lewis, by H. C. Ferguson, his counsel, which will be hereafter adverted to and disposed of.

[1, 2] Unless avoided or affected by issues presented by the answers, the former decision here, though by a divided court, must be regarded as the law of this case. Formerly the case was presented upon the bill and the exhibits therewith, and the demurrer of the defendants thereto sustained by the lower court, but which we overruled, and remanded the cause. Our opinion on the former hearing will disclose that the questions then presented were, what is the true construction of the two leases for oil and gas executed by Edward Lewis and Mary M. Lewis, his wife, in April, 1900, and what the effect on the rights of the parties to the oil and gas of the subsequent decree dividing and partitioning the lands covered by said leases between the heirs at law of the said Edward Lewis, then deceased, referred to in the bill, and the subsequent conduct of the partitioners in relation thereto, and in relation to the subsequent development of oil and gas on the lands allotted the partitioners?

Unless a good defense was presented by the answers of the defendants filed on the remand to the circuit court, the decree pronounced on May 27, 1919, should be adhered to and executed, and that of January 23, 1920, again dismissing the bill, should be reversed upon the appeal and assignments

of error therein by the appellants Campbell and others in Case No. 4091, and of W. O. Abney and others in Case No. 4156.

That the court below was bound, as we are now bound on this appeal, by whatever was decided upon the former appeal as the law of this case, is not an open question in this state, unless for want of parties or for other error in the decree it must be reversed. *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. 265; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223; *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. 639; *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009. And this is the law in most jurisdictions, state and federal. *Campbell's Ex'rs v. Campbell's Ex'rs*, 22 Grat. (Va.) 649; *Bank of Old Dominion v. McVeigh*, 29 Grat. (Va.) 548. For a full note on the subject with reference to many decisions, see *City of Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321.

The issues sought to be presented by the answers of Lucy J. Lynch and others, defendants, were: First, that in the suit for partition and assignment of dower brought by Lucy J. Lynch v. Mary M. Lewis et al., widow and heirs of Edward Lewis, deceased, referred to and pleaded in the bill, the court, having jurisdiction of the subject matter and the parties, had by the decree of partition therein pronounced on April 2, 1907, finally adjudicated beyond recall the rights of the parties in interest in the land partitioned and in the oil and gas therein; and said decree was pleaded in estoppel of the claims of the plaintiffs to any of the oil and gas produced by the lessee in said leases not found under and produced from the particular lot allotted to them in said partition; second, that the plaintiffs W. O. Campbell and his children, then adults, had agreed with the widow and other heirs of said Edward Lewis, at the time of said partition, that the person to whom each purpart was assigned should be and was entitled in fee to the oil and gas underlying the same, and that W. C. Campbell and his children had acquiesced in such decree and agreement, for nearly seven years, until the situation of the parties had changed, and until they had concluded that the two parcels of land allotted to them would not prove as valuable for oil and gas as anticipated at the time of said partition; third, that early in 1907, John E. Lewis, F. W. Abney and W. C. Campbell, by written notice to the South Penn Oil Company, Mary M. Lewis and others, protested that they owned the oil and gas under the lands allotted to them, and that John E. Lewis and said Abney had, under the claim that they owned the oil and gas under the tract assigned to them, brought suit against the South Penn Oil Company and others to cancel the lease thereon as a cloud on their title, thereby estopping themselves from asserting any interest in the oil and gas under the purparts assigned to

others; fourth, that after the completion of the gas well assigned to John E. Lewis and F. W. Abney, the gas rental of \$200.00 per year was paid to and received by said Abney, and that the plaintiff W. O. Campbell, after said partition and for more than three years after the drilling of the well on the purparts assigned to the other partitioners, had accepted the rentals accrued to him under the said leases; fifth, that upon the drilling of the wells on each purpart on which oil and gas were found the lessee had recognized the partition of said land including the oil and gas and treated such allottee as the owner in fee of the oil and gas in and under the parcels allotted to them, and thereby had agreed to the subdivision of the original leases into seven, and of all which said Campbell and his children had notice, and had acquiesced therein for at least six years, and until they supposed that said partition had turned out to their disadvantage.

After the filing of the foregoing answers, the administrator of Mary M. Lewis and others filed supplemental answers, in which they set up that in the event the decrees in the partition suit were not held binding and efficacious to partition the oil and gas, that the said Mary M. Lewis and her personal representatives under the terms of the leases were entitled to one-half of the oil and gas royalties absolutely and to her dower or distributive share as widow in the other half so long as she should live. To these supplemental answers the plaintiffs excepted, on the ground that if respondents were entitled to such relief, they were so entitled under the original answers and not by reason of anything alleged in their supplemental answers.

The only other pleading which we are called upon to consider is the proposal of the representatives of the defendant F. W. Abney, deceased, to withdraw their former answer and abandon their position taken therein that he was entitled to the royalties of the oil and gas under the parcel allotted to him and J. E. Lewis, and file a new answer in which they assumed the position taken by plaintiffs that they were entitled to a one-sixth part of all the royalties and rentals, regardless of their former position in relation thereto and in relation to said partition.

One of the matters complained of here by Lucy J. Lynch and others, appellants in Case No. 4108, is that after the filing of their answer on May 27, 1919, of which they were never in default, the court, after replications by plaintiffs then filed, were not given time in advance of the final decree entered on that day to make good their answers by proofs. Whether so prejudiced of course depends upon the material of the answers and whether respondents have had the advantage of the evidence in the case taken before the commissioner. The decree of May 27, 1919, we find, provided that any party in interest was to be

at liberty to take depositions before any person duly authorized, and to file the same before the commissioner as if taken in his presence, and that all testimony taken in the cause, before the commissioner or some other person, might be used before the court for any and all purposes in determining any of the issues involved in the controversy.

On the first point of error in the decree of May 27, 1919, relied on as defensive in the answers of appellants in Case No. 4108, namely, that the decree of partition was res adjudicata and conclusive of the rights of all parties, this proposition was fully disposed of adversely to appellants' present contentions in the decree pronounced here on the former appeal. That decree was pleaded, and its effect as an adjudication of the rights of the parties to the oil and gas was presented by the demurrer to the bill and adjudicated by the decree pronounced here; its legal effect as a partition of the oil and gas produced under the existing leases was denied and adjudicated in favor of plaintiffs. The answers, therefore, in so far as they affirm the conclusiveness of that decree amounted to no more than a renewal of the demurrer to the bill. *Lawrence v. Montgomery Gas Co.*, 99 S. E. 497.

[3] The next inquiry is, was there an agreement between the partitioners at the time of the partition respecting the oil and gas to be produced under the existing leases, that the same was to be included therein as pleaded in the answers? Respondents complain by their second point of error that they were not given time to take testimony on this part of their defense. The record shows no motion for a continuance to take testimony. If defendants had desired a continuance to give them time to take evidence, good practice required that they should have moved the court for a continuance. *McLaughlin v. Sayers*, 72 W. Va. 364, 78 S. E. 355; *Cross v. Cross*, 56 W. Va. 185, 49 S. E. 129. No such motion appears in the record.

[4] But they did later take evidence on this question of the supposed agreement between the partitioners as to the scope of the partition. We may look to that for the purpose of determining whether such an agreement was actually made. The evidence taken by respondents on the question of this supposed agreement consists of that of James A. Lynch, husband of Lucy J. Lynch, J. M. Lewis, and of O. M. Chambers, one of the commissioners, who participated in the partition of the lands. This evidence mainly relates to some loose conversation of C. W. Campbell objecting to the proposed allotment of a child's share of the land in fee to Mrs. Lewis, the widow of Edward Lewis, and cautioning the commissioners to be careful as they might give some of the heirs the advantage over the others in respect to oil and gas; and the question of oil and gas

was talked about by one or two of the two or three partitioners present at one or the other of the two meetings of the commissioners preliminary to making the partition. But there is nothing in any of the testimony showing any reference to the existing leases on the land, nor that any of these conversations had any application to the existing leases, and certainly there is nothing therein amounting to an agreement between all the numerous partitioners specifically agreeing that the partition of the land should include the oil and gas covered by the existing leases. Not all, but only two or three of the partitioners are shown to have been present. Some were infants; some of Campbell's children were infants. If the legal effect of the decree was not to divide and partition the oil and gas covered by the outstanding leases, we do not see how these conversations with the commissioners could operate, either in law or equity, to estop the partitioners from their right and title to the oil and gas that might be produced under the leases of those lands. To be effective such a supposed agreement would necessarily have to be binding on all, else on none of them. 1 *Herman on Estoppel*, p. 14, § 20; 2 *Id.* p. 921, § 793. See, also, cases cited in 5 *Enc. Dig. Va. & W. Va. Rep.* 201.

[5] Moreover, it is very doubtful whether the facts constituting the supposed estoppel are sufficiently pleaded, for to be available they must be pleaded. And our decisions hold that every estoppel, since it concludes one from alleging the truth, must be certain to every intent and is not to be taken by argument or inference. *Vanbibber v. Belrne*, 6 *W. Va.* 168, 178; *Lorentz v. Lorentz*, 14 *W. Va.* 809, 921; *Water Co. v. Browning*, 53 *W. Va.* 436, 442. 44 *S. E.* 267. In the latter case, approving the doctrine stated in 4 *Am. & Eng. Dec. in Eq.* 263, it is said:

"The estoppel must be certain; and by this is meant, not only that the facts upon which it is based should be clearly proven, but they should not be capable of bearing any other construction than that put upon them."

[6] Another principle of estoppel in pais applicable here is that mere silence will not work an estoppel, and that to effect an estoppel by silence it must appear that the person has full knowledge of all the facts and of his rights, and had an intent to mislead or at least a willingness that the other party might be misled by his attitude. 10 *R. C. L. tit. Estoppel*, § 21, pp. 692, 693; *Hidden, Trustee, v. Mahanes*, 119 *Va.* 116, 89 *S. E.* 121. And as these authorities say, a person claiming an estoppel must have been misled to his injury, if an estoppel is not declared. There is nothing in pleadings or proofs showing reliance by respondents on acts or representations of plaintiffs or any of the partitioners, nor prejudice resulting therefrom other than that they received the oil and gas royalties

and appropriated the whole thereof produced from wells on their particular lots. They expended no money in the production of oil and gas; nor have they otherwise been injuriously affected. True, they will be required to pay to the other partitioners their shares of the oil and gas rentals according to the principles of the decision; but this is not such prejudice as will estop the other partitioners from claiming their shares of the oil and gas produced.

Nor do we see how respondents, as claimed by them in their third point of defense, were prejudiced by the conduct of the plaintiffs and F. W. Abney in notifying the lessees of their purpose to cancel the leases so far as they covered the lands allotted to them, nor in the bringing of suit by them against the oil companies, owners of the leases, to cancel the same. They were defeated in that suit; and besides, how could that proceeding have misled respondents to their injury? To estop plaintiffs in the assertion of their rights, as we have seen from the authorities already cited, defendants must have been led thereby to change their circumstances and act to their prejudice. Nothing amounting to such prejudice is pleaded or proven.

And we do not see how the fact that John E. Lewis or his grantee F. W. Abney, received from the oil companies, lessees, the gas rental of \$200.00 per year accruing from the lot allotted to said Lewis in said partition, as affirmed in their fourth point of defense, operated to mislead respondents or any of the other partitioners. They did not in any way change their position with respect to their lots, or spend any money by reason thereof. The Abney estate will be required to account for such gas rentals, as respondents will be required to account for the oil and gas rentals received by them. Nor have respondents been in any way prejudiced by the act of the plaintiff W. O. Campbell, a tenant by the curtesy of his wife, one of said partitioners, and as heir of his deceased daughter, in receiving from the lessees his share of the oil and gas rentals accruing from the wells on the dower lot set off to Mary M. Lewis, widow of Edward Lewis, after her death. As the dower lot had not been partitioned among the heirs of Edward Lewis, Campbell was entitled as such tenant by the curtesy to his share of the oil. It is suggested that the decree of May 27, 1919, is erroneous as to Campbell in giving him forever the share of his wife in the oil and gas from the dower lot to the prejudice of his children, some of whom are infants. His right as tenant by the curtesy of course would end with his death, and the oil from the dower lot would then go according to the law of descents and distributions, and we see no prejudice in any way to respondents and appellants.

The fifth and last ground of defense re-

mains to be considered, namely, that the oil companies, lessees, had recognized said partition, and as wells had been drilled had treated the royalties in the oil and gas produced as belonging to the partitioners on whose lots the wells had been drilled, and that Campbell and the other partitioners had notice thereof and had acquiesced therein until they had found out that said partition had turned out to their disadvantage. So far as the oil and gas companies are concerned, they are protected as against Abney and Campbell by the decree in their favor in the suit brought against them, already referred to, and by the voluntary surrender of any rights as claimed against said lessees. These companies have been dismissed by agreement out of this suit, and there is involved now only the rights of the partitioners to the oil and gas rentals produced and paid over to the partitioners as stated, and there is nothing in the pleadings or proofs showing prejudice to respondents and appellants to which the principles of estoppel can be applied.

We now come to the consideration of the defense sought to be presented by the supplemental answers of the administrator of Mary M. Lewis, deceased, and of respondents Lucy J. Lynch and others. It is said in these answers that by the terms of the leases for oil and gas executed by said Edward and Mary M. Lewis, of April 12, 1900, properly construed Mary M. Lewis, one of the lessees, was entitled in her own right to one-half of the oil and gas royalties and to a dower right in the other half thereof, and that the decree of May 27, 1919, complained of, is erroneous in denying them their rights as heirs of Mary M. Lewis, by giving a portion to Mrs. Campbell or her husband and heirs when she was not an heir of Mary M. Lewis. We think the question was fully presented by the original bill and exhibits. The said leases were fully pleaded and exhibited with the bill, and the demurrers thereto presented fully, without the aid of answers, the question now sought to be presented anew on this hearing. This question was fully adjudicated on the former appeal. Whether the rights of Mary M. Lewis under these leases were rightly or wrongly determined, is a question not now open for consideration; for that adjudication must be respected in any subsequent decree, as the law of this case. Wherefore, we respond to the arguments of counsel predicated on prior decisions of this court, of which *Coffman v. Gas Co.*, 74 W. Va. 57, 81 S. E. 575, is perhaps the latest, that we can do nothing but refer them to the prior decision in this case, point four of the syllabus.

[7] In a reply brief filed by respondents and appellants Lucy J. Lynch and others in Case No. 4106, the absence of Amanda E. Lewis, wife of John E. Lewis, is urged as

an additional ground for reversing the decree of May 27, 1919, and affirming the decree of January 23, 1920. This proposition is based on the contract of said Lewis and wife with F. W. Abney, of October 22, 1906, and their deed to said Abney, of April 26, 1907, made pursuant thereto, where there was "reserved and excepted from this deed one-sixteenth part of the oil in said land if any shall be discovered or found therein." It is asserted that the exception or reservation was of a joint interest in favor of both grantees upon the principles announced in *Pyle v. Henderson*, 55 W. Va. 122, 46 S. E. 791, *Beckwith v. Laing*, 66 W. Va. 246, 249, 66 S. E. 354, and *Coffman v. Gas Co.*, supra. We do not think these cases have any application to the provisions of this contract and deed. The effect of these instruments was to except from the grant one-sixteenth of the oil in place, which was not granted, leaving the title to this much of the oil in the owner, neither reserving nor granting to the wife anything except her inchoate right of dower in the oil excepted. We do not think she was a necessary party to the suit. Her husband is still living, and the question of her dower right in the oil is not presented by the record, and while her husband is living it could not arise.

[8] This disposes of all the material questions presented by appellants Lucy J. Lynch and others on their appeal in Case No. 4108. We also have the appeal of W. O. Abney and others, representatives of the estate of F. W. Abney, deceased. The court below, in the decree of January 23, 1920, dismissing plaintiffs' bill, denied them the right to withdraw their former answer and file a new one, in which they proposed to take a position respecting the partition of said land different from that assumed by them in their former answer, and to claim the benefits of the decree of May 27, 1919, and share proportionally in the division of the oil and gas rentals with plaintiffs Campbell and others. This new answer sets up reasons which it is assumed by them justify this change of position, namely, the death of F. W. Abney, and the failure of his personal representatives to comprehend or appreciate, until after the commissioner's report was filed, the inequitable results to them of the position taken in their original answer. One fact strongly appealing to a court of equity in behalf of these appellants is that if they should be held to the concessions in their original answer, they would, on the principles of the decree pronounced here, be compelled to account to the other partitioners for about all of the \$1,900.00 received by them for royalty or rent for the gas well on their lot, and not be allowed to share in the royalty oils and gas rentals produced from the other lots. The record shows how inequitable this result would be to the Abney estate, and there appears no just reason on principles of estoppel,

rules of pleading, or otherwise, why they should not be allowed to share with the other partitioners according to the decree and as reported by the commissioner to whom the cause was thereby referred. This conclusion, we think, is supported by the case of *Depue v. Sergeant*, 21 W. Va. 326, and in *Smith v. Babcock*, 3 Sumn. 583, Fed. Cas. No. 13008, cited and approved in the *Sergeant Case*.

Since the foregoing appeals were allowed and docketed here, John Edward Lewis has appeared and cross-assigned error. His counsel says in his brief that before the Abney estate assumed their new position, he was satisfied to stand by said partition; but now he opposes the decree in favor of said Abney estate, giving to it what would have been his share in all the gas under the whole tract and fifteen-sixteenths of his one-sixth in all the oil therein, for the reason that under his contract with said F. W. Abney, he granted Abney only the gas and fifteen-sixteenths of all the oil under the particular ninety acres allotted to him in said partition. He also insists that his wife Amanda E. Lewis is a necessary party to the suit, and that because of her absence the whole decree should be reversed. We do not see what right John E. Lewis has to complain. By his contract with Abney made before the partition, he and his wife undertook to sell to said Abney "all their interest in the lands belonging to the estate of Edward Lewis, situate on the head of Little Sandy, in Roane County, West Virginia, at the price of twenty dollars per acre, the said interest being an undivided one-sixth ($\frac{1}{6}$). True, by the same contract they also agreed that as soon as partition of said lands should have been made and the interests of the parties therein allotted to them that they would make to said Abney a deed therefor with covenants of general warranty, free from incumbrances or adverse claims, reserving however from said conveyance a one-sixteenth ($\frac{1}{16}$) part of the oil in said land if any should be found therein; but, except for the one-sixteenth of the oil reserved, said Lewis and wife by their contract agreed to sell their interest in the estate in said land; wherefore as the decree gives said Lewis, or does not give to Abney, the one-sixteenth of the one-sixth of the oil under the whole tract, but leaves that one-sixteenth to said Lewis, how can he be heard in behalf of his brothers and sisters whose rights and interests are fixed by the decree of this court and by that of the circuit court, of May 27, 1919, appealed from by them. That Lewis's wife, Amanda E. Lewis, is not an interested or necessary party to this suit, we have already shown in response to the same point made in behalf of Lucy J. Lynch and others.

From the foregoing it manifestly appears that the decree below of January 23, 1920, must be reversed, and the cause remanded, to be proceeded with according to the principles herein adjudicated and further according to the rules and principles governing courts of equity.

(88 W. Va. 371)

PERDUE et al. v. WARD et al.

(Supreme Court of Appeals of West Virginia.
April 12, 1921.)

(*Syllabus by the Court.*)

Judgment \Leftrightarrow 590(4)—Decree in suit to restrain obstruction of right of way held not to estop same plaintiffs to recover damages for obstruction.

A final decree in an injunction suit, instituted solely for the purpose of inhibiting defendants from obstructing plaintiffs' right of way over defendants' land, and which decree affords that relief only, is not an estoppel to a subsequent suit at law by the same plaintiffs against the same defendants to recover damages caused by the obstruction of plaintiffs' right of way; and especially is this true where the record of the injunction suit discloses that the question of damages for the obstruction was not even mentioned.

Case Certified from Circuit Court, Wayne County.

Suit by Orra Perdue and others against Sam Ward and others. Judgment for defendant on demurrer, and case certified. Reversed and demurrer sustained.

O. W. Ferguson, of Wayne, and O. S. Welch, of Huntington, for defendants.

LIVELY, J. Orra Perdue and others instituted an action of trespass on the case against the defendants Sam Ward and Lindsay Ward for damages for obstructing a right of way over the defendants' land to the county road from a tract of 75 acres owned by the plaintiffs in Wayne county. A special plea was interposed by defendants, bringing into the case the record of a former suit between the same parties concerning the same right of way, decided by the Supreme Court and reported in 85 W. Va. 474, 102 S. E. 93, and styled *Alice Roberts et al. v. Lindsay Ward et al.*, which it is urged is *res judicata* of the right of the plaintiffs to the damages here involved.

The circuit court decided that the decree of the Supreme Court was *res judicata* of the claim of damages because if the damages were not litigated in the former injunction suit they could have been, and ought to have been; and this is the controlling question certified for decision here.

An inspection of the injunction suit of *Roberts v. Ward* set up here as a bar to damages discloses that the question of damages

was not involved. The only allegation in the bill which has any bearing whatever on the question is that the closing of the right of way by defendants "operates to the great and irreparable injury of the plaintiffs in the use, farming, and occupancy of said tract of land." No damages are sought for or asked in the prayer, and nothing whatever is said about damages in the evidence. Where there is no pleading, there can be no recovery. *Allegata and probata* must correspond. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366. This allegation of "irreparable injury" in the original bill is not a sufficient pleading of damages, and was clearly not intended to be so. It is a mere conclusion. A plaintiff's demand for any specific relief must be set out with reasonable certainty, with facts and circumstances of time, place, and manner, as will fully disclose his demand and inform the defendant of what he has to meet. The facts out of which his demand arises must be stated, and not merely conclusions of law. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611. Without proper pleading, no relief can be had. In the bill there was no attempt to plead damages, none were asked, no evidence taken on that question, and no recovery, clearly indicating that the parties and the court considered that this question was in no way involved.

We are not unmindful of the principle that where equity jurisdiction has been obtained all incidental relief may be granted, and the cause retained for that purpose in order to avoid a multiplicity of suits and settle all questions in controversy between the parties growing out of the principal matter in litigation. The court below took the view that, inasmuch as plaintiffs might have so framed their injunction bill as to include damages, might have introduced evidence on that question, and ought to have done both, but failed or neglected to do either, then they should be estopped for that reason. The weight of authority seems to be otherwise. The two actions are separate and distinct. One is for the purpose of preserving an easement free and unobstructed, and to compel the removal of obstructions already placed, peculiarly a subject of chancery jurisdiction; and the other, assessment of damages, peculiarly a question for a jury. The plaintiffs are entitled to their trial by jury preserved to them by the Constitution. In the injunction suit the right of way is the foundation of the action, and not the damages suffered. In many cases of this character no damages are involved, and especially is this true where the obstruction is such as might usurp the right of way by adverse user. *Danielson v. Sykes*, 157 Cal. 686, 109 Pac. 87, 28 L. R. A. (N. S.) 1024; *Swift v. Coker*, 83 Ga. 789, 10 S. E. 442, 20 Am. St. Rep. 347; *Schmoele v. Betz*, 212 Pa. 32, 61 Atl. 525, 108 Am. St. Rep. 345.

The principle governing this case is well

stated by the Supreme Court of the United States as follows:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, where the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record in the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined, that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered to have settled that matter as to all future actions between the parties; and, further, in cases in which the record itself does not show that the matter was necessarily and directly found by the jury, evidence aliunde consistent with the record may be received to prove the fact; but, even where it appears from extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded." *Steam Packet Co. v. Sickles*, 72 U. S. (5 Wall.) 580, 18 L. Ed. 550.

Where a decree in a former suit is pleaded as a bar in a subsequent suit about the same matter, not mere matters of defense, in order to be a bar, it must appear that the matter in the last suit was in issue in the first, and that the pleadings in the first suit were such that the court could have passed upon such matters. *State v. McEl-downey*, 54 W. Va. 695, 47 S. E. 650. Judge Poffenbarger further illustrates the principle as follows:

"Take, for illustration, an executory contract for the sale of land. Circumstances entirely aside from the validity of the contract may constrain a court of equity to refuse specific performance of it, without declaring it invalid. Thereafter a court of law may entertain an action on it for damages. Here we have the same contract and the same parties, but the former suit would not conclude the latter. The causes of action are not the same. One is the assertion of a claim for damages for a breach of the contract, and the other a claim of right to specific performance." *Hudson v. Land & Mining Co.*, 71 W. Va. 403, 76 S. E. 797.

See this case for a discussion of the principle involved here and citation of cases where it is applied.

"The estoppel of a judgment extends only to the points directly involved in the action and decided, and not to any matter which was only incidentally cognizable or which came collaterally in question, although it may have arisen in the case and have been judicially passed on." 23 Cyc. 1309.

See, also, *Henry v. Davis*, 13 W. Va. 230; and *Western M. & M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250, where it is held that to make a fact passed on in a former suit *res judicata* it must have been directly

and not collaterally in issue in the former suit, and there decided. Further illustrative of the rule and peculiarly applicable to the question certified is the decision in *Piro v. Shipley*, 33 Pa. Super. Ct. 278, wherein it is held:

"Where, in a suit in equity to restrain a trespass of a continuing and permanent character, it appears that neither in the pleadings, nor in the evidence, nor in the decree, was any mention made whatever of damages, such suit is not res adjudicata of a subsequent action of trespass to recover actual and compensatory damages for the trespass, the further continuance of which was enjoined in the equity suit."

We are cited to *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735, which holds exactly opposite to the decision of the Pennsylvania court just quoted. But it will be observed that this decision was influenced by the code practice adopted by that state, for it is stated therein that the code system of practice was undoubtedly designed to avoid a multiplicity of suits by enabling parties to settle and determine in one action all matters of difference between them arising out of or relating to the same transaction. The bill in the case of *Inderlied v. Whaley*, 85 Hun, 63, 32 N. Y. Supp. 640, cited, not only prayed for an injunction against the trespasses being committed by the defendant, but sought damages as incidental to equitable relief, and the court held that under a proper state of facts the plaintiff was entitled to all damages sustained up to the time of judgment, and a recovery of damages would be a bar to a future suit for the same damages; that is, the damages accruing up to the time of the decree in the injunction suit. The case of *Alderson v. Horse Creek Land Co.*, 81 W. Va. 411, 94 S. E. 716, is different from the case under consideration. *Wingfield* held a tax title to the land in litigation, and *Shrewsbury*, trustee in bankruptcy, representing the former owner from whom the land was sold for taxes, sued to set aside the tax deed as a cloud on the title, which suit was successful, and he, *Shrewsbury*, trustee, then sold the land at a trustee's sale to *Geo. P. Alderson*, who proceeded against the defendant *Horse Creek Land Company* for an accounting for timber and coal taken from the land and for a partition of the land. The defendant set up as a defense, among other things, that it was the owner of the entire lands, and had purchased a title to a part of the lands known as the *Levassor* title, which had been adjudged to be a superior title to that of *Alderson*, and that it was the owner of all the lands by reason of adverse possession under the tax deed as color of title. Defendant insisted that the *Levassor* title was not set up as a matter of defense to the first suit, and that it was not necessary for it so to do in order

to get the benefit of it as a defense, and that the said title was not involved upon the former hearing. This contention was denied by this court, which held that it was the duty of the defendant to set up in the first suit all its defenses, otherwise it would be precluded from so doing in the subsequent suit. The opinion says:

"Ordinarily but one opportunity is given a defendant to make defense, and if he fails to present all of the matters which are available to defeat the plaintiff's right in whole or in part, he will be forever barred from thereafter presenting them. This seems to be the well-established doctrine of the authorities cited above."

The authorities cited were to sustain point 1 of the syllabus, which must be read in connection with the facts of that case. The subject-matter in both suits was the title to the land, and the defense set up in the second suit was incident to and came within the legitimate purview of the subject-matter, and it was the duty of defendant to plead that defense in the first suit or forever be barred from asserting it against the plaintiff.

"A judgment is not conclusive of every question which might have been made in the case, as is sometimes erroneously said, but only of matters that had of necessity to be determined before the judgment could have been given." *Hart v. Bates*, 17 S. C. 35.

See, also, *Allebaugh v. Coakley*, 75 Va. 628, where it is held if the cause of action is divisible, or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury, where the judgment is relied upon as a bar.

We conclude that the decree in the injunction suit is not a bar to the present suit for damages, and so answer the question certified.

Reversed.

(88 W. Va. 376)

FOREMAN et al. v. GREENBURG et al.
(No. 4120.)

(Supreme Court of Appeals of West Virginia.
April 12, 1921.)

(Syllabus by the Court.)

1. Easements §8(4)—Use by landowner of private way over adjoining tract of another jointly with him held presumptively adverse.

Open, continuous, and notorious use by an owner of land of a private way over an adjoining tract owned by another person, known, acquiesced in, unobjected to, and unprotested by the latter, is presumptively adverse to him and enjoyed under a bona fide claim of right, even though the way is used jointly by both owners as a common outlet from their properties.

2. Easements ¶5—Use of private way over land of another for 10 years held to give title by prescription.

Such use for a period of 10 years, in the absence of proof of circumstances altering its character, ripens into perfect title to an easement over the adjoining land by prescription.

3. Easements ¶8(4)—Way through inclosed lands obstructed by gates presumptively private way; claimant of way through inclosed lands need only prove open, notorious, and known user to establish easement therein.

A way through inclosed lands, burdened or obstructed by gates or bars, is presumptively a private way, notwithstanding its use to some extent by the general public, and the claimant of the way, as a private one appurtenant to his land, is not required to prove some act indicative of an independent assertion of right beyond that shown by his open, notorious, and known user, in order to establish or maintain the easement.

4. Easements ¶41—Extent of easement by prescription determined by extent of user.

When an easement has been acquired by prescription, the extent of the right so acquired is measured and determined by the extent of the user out of which it originated.

Appeal from the Circuit Court, Wood County.

Suit by Alda Foreman and others against Tony Greenburg and others. Decree for complainants, and defendant named appeals. Affirmed.

William Beard, of Parkersburg, for appellant.

Turner & Brennan, of Parkersburg, for appellees.

LYNCH, J. The reasons assigned in the petition of the defendant in the suit for reversal of the decree granting the prayer of the bill are: The refusal to sustain the demurrer to the bill; the adjudication of an indefeasible title by prescription to an easement of way over defendant's land; and, if any such right existed, the establishment of one having a width sufficient to allow passage thereon of two vehicles moving in opposite directions. As summarized by appellant in his brief, "there is but one question involved" upon this hearing, "and that is whether the appellees' claim to a right of way by prescription has been made to appear," and again "the exact question here is: Can a permissive use of a road over land of one of two owners of adjoining farms, using the right of way jointly as a common outlet, ever ripen into an easement by prescription?" This, he says, "is a fair statement of the appellees' claim to the use of the roadway. It simply takes as true the allegation of the appellees' bill." If this summarization comprehends the issues, it necessarily prescribes the limit of this discussion. Beyond this limitation the investigation need not proceed. Appellant

has voluntarily, and it is presumed advisedly, assailed the decree at what he apparently deemed its most vulnerable point.

The land owned by Mrs Foreman, one of the plaintiffs, she acquired by descent from her father, John Small, and he from the heirs of Reuben Spencer by deed, and Spencer from Joseph T. Leavitt also by deed in 1848. The Small land adjoins the land of appellant, the title to which he acquired from the same remote source, though it did not vest in him until the year 1909 by deed of Mrs. Cottingham. Their familiarity with the surrounding circumstances qualified them to speak intelligently and accurately respecting the existence of the controverted roadway, as they saw and knew it many years before appellant's purchase of the tract owned by him. The road was where it now is, they say, when they first became acquainted with Small and Whitlatch. They knew its location and the constant use made of it during the time of the proprietorship of the successive owners after Spencer, whom they did not know and never saw. Their testimony was unshaken when tested by cross-examination, and there was no other attempt to impeach their veracity or contradict their testimony. Besides, the witnesses who spoke for appellant fully and completely corroborate the facts proved by appellees respecting the long and uninterrupted user of the easement through Greenburg's land. The statement of appellant himself is emphatic upon that question, and by his testimony he confirms the existence of the roadway and its continuous enjoyment by both parties, occasionally by others, whose convenience it served in reaching the nearest public highway. It cannot therefore be said that the effort to establish the continued existence and use of the roadway for the requisite 10-year period necessary under the holdings of this court has failed.

[2, 3] The road in question extends for part of its length along the common line of both properties and for the remainder of the distance on, appellant's land. Both tracts are inclosed and the road itself burdened or obstructed by gates or bars and has been used in that condition for many years. Presumptively, therefore, it is a private way. *Roberts v. Ward*, 85 W. Va. 474, 102 S. E. 96. As in most cases of this character, there is no proof that express permission to use it was ever requested by or granted to appellees, but they and their predecessors in title have used it for more than 50 years, with the acquiescence of the defendant and those through whom he derived his title, and without any objection on the part of any of them until the year 1919, when a dispute arose with respect to a stile over the common fence. What appellant relies on as constituting grants of permission amounted to no more than mere acquiescence and al-

lence on the part of the owners of the servient tract. User of such character is presumptively adverse to the servient owner and enjoyed under a bona fide claim of right, and when continued for a period of 10 years, in the absence of circumstances altering its character ripens into perfect title to an easement by prescription. *Roberts v. Ward*, 85 W. Va. 474, 102 S. E. 96; *Staggers v. Hines*, 104 S. E. 768. See, also, *Walton v. Knight*, 62 W. Va. 223, 58 S. E. 1025; *Hawkins v. Conner*, 75 W. Va. 220, 83 S. E. 982.

[1] But appellant insists that, as he also has used the way, when necessary and convenient, as a means of access to and from various portions of his farm for agricultural and other like purposes, and jointly with appellees as an outlet to the county road, such promiscuous user precludes appellees from setting up a right of way adverse to him; in other words, that a joint use excludes the possibility of acquiring an easement by prescription under an adverse claim of right. In response to such objection it is sufficient to say that so long as no objection was offered on the part of appellant or his predecessors in title there was no occasion for appellees to assert verbally a right to use the road. "In the absence of proof to the contrary, every trip over the road was an assertion of right. The user itself, for the statutory period of time, 10 years, established prima facie a bona fide claim of right." *Roberts v. Ward*, cited. Appellees and their predecessors made no request, so far as the record discloses, for permission to use the way, and received none, but continued to use it without objection and with the owner's silent acquiescence. Being a private way or road, every trip over it, therefore, whether on foot, by horse, or wagon, must have been and was under claim of right and necessarily adverse to appellant. *Pavey v. Vance*, 56 Ohio St. 162, 46 N. E. 898. Indeed, Whitlatch is shown to have recognized on one or more occasions Small's right to pass over the way during their ownership of the adjoining tracts. The cases cited fully sustain the principles upon which our conclusions rest, and repetition of the arguments therein advanced can serve no useful purpose. They fully answer the objection urged against the acquisition of an easement by prescription when the way is used in common by the claimant and owner of the land over which it passes.

Though appellant's right of ownership of the tract is now subject to the dominant right of appellees to use the way across it, yet the former may enjoy the benefit of his land and of the road notwithstanding the right of the latter therein. The only restriction imposed in such cases is that the use of the servient owner must be reasonable and such as will not impair or injure the easement or interfere with its enjoyment by

the dominant owner. 19 C. J. tit. Easements, § 226. And the latter should recognize and respect the corresponding rights of the servient owner, by exercising reasonable care in his use of the road so as not to injure or interfere with the due enjoyment and cultivation of the property over which the road extends, closing after him the gates which have long been in use for the purpose of preventing the trespass or straying of cattle and other animals.

[4] That part of the decree requiring the way so acquired by prescription to be of a width sufficient to permit the passage of two vehicles moving in opposite directions seems not to be unreasonable when considered in the light of the evidence. When an easement has been acquired in such manner, the extent of the right so acquired is measured and determined by the extent of the user out of which it originated. *Rogerson v. Shepherd*, 33 W. Va. 307, 317, 10 S. E. 632; *Staggers v. Hines*, 104 S. E. 768; *District of Columbia v. Robinson*, 180 U. S. 92, 21 Sup. Ct. 233, 45 L. Ed. 440; *Board v. N. & W. Ry. Co.*, 119 Va. 763, 91 S. E. 124; 19 C. J. 967. In 1 Elliott, *Roads & Streets* (3d Ed.) § 196, the author says:

"If the right to the way depends solely upon user, then the width of the way or the extent of the servitude is measured by the character of the user, for the easement cannot be broader than the user."

The testimony shows that the width of one of the gates was 10 feet 8 inches, and since it presumptively bore a close relation to the width of the roadway, the court not unreasonably could designate and define the prescriptive width as it did.

Finding no substantial error, we affirm the decree.

(88 W. Va. 400)

PROPST v. CALHOUN COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia.
April 12, 1921.)

(Syllabus by the Court.)

1. Highways §93—Certain formalities as to appointment and bond held not to invalidate acts of highway patrolman.

The acts of a highway patrolman are not invalid because the order appointing him does not in terms require him to give bond, or because the bond which he did give was acknowledged before a notary public, or because the records of the county court do not show that his bond had been approved, or because no certificate was issued to him by the clerk of the county court showing his appointment.

2. Taxation §608(2)—Equity may enjoin collection of tax in violation of provision of Constitution.

Equity has jurisdiction to enjoin the collection of a tax levied in violation of a provision of the Constitution.

3. Highways \S 122, 151(1)—Requiring labor on public roads not "taxation"; collection of money from one failing to perform road work not unconstitutional.

To require the inhabitants of a district to perform labor upon the public roads is not "taxation," and the collection of the amount required by law to be paid by any such inhabitant who fails to perform the labor required of him is not in violation of any of the provisions of the Constitution of this state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax—Taxation.]

Certified from Circuit Court, Calhoun County.

Suit by John Propst against the County Court of Calhoun County and others. Demurrer to bill sustained, and case certified. Affirmed.

R. S. Blair, of Harrisville, for plaintiff.

Lorentz C. Hamilton, of Grantsville, for defendants.

RITZ, P. The plaintiff filed his bill in this case for the purpose of enjoining the collection from him of the sum of \$8, the amount which he was required by the patrolman of roads in his district to pay in lieu of performing four days labor on the public roads.

It appears from the allegations of the bill that the county court of Calhoun county had by an order appointed H. H. Helney patrolman of roads for Center district of said county and that the said Helney, in accordance with the provisions of law, notified the plaintiff to appear at a certain time and place and perform four days' labor upon the public roads of said district; that the said plaintiff refused to comply with this summons, which fact was noted by the patrolman of roads, and a suggestion issued by a justice of the peace upon the bank account of the plaintiff for the purpose of collecting the sum of \$8 in lieu of the four days' labor required of him. He then filed his bill seeking to enjoin the collection of this claim. The circuit court, after sustaining a demurrer to this bill, certified the question of the sufficiency thereof to this court.

Plaintiff insists that he should not be required to pay this sum in lieu of the work required of him upon the roads for several reasons: First, that the patrolman, H. H. Helney, was not required in the order appointing him to give bond as required by law; second, that the bond executed by Helney was not acknowledged before the proper authority, it having been acknowledged before a notary public instead of before the county court; third, that there is no record of the county court showing the approval of the bond; fourth, that no certificate was issued by the clerk of the county court and delivered to the patrolman showing his appointment.

For these four reasons he insists that the patrolman was not an officer at all, and that his action in summoning him to work upon the roads was without authority of law.

[1] It is averred in the bill that the county court did as a matter of fact appoint Helney as patrolman of roads of Center district, and the question raised by the above contentions is: Do the irregularities indicated invalidate his acts as such patrolman? Conceding for the sake of the argument that the order appointing him should have specified therein that he must give a bond, and that it fails in this regard, and that such bond must be taken by the county court and approved by it, and that the record does not show that this was done, and that no certificate showing his appointment was issued to him by the clerk, does this render his acts as such patrolman void? That he was acting under color of authority there can be no question. The county court had actually made the appointment, and he had actually entered upon the duties of the office, and was performing them. That he may not have complied with all of the requirements of the law, or that the county court, or the clerk of the county court, may not have complied with some of the requirements of the law, could not invalidate his acts done in the execution of the duties of the office. Irregularities in the giving of an official bond, or even failure to give an official bond, where the officer elected or appointed enters upon and performs the duties of the office, will not invalidate his acts. He will be a de facto officer. Constantineau on the De Facto Doctrine, \S 137, 138. It is likewise true that one who is in possession of an office in the open exercise of its functions under color of an election or an appointment is a de facto officer, even though such election or appointment may be irregular. Constantineau on the De Facto Doctrine, \S 171. Whether the patrolman in this case was an officer de jure, or only an officer de facto, we need not determine. He was certainly such officer de facto, and his acts as binding upon the plaintiff in this case as though he held the office de jure.

[2] The plaintiff asserts as his reason for going into a court of equity to enjoin the collection of this claim the lack of opportunity to apply to the county court for relief, for the reason that said court, under the law, would not meet until after the money had been collected from him. If, as the plaintiff contends, the attempt to collect this money from him is in violation of the constitutional limitations placed upon the county court, equity has jurisdiction to enjoin the collection of it. Turkey Knob Coal Co. v. Hallanan, 84 W. Va. 401, 99 S. E. 849; Simms v. Sawyers, 85 W. Va. 245, 101 S. E. 467.

[3] The principal contention made by the plaintiff is that this is an assessment against him in excess of the amount limited by the

Constitution. His averment is that the county court of Calhoun county had already laid a levy of 90 cents on the \$100 of taxable property in the district in which he is an inhabitant; that he is assessed with about \$2,000 of such taxable property; that the Constitution limits the levy which the county court is authorized to make to 95 cents on the \$100 of valuation, and to allow it to collect this \$8 in addition to the 90 cents levied would make the total assessment against his property more than \$1.30 on the \$100 of valuation. If his contention is correct that the requirement that certain of the inhabitants must perform labor upon the public roads is a tax, then it might be in violation of the provision of the Constitution referred to. But is such a requirement in any sense taxation? It has been for a great many years one of the means adopted by the legislative authority for the purpose of maintaining the highways of the country. Proper maintenance of such public roads has always been considered of the greatest public importance to any community. In fact, it may be said that the very life of the people depends upon the highways being maintained in a passable condition, and the duty is imposed upon the public authorities to so maintain them. There are many public duties which the citizen is called upon to perform without compensation, or for very inadequate compensation. Not so very long ago military service was required, whenever the necessity therefor arose, without making any compensation to the citizen furnishing such service. Service on juries has always been required, in some jurisdictions without any compensation, and in most jurisdictions for a compensation very much less than the actual value of the services. Attendance as witnesses is even now required in this state before grand juries without any compensation therefor. It has been held with practical uniformity by the courts construing such requirements as this that labor upon the public roads is of the same character as military service, service on juries, or attendance as a

witness, and that it is in no sense taxation; that it is one of the public duties which the citizen owes to his community, and which he may be required by the proper authority to perform. While the tendency of later years has been for the public to make compensation for such services, the power of the Legislature to require them without compensation cannot be denied. It may be that the burden would be more equitably distributed were full and complete compensation made to each citizen for all services rendered by him to the public, but the legislative mind has not yet declared this to be the public policy of the state, and it may be doubted whether existing conditions are such as that such full compensation could be made without unduly embarrassing the administration of public affairs. This question has been before the courts of a number of the American states, and the conclusion we have reached is sustained by the decisions so far as we have examined them. *State v. Sharp*, 125 N. C. 628, 34 S. E. 264, 74 Am. St. Rep. 663; *State v. Wheeler*, 141 N. C. 773, 53 S. E. 358, 5 L. R. A. (N. S.) 1189, 115 Am. St. Rep. 700; *Short v. State*, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404; *Overseers of the Poor of Amenia v. Overseers of Stanford*, 6 Johns. (N. Y.) 92; *Town of Pleasant v. Kost*, 29 Ill. 490; *Fox v. City of Rockford*, 38 Ill. 451; *McDonald v. County of Madison*, 43 Ill. 22; *City of Macomb v. Twaddle*, 4 Ill. App. 254; *Leedy v. Town of Bourbon*, 12 Ind. App. 486, 40 N. E. 640; *Johnston v. City of Macon*, 62 Ga. 645; *Dennis v. Simon*, 51 Ohio St. 233, 36 N. E. 832; *Barrow v. Hepler*, 34 La. Ann. 362; *Town of Starksborough v. Town of Hinesburgh*, 13 Vt. 215.

Our conclusion is that there is no merit in the contentions set up by the plaintiff to defeat the payment of the charge made against him for his failure to work upon the public roads as required, and the action of the circuit court sustaining the demurrer to his bill is affirmed.

(88 W. Va. 414)

BANK OF MARLINTON v. POCAHONTAS DEVELOPMENT CO. et al.
(No. 4081.)(Supreme Court of Appeals of West Virginia.
April 12, 1921.)*(Syllabus by the Court.)*

1. Judges \S 55—When special judge retires after removal of disability of regular judge, the latter may conduct further proceedings.

Where, because of interest in a cause, the judge of a circuit court cannot properly preside at a trial thereof, and a special judge is elected, and during the prosecution of the cause such disability is removed and the interest of the regular judge in the cause entirely extinguished, and he is dismissed therefrom as a party, and the special judge elected to preside at the trial thereof retires as such special judge, it is not error for the regular judge to conduct the further proceedings therein.

2. Dismissal and nonsuit \S 22—Where debt of nominal plaintiff in lien creditor's suit has been discharged, he may be dismissed.

Where in a lien creditors' suit the debt of the nominal plaintiff has been satisfied and discharged pending the litigation, it is proper for the court to dismiss such nominal plaintiff from the suit, and to order the cause to be further proceeded with for the benefit of the other lien creditors who have come into the suit and asserted their liens.

3. Receivers \S 55—Discharge of special receiver refused until account settled, though appointed by disqualified judge.

Even though a special receiver appointed in a chancery cause may have been so appointed by a special judge, who ought not to have presided because of interest, it is not error to refuse to discharge such special receiver until he has settled his accounts and made disposition of the property and funds in his hands under the order of the court.

4. Reference \S 83—Decree on commissioner's report not improper because commissioner neglected to state nature of notice to parties of completion of report.

It is not error to enter a final decree upon a commissioner's report in a lien creditors' suit because the commissioner fails to state whether the notice which he gave to the parties of the completion of his report was given by mail or personally.

5. Reference \S 100(1)—Final decree may be entered without having accounts of special receiver settled before commissioner, where no exceptions to report.

It is not error to enter a final decree in a lien creditors' suit without having the accounts of a special receiver appointed therein settled before a commissioner, where such special receiver has made a full and detailed report of his transactions to which there are no exceptions. In the absence of any showing that such report is erroneous, the court may confirm the same, and act thereon as though the special receiver's accounts had been settled before a commissioner.

Appeal from Circuit Court, Pocahontas County.

Suit by Bank of Marlinton, for itself and others who might join, against the Pocahontas Development Company and others. Decree for plaintiff, and defendant named appeals. Affirmed.

J. M. Hoover, of Webster Springs, for appellant.

F. R. Hill and Andrew Price, both of Marlinton, for appellees.

RITZ, P. This is a lien creditors' suit brought by the Bank of Marlinton on behalf of itself and all other lien creditors of Pocahontas Development Company, for the purpose of subjecting to sale in satisfaction of the liens against it the real estate of said company.

After several years spent in an endeavor to have an account of the liens taken and the land owned by the company ascertained, a decree of sale was finally entered, to review which this appeal is prosecuted.

No contention is made by the defendant Pocahontas Development Company that the liens are not valid, or that it is not the owner of the property, or that it should not pay its debts, but every technical defense known to the law has been taken advantage of during the progress of the litigation to delay the same, and to prevent sale of the property in satisfaction of the liens, and the fictitious and insubstantial character of the errors assigned upon this appeal but emphasize this purpose upon the part of the defendant. No brief is presented on behalf of the appellant in this court, and we might very well say that it has abandoned its assignments of error made in the petition, being of the opinion upon further consideration that the same were lacking in merit. We have determined, however, to consider them and decide the questions raised by the assignments of error, in view of the fact that a decision of at least some of them may be necessary in the further prosecution of the suit in the lower court.

[1] The first error assigned is that the decrees entered by the regular judge of the circuit court, including the decree of sale appealed from, should be reversed because said judge was a party to the litigation, and could not properly enter such decrees. It appears that when the suit was originally instituted the lands of the debtor had been returned delinquent and sold for the nonpayment of the taxes assessed against the same, and that the purchaser at such tax sale subsequently was elected judge of the circuit court of Pocahontas county. The defendant had not redeemed the lands from this delinquency, and because of his interest therein as such purchaser such judge was made

a party defendant to the suit. When the suit came on for a hearing an order was entered showing the impropriety of the judge sitting in the case, and directing that a special judge be elected. This was done, and this special judge qualified by taking the oaths prescribed by law, and entered a decree of reference. He likewise, on motion of some of the lien creditors, acquiesced in by the defendant debtor, appointed a receiver to take charge of the real estate, some of which was improved, and to collect the rents therefrom, pay the taxes thereon, and hold the same pending the further order of the court. Shortly after the institution of the suit the land was redeemed from the delinquency for which it had been purchased by the judge of the court, and he no longer had any interest therein. A decree was entered in the suit showing the redemption of the land from this delinquency, and further showing that the defendant purchaser, who was the judge of the court, was no longer interested in the litigation, and dismissing him as a party to the suit. Thereafter, the special judge entered an order, showing that there was no longer any necessity for him continuing as judge in the case, and vacating his office as special judge, and thereafter the regular judge of the court presided during the progress of the litigation. Further than this, the order entered in the cause, showing that there was no further necessity for the special judge acting, and discontinuing his functions as such, was agreed to on the record by the defendant debtor. It will be seen from the foregoing that at the time of the entry of the decree of sale complained of the judge of the circuit court of Pocahontas county had absolutely no interest in this litigation. His interest had been determined and a decree entered so deciding and dismissing him as a party to the cause, and there was no reason, when the special judge who had been elected declined to proceed further with the cause, as shown by the order, for the election of another special judge. The contention that the regular judge was in any wise disqualified at the time he entered the decree of sale because of interest is without merit, for the reason that the statement that he was then interested in the cause is not supported by the record, and for the further reason that the defendant itself agreed that the cause should be further heard by such regular judge. It does not come with very good grace from it at this day to object to his entering these decrees after it had solemnly agreed that he should preside at all further hearings in the suit.

[2] The second and third assignments of error go to the action of the court in dismissing the plaintiff, Bank of Marlinton, from the suit and ordering it to proceed for the benefit of the other lien creditors

who had filed answers and asked that their liens be enforced. It appears that during the progress of the litigation the debt of the Bank of Marlinton was paid off, and it was no longer interested. Upon this fact being made known to the court, and upon the motion of the said Bank of Marlinton it was dismissed from the cause, and the suit ordered to proceed for the benefit of all other lien creditors who had filed answers and asked to have the benefit of said suit. Objection is made that the order did not formally make these other lien creditors plaintiffs, and, further, that it was error to dismiss the Bank of Marlinton from the suit, thus saving it from liability for costs which might thereafter be incurred. There is nothing in this contention. There was no reason for longer continuing the Bank of Marlinton as a party to the suit when its debt was fully satisfied, and it would have been entirely improper, as we have held, to dismiss the suit because the debt of one lien creditor was satisfied. By the very provisions of the statute all lien creditors are parties plaintiffs, and the fact that the order did not in so many words make the other lienors who had filed answers in the cause parties plaintiffs does not change their status. The statute makes them parties plaintiffs in the suit, and the effect of the court's order in directing that the litigation should thereafter proceed for their benefit made them parties plaintiffs and responsible for any costs thereafter incurred. *Linsay v. McGannon*, 9 W. Va. 154; *Bilmyer v. Sherman*, 23 W. Va. 656; *First National Bank v. De Berriz*, 105 S. E. 900.

The fourth assignment of error is that the order for the election of the special judge was entered upon the law side of the court, while this cause was and is a chancery cause. We do not know whether the statement is true that the order providing for the election was entered upon the law side of the court, but whether true or not it appears from this record that it was also entered in this suit as one of the orders made during the progress thereof, and the fact that it also may have been entered upon the law side of the court would not have the effect of invalidating the election of the special judge.

[3] The fifth assignment of error is based upon the refusal of the court to discharge the special receiver who had been theretofore appointed by the special judge, upon the ground that said special judge was disqualified to act as such, because he was a stockholder and director of a bank which was one of the judgment creditors in said suit. This motion was not made for several years after the special receiver had been appointed and had qualified, after he had collected considerable sums of money from rents from the property, and from sales of certain of the property, which sales were

made by said special receiver by agreement of the appellant entered of record. The motion was made when the case was ready for final decree, when there was nothing further for the special receiver to do except to pay over the money found in his hands as directed by the court and preserve the property until sale thereof could be made by special commissioners who were appointed for that purpose. It is perfectly patent that the court should not have discharged the special receiver at that time, for the very good reason that such action would have left a considerable sum of money in his hands undisposed of, and to discharge him would only have made necessary the appointment of some one else to preserve the property until the same could be sold. Such special receiver made a full and complete report at that time of all of his transactions, showing what funds had come into his hands and from what sources, and what disposition he had made of them so far as they had been paid out, and what balance he still held. There were no exceptions to this report by any party, and the court very properly directed him to pay the balance in his hands, after allowing him certain compensation, to which there is no objection, upon the lien first in order of priority. This was the proper disposition to be made of this fund; and, of course, in the natural course of the suit, when the special receiver has done this and reported that fact to the court, he will be discharged. Whether the special judge was so interested as to make it improper for him to appoint such special receiver we need not inquire. No suggestion of the interest of such special judge was ever made until after the special receiver had acted under the decree by the agreement and with the assent of the appellant here. No purpose could have been served by discharging the special receiver at the time his discharge was asked for. In fact, it would have been entirely improper to discharge him until he had made settlement of his accounts and paid over the fund in his hands. Clearly this motion was made at the time it was for no other purpose than to embarrass the creditors in the further prosecution of the suit, for it could not be to the judgment debtors' interest to have a receiver discharged who had a considerable sum of money in his hands applicable to the liens.

The sixth assignment of error relates to the disability of the regular judge on account of his interest in the suit, and has been disposed of by what we have heretofore said.

The seventh assignment of error is to the action of the court in overruling appellant's exceptions Nos. 1, 2, 3, 4, 5, 8, and 9 to the commissioner's report. We will take these exceptions up in their order. The assignment is not well taken so far as exception

No. 1 is concerned, for the very good reason that the appellant's exceptions, indorsed to the commissioner's report, show that there was and is no exception No. 1.

[4] The second exception insists that it was error to act upon the report of the commissioner, because such commissioner failed to certify the time and manner of giving notice to the attorneys of record of the completion of the report. The certificate of the commissioner attached to his report shows that he completed it on the 24th of September, 1919, and on that day gave notice to the attorneys of record, naming them. Section 7, c. 129 (Code 1913, sec. 4852), provides that such notice may be given verbally or in writing. The commissioner does not show whether he gave it verbally or in writing. The exception does not intimate that such notice was not in fact given, but it is contended that the report should not be received because the commissioner did not show in which way he gave such notice. It is apparent that there is no merit in this exception. The notice was given in one way or the other, and the parties do not complain that they did not have the notice, and it is not very material that the commissioner should state in his report whether he gave the notice by mail or personally. The rights of no party could be injuriously affected because of this failure.

The third exception is to the action of the court in dismissing the Bank of Marlinton from the suit and ordering it to proceed for the benefit of other lien creditors. What we have before said sufficiently disposes of this exception.

[5] The fourth and fifth exceptions are based upon the failure of the commissioner to settle the accounts of the special receiver. The commissioner was not directed in the decree of reference to settle these accounts. The special receiver filed in the cause a very complete and detailed report of all his transactions, and no exceptions are taken to this report by any party. We can see no reason why expense should be incurred in having the commissioner go over the special receiver's accounts in the absence of some suggestion that there was something wrong therewith, or some necessity therefor. The court could and did enter a decree upon the report of the special receiver disposing of it and directing the application of the fund still remaining in the hands of such receiver. To have required the commissioner to settle the accounts of the special receiver would only have caused delay and added additional expense to the litigation, and would have accomplished no beneficial purpose.

The eighth exception goes to the action of the commissioner in reporting a judgment in favor of L. M. McClintic, special receiver, against the appellant, it being asserted that

the commissioner made certain findings in regard to this judgment not necessary for the determination of this cause. Whether this is true or not we need not inquire. Such findings or inquiries as were made by the commissioner beyond the necessities of the case are unimportant. He did ascertain and report the material thing to be inquired into, and that was the validity of the judgment and the status of the lien, and this is not questioned.

The ninth exception is based upon the failure of the commissioner to report all of the land owned by the appellant. If it were true that the commissioner did not report all of the land owned by the appellant, there might be something in this exception, but the hypothesis upon which it is based is not supported by the record. The commissioner found that all of the land owned by appellant was conveyed to it by a deed from John T. McGraw, dated the 28th of September, 1891, purporting to convey 620 acres; that this land was subsequently divided into town lots by a plat recorded in the county clerk's office, and that the part of this 620 acres which the commissioner reports as being owned by the appellant is those lots which remained after excluding therefrom all lots which it had theretofore sold, and which lots or tracts of land were situate in the town of Marlinton, Edray district, Pocahontas county, W. Va. Then each of said lots is set out by number and section. From this it sufficiently appears that the land reported is all of the land of the defendant.

This disposes of all of the assignments of error made. We find no merit in any of them, and the decree complained of is affirmed.

(88 W. Va. 439)

LINDENBURG v. AMERICAN RAILWAY EXPRESS CO. (No. 4221.)

(Supreme Court of Appeals of West Virginia.
April 19, 1921. Rehearing Denied
May 10, 1921.)

(Syllabus by the Court.)

1. Carriers \S 158(2), 218(1)—Interstate carrier held liable for full loss or damage to live stock and other property except baggage unless exoneration and a limited liability based on a declared or agreed valuation are effected.

Under the act of Congress passed August 9, 1916 (section 7976, Barnes' Federal Code [U. S. Comp. St. \S 8604a]), known as the "Second Cummins Amendment" to the Interstate Commerce Act, a common carrier is liable for the full actual loss, damage, or injury to ordinary live stock received by it for shipment in interstate commerce, caused by it or any connecting carrier to which it is delivered,

and for such loss, damage, or injury to any other property so received, except baggage, unless, by the action of the Interstate Commerce Commission and itself, exoneration from such liability and adoption of a limited one, based upon a declared or agreed value, are effected.

2. Carriers \S 158(2)—Carrier liable for full actual loss, unless shipper's written declaration of value or agreement on released value be taken, notwithstanding adoption by Interstate Commerce Commission of regulations for limited liability or filing of rates by carrier.

Even though the Interstate Commerce Commission, under the authority conferred upon it by said statute, has adopted and promulgated regulations by which such limitation of liability may be effected as to all property in interstate shipment, except ordinary live stock, and in compliance with such regulations a carrier has filed and published and put into effect its tariffs and rules for maintenance of rates dependent upon value declared in writing by the shipper or agreed upon in writing as the released value of the property, approved by said commission, it remains liable for such full actual loss, damage, or injury, in the case of any particular shipment, unless it takes from the shipper a written declaration of the value of the property, or a written agreement with him upon the released value thereof, signed by him.

3. Carriers \S 158(2)—Receipt by carrier containing no statement of value signed by shipper held not to relieve carrier from liability for full actual value, even though rate charged same as would have been charged upon minimum value under Interstate Commerce Commission rules.

In such case the delivery to the shipper, of a receipt executed by the carrier, in which there is no statement of value signed by the shipper, does not relieve the latter from liability based upon full actual value, even though the rate charged for carriage of the property is the same as would have been legally charged upon the minimum value of the property, under the regulations and tariffs validly promulgated, posted, and maintained.

4. Carriers \S 82(2)—Second Cummins Amendment to Interstate Commerce Act not in conflict therewith when interpreted to require receipt from shipper in declaring value.

So interpreted, said statute does not conflict with the provisions of the Interstate Commerce Act (U. S. Comp. St. \S 8564, 8565), inhibiting preferences and unjust discrimination, nor is it inconsistent with them, or either of them.

(Additional Syllabus by Editorial Staff.)

5. Carriers \S 13(2)—"Unjust discrimination" defined.

"Unjust discrimination" is different treatment of persons of the same class, under like or similar conditions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unjust Discrimination.]

Error to Circuit Court, Kanawha County.

Action by A. J. Lindenburg against the American Railway Express Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. M. Hartung, of New York City, and Davis & Davis, of Charleston, for plaintiff in error.

Morgan Owen, of Charleston, for defendant in error.

POFFENBARGER, J. The judgment here involved stands upon the theory of liability of the plaintiff in error, for full value of property intrusted to it for transportation from Indianapolis, Ind., to Charleston, W. Va., and lost in shipment, by reason of failure on its part to comply with provisions of the federal statute, authorizing express companies to limit their liability, on the basis of declared or agreed value, and known as the "Second Cummins Amendment." Barnes' Fed. Code, § 7976 (U. S. Comp. St. § 8604a). The issues of fact were tried by the court in lieu of a jury, and the substance of the evidence was made a part of the record.

The shipment consisted of two trunks weighing, respectively, 200 pounds and 100 pounds and a 10-pound package. On delivery at Charleston, the 200-pound trunk was in bad condition, some of the goods in it having been totally destroyed and others badly damaged by water, in some way. As proved and found by the court the damages amounted to \$916.15. On the theory of compliance with the law and validity of the tariff regulations and receipt given, the defendant admitted liability in the sum of \$110, tendered that amount, and denied liability for anything more.

The charges paid were such in amount as would have corresponded with a declared or released value of 50 cents per 100 pounds, the ordinary or basic value of property, with some exceptions, as fixed for purposes of transportation by the Interstate Commerce Commission regulations, and the uniform receipt prescribed by that commission, in the absence of a specification of a higher value. The receipt given the shipper, however, was not in the form of the uniform receipt so prescribed and in use at the time of the shipment. It was an old form in use under former law, known as the "First Cummins Amendment" (U. S. Comp. St. §§ 8592, 8604a) or the "Carmack Amendment" (U. S. Comp. St. §§ 8604a, 8604aa). It absolved the company from loss or damage by default or negligence occurring beyond its own lines, and contained no declaration or release of value in writing, signed by the shipper, which the law in force at the date of the shipment required.

[1] It is unnecessary to inquire and determine whether the plaintiff in error had been

specifically or expressly authorized by the Interstate Commerce Commission to avail itself of the law authorizing limitation of its liability, since we are clearly of the opinion that, if authorized so to do, it omitted to avail itself of the right of limitation, in respect of the shipment in question, by its failure to comply with the regulation provided for effectuation thereof.

Having declared that all common carriers engaged in interstate commerce should be liable for the full actual loss, damage, or injury to property received by them for transportation in such commerce, occurring on their own lines or those of connecting carriers, the statute provides for partial limitation of such liability, as to some kinds of property, under certain circumstances. In the case of ordinary live stock, there can be no limitation. Liability for such full value does not apply to baggage. Nor does it apply to any other property, save ordinary live stock, that the Interstate Commerce Commission may see fit, in the exercise of its discretion and powers, to require or authorize to be carried upon rates dependent upon "the value declared in writing by the shipper or agreed upon in writing as the released value" thereof. In other words, no property can be carried upon such rates and under such a limitation, except baggage and such other property as the Commission requires or authorizes to be so carried. When there is an acceptance of property that has been required or authorized to be so carried, and the value thereof has been so declared or agreed upon, the liability of the carrier is limited to such value.

Under the authority thus conferred upon it, the Interstate Commerce Commission has authorized all property other than ordinary live stock to be carried at rates dependent upon such declared or agreed values and limited liability. That the property involved here could have been so carried is beyond doubt, and it also falls within the class authorized to be carried on a value not exceeding \$50 for a shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for a shipment in excess of 100 pounds, unless a greater value is declared or agreed upon in writing.

For some reason presumptively found in necessity or expediency, the statute requires the declaration or agreement as to value to be made in writing, or rather does not authorize carriage under limited liability, nor the Commission to provide for it, except upon a written declaration or agreement as to value. In its prescription of the uniform receipt, the Commission has observed this requirement, by providing spaces for the value and the signature of the shipper. It has also interpreted the statute as requiring the carrier to give the shipper an opportunity to elect what value he shall declare,

whether that specified in the classification for use in the absence of a declaration of any other, or some higher valuation, imposing upon him a higher rate for transportation. In other words, the receipt contemplates a declaration of value by the shipper, or an agreement with him upon the value in every instance. This seems to be the only interpretation of which the statute is fairly susceptible. It does not authorize either the Commission or the carrier to fix values. It says property may be authorized to be carried upon "rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property."

[2, 3] As, in this instance, the carrier did not take from the shipper a written declaration of value nor a written agreement as to value, signed by him, it failed to place itself within the requirements of the statute and the regulations of the Interstate Commerce Commission prescribed thereunder. In other words, it did not comply with the conditions precedent to its right to carry the property under a limitation of liability. It should have given him a receipt specifying a value fixed by himself, and evidenced by his signature. In doing so, it would have given him the option as to value contemplated by the law. In failing to do so, it denied him that option. Besides, it neglected to avail itself of the right conditionally conferred upon it by the statute and the regulations, by its failure to take his written declaration or agreement as to value. A writing not signed by him, although specifying value, was not a declaration or agreement in writing by him.

Preparation and promulgation of regulations by the Interstate Commerce Commission and the posting of tariffs by the carrier, conforming to such regulations, do not alone limit the liability in any particular case. Although they may be constructive notice to the shipper, the carrier's liability stands on the basis of full actual value, unless limited in the manner prescribed. Such limitation cannot be effected in any other way. *McCormick v. Southern Express Co.*, 81 W. Va. 87, 93 S. E. 1048. As the provision now under consideration was not in the "Carmack Amendment" nor the "First Cummins Amendment," the decisions interpreting and applying them, relied upon in the argument submitted for the plaintiff in error, are not applicable. In *American Express Co. v. U. S. Horse Shoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990, decided under the present law, the shipper signed the written valuation. In *Boston & Maine R. Co. v. Piper*, 246 U. S. 439, 88

Sup. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1915B, 469, the bill of lading contained an illegal limitation upon which the carrier relied in its defense.

[4, 5] This interpretation does not permit discrimination and preferences forbidden by sections 7885 and 7886, Barnes' Federal Code; sections 2 and 3, c. 104, Act Feb. 4, 1887 (U. S. Comp. St. §§ 8564, 8565). All of these provisions must be read together. What is authorized by one of them is not forbidden by any other. They are not irreconcilably repugnant. The terms of the section inhibiting preferences are very general. They do not enumerate or define preferences. What another statute legalizes cannot be deemed to be an undue or unreasonable preference. The Cummins Amendment contemplates and expressly imposes liability on the basis of full actual value, unless the carrier limits it to a different basis, by compliance with certain conditions. If, in a practical sense, this statute works discrimination, it is not an illegal discrimination. Unjust discrimination is different treatment of persons of the same class, under like or similar conditions. For the difference in treatment of shippers so affected, there is ample basis in the difference in circumstances. A shipper who has been denied a right which the law requires the carrier to extend to him, respecting the rate he shall pay and the extent of its liability to him, occupies a substantially different position from that of one to whom such right has been accorded. That difference constitutes firm ground for classification in legislation. The purpose of the statute is to give the shipper right in every case to hold the carrier to liability on the basis of actual value, if he desires to do so; but, to avail himself of such right, he must state such value in money in his declaration or agreement, and pay charges based thereon. To effectuate this purpose and adequately guarantee such right to him, it has been deemed necessary to require the carrier, in every instance, to allow him an opportunity to elect what value he will place upon his property, by taking his statement as to it, writing it in the receipt, and requiring him to sign it. Imposition of this duty upon both parties prevents the carrier from fixing the value itself in the great majority of cases, as it did under the "First Cummins Amendment." Hence the provision is a vital one, and stands upon considerations of very great importance.

Upon these principles and conclusions, the judgment complained of will be affirmed.

(88 W. Va. 381)

STATE v. KIRKPATRICK.

(Supreme Court of Appeals of West Virginia.
April 12, 1921.)*(Syllabus by the Court.)*

1. Indictment and Information \Rightarrow 11(4)—Physicians and surgeons \Rightarrow 6(9)—Indictment held sufficiently to negative exception and to charge practicing without license.

An indictment which avers that defendant without first having complied with sections 9, 10, and 11 of chapter 150 of the Code (secs. 5343-5345), governing applicants and the issuing of certificates of license to practice medicine and surgery in this state, and without first having obtained a state license so to do, as required by the laws of this state, did unlawfully practice medicine and surgery, as defined in chapter 150, § 8aXII (sec. 5342) Supplement 1918 of the Code, sufficiently charges the offense prescribed by the statute, and sufficiently negatives the fact of defendant's being of the first class of practitioners described in said section 9.

2. Indictment and Information \Rightarrow 11(4)—Indictment for practicing medicine without license held sufficiently to negative that defendant was of first class of practitioners described in statute.

While practitioners of medicine and surgery since the amendment of said section 9 by chapter 22 of the Acts of 1889, have not been required to submit themselves to examination and obtain new certificates of license, nevertheless prior to that amendment and since the amendment and re-enactment of said chapter 150 in 1882 (Acts 1882, c. 93), they have been required to have such certificates of license as a condition of the right to practice medicine and surgery, and the averments of the indictment sufficiently negative the fact that defendant was of the first class of practitioners described in the statute.

3. Indictment and Information \Rightarrow 11(1)—Indictment for practicing medicine without license need negative exceptions, and not provisos, of the statute.

In an indictment for a statutory offense like the one described, the pleader need negative only exceptions, not provisos, of the statute.

Case Certified from Circuit Court, Upshur County.

Minnie Kirkpatrick was indicted for practicing medicine without a license. Indictment quashed, and case certified. Reversed, and demurrer overruled.

EL. T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for the State.

Young & McWhorter, of Buckhannon, for defendant.

MILLER, J. The circuit court ruled that the following indictment was not sufficient in law, sustained defendant's demurrer there-

to, and certified to us the question whether its ruling thereon was correct:

"The Grand Jurors * * * upon their oaths present that Minnie Kirkpatrick, on to-wit: on the _____ day of _____, A. D., One Thousand Nine Hundred and Nineteen, within one year next preceding the date of the finding of this indictment, in the County of Upshur, without having first complied with sections 9, 10 and 11 of Chapter 150 of the Code of West Virginia governing the applicants and the issuing of certificates of license to practice medicine and surgery in the State of West Virginia, and without first having obtained a state license to do so, as required by the laws of the State of West Virginia, did unlawfully practice 'medicine and surgery' as defined in Chapter 150, Section 5342 (8aXII), Supplement 1918 to the Code of West Virginia. Against the peace and dignity of the State."

Section 9, chapter 150, of the Code in so far as pertinent, is as follows:

"The following persons and no others shall hereafter be permitted to practice medicine in this state: (1) All such persons as shall be legally entitled to practice medicine in this state at the time of the passage of this act. (2) All such persons as shall be graduates of a reputable medical college, recognized as such by the state board of health, who shall pass an examination before said state board of health and shall receive certificates therefrom, as hereinafter provided."

As sections 10 and 11 referred to in the indictment relate to the obtaining and rec-ordation of certificates or licenses issued, and to the proof required of applicants of their educational qualifications to practice, etc., they are not particularly important in the disposition of the case presented.

Section 8aXII of the said chapter (Code Supp. 1918), being section 12 of chapter 11, Acts 1915, defines the term "practice of medicine and surgery" as used in the act as "treatment of any human ailment or infirmity by any method," and says that

"to open an office for such purpose or to announce to the public in any way readiness to treat the sick or afflicted, shall be deemed to engage in the practice of medicine and surgery within the meaning of this act."

Section 15 of said chapter (sec. 5348), being section 15 of chapter 150 of the Code as amended and re-enacted by chapter 93, Acts 1882, defining the offense charged in the indictment, provides:

"If any person shall practice, or attempt to practice, medicine, surgery, or obstetrics in this State, without having complied with the provisions of section nine of this chapter, except as therein provided, he shall be guilty of a misdemeanor and fined for every such offense, not less than fifty nor more than five hundred dollars, or imprisoned in the county jail not less than one month nor more than twelve

months, or be punished by both such fine and imprisonment, at the discretion of the court."

[1] The first proposition relied on by the defendant to sustain the ruling of the court below is that neither sections 9, 10, or 11 of said chapter 150 of the Code applies to the remedial or inhibiting clauses of said chapter, but relate solely to the procedure or methods prescribed for applicants to obtain licenses to practice medicine and surgery, and that chapter 11 of the Acts of 1915 (Code Supp. 1918, c. 150, 8a.I to 8a.XIII [secs. 5342a-5342m]) in no way purports to amend chapter 150 of the Code, which prescribes penalties for violation of this statute. We find however that chapter 11 of the Acts of 1915 does by the last provision thereof undertake to repeal all acts and parts of acts inconsistent therewith, wherefore, sections 9, 10, 11 and 12 of said chapter 150 of the Code as previously existing are superseded by the provisions of the act of 1915, so far as repugnant thereto. Section 12 of chapter 11 of the Acts of 1915 specifically provides that:

"The examination of applicants and the issuing of certificates of license thereto shall be governed by sections nine, ten and eleven of chapter one hundred and fifty of the Code of West Virginia," etc.

Moreover, counsel are mistaken in saying that the indictment is under sections 9, 10 and 11 of said chapter 150. It does recite that defendant without having first complied with said sections governing applicants and issuing certificates of licenses committed the offense, but it also charges that defendant "without having first obtained a state license to do so, as required by the laws of the State of West Virginia, did unlawfully practice 'medicine and surgery' as defined in chapter 150, section 5342, (8a.XII) Supplement 1918 to the Code of West Virginia," the latter section being said section 15 of chapter 150 as amended and re-enacted in 1882. So that the effect of the indictment was to charge defendant with violation of said penal provision of section 15 against practicing medicine and surgery without a license as therein provided.

[2] The second proposition and the one mainly relied on is that the indictment fails to negative the right of defendant to practice medicine and surgery under the condition named in the first clause of section 9, namely, that she was not of the class of practitioners who were legally entitled to practice at the time of the passage of the act. Who were the persons entitled to practice medicine and surgery "at the time of the passage of this act"? This language was brought into chapter 150 the first time by the amendment to section 9 thereof by

chapter 22 of the Acts of 1889. Three specific classes are there described, the second being:

"All persons not graduates in medicine, but who have practiced medicine in this state under a certificate issued by the state board of health, prior to the passage of this act, are authorized to practice medicine in all its departments in this state."

This act gave the right, first, to graduates of medical colleges; second, to those not graduates but who had previously obtained licenses from the state board of health; third, to those not belonging to either of the other classes, who should before practicing be examined and obtain a certificate to practice from the state board of health. So the second class in the act of 1889 became the first class by the amendment of the same section by chapter 7 of the Acts of 1895, and remained so by the same description in the amendment thereof by chapter 66 of the Acts of 1907, the same now contained in the Code (sec. 5343), since which time this section has not been amended. It is manifest therefore that since the amendment of section 9 in 1889 no person of the first class in the present statute was entitled to practice medicine and surgery without a certificate of license. This being so, does not the averment of the indictment that the defendant unlawfully practiced medicine and surgery without having first obtained a state license sufficiently negative the fact that defendant was of the first class as well as of the second class? In either case, if she had not procured a license in the manner pointed out in the statute, she would be guilty of violation of said section 15 of chapter 150.

[3] All other provisions of the statute relied on, under which defendant would protect herself, are covered under provisos and are clearly defensive. The pleader need negative exceptions only, not provisos. *State v. Richards*, 32 W. Va. 348, 356, 9 S. E. 245, 8 L. R. A. 705.

But it is argued that since the act of 1889 practitioners were not required to have a license to practice medicine. This is not a proper construction of the provision of that act. Always since 1882 a practitioner has been required to have a license or certificate; since then if he had a license issued prior to that time he was not required to submit to an examination or procure a new or additional license; but at no time since 1882 has anyone been entitled to practice medicine without a license or certificate from the proper authority.

For these reasons, we are of opinion that the court erroneously quashed the indictment, and that its rulings thereon should be reversed and the demurrer overruled. Our response will be so certified.

(88 W. Va. 396)

HOPE NATURAL GAS CO. v. JARVIS.(Supreme Court of Appeals of West Virginia.
April 22, 1921.)*(Syllabus by the Court.)*

1. Mines and minerals \Leftrightarrow 79(7)—**Recovery of delay rentals paid under leases held proper under special count in assumpsit alleging payment and partial failure of title.**

Recovery of money paid as delay rentals under oil and gas leases, upon a consideration that has partially failed by reason of lack of title in the lessor, to part of the land embraced by the leases, may be had upon a special count in a declaration in assumpsit, alleging payment of the rentals and such partial failure or lack of title, in addition to the other admittedly necessary allegations.

2. Mines and minerals \Leftrightarrow 79(7)—**Allegations to recover delay rentals paid held sufficient for recovery of damages for breach of covenant for peaceable and quiet enjoyment under oil and gas lease.**

If, in such count, there is a further allegation of adjudication against the lessee, of such lack of title, and partial cancellation of the lease, it is sufficient for recovery of damages for breach of the covenant for peaceable and quiet possession of the leased premises, implied in the lease.

3. Decisions compared.

There is no inconsistency between the principles enunciated in *Philadelphia Co. v. Shackleford*, 83 W. Va. 280, 98 S. E. 568, on the one hand, and those stated in *Knotts v. McGregor*, 47 W. Va. 568, 35 S. E. 890, and *Gaffney v. Stowers*, 73 W. Va. 420, 80 S. E. 501, and other similar cases, on the other hand.

Certified from Circuit Court, Calhoun County.

Action by the Hope Natural Gas Company against C. A. Jarvis, administrator. A demurrer to the declaration was overruled, and case certified. **Affirmed.**

A. B. Fleming, Charles Powell, and Kemble White, all of Fairmont, for plaintiff.

A. G. Mathews and Lorentz O. Hamilton, both of Grantsville, for defendant.

POFFENBARGER, J. On the joint application of the parties to this action, the trial court has certified to this court, for review, its interlocutory order overruling a demurrer to the declaration and each count thereof.

The action is in assumpsit, and for the recovery of portions of delay rentals paid under oil and gas leases on the theory of breaches of implied covenants of the leases and failure of consideration, it having been ascertained and judicially determined, long after the date of the lease and payment of the rentals, that the lessors had no title to certain portions of the leased lands. The declaration contains the common counts and two special counts.

In so far as it goes to the entire declaration and the common counts, the demurrer was properly overruled. Their sufficiency is admitted. At any rate, it is not questioned in the argument.

[1-3] The first special count is based upon a lease of 750 acres of land, for oil and gas purposes, dated April 15, 1909, which seems to have taken the place of an older lease of the same land, dated October 27, 1899; each lease having been given for a term of 10 years, and the later one having been intended to go into effect or to replace the earlier one, only in the event of the expiration thereof by reason of failure to produce oil or gas on the land within the term specifically stipulated for. The second is based upon the same kind of a lease of a 200-acre tract, bearing the same date, and made in view of the probable expiration of a former lease of the tract, bearing date October 27, 1899. Said first special count alleges failure of title in the lessors to two portions of the 750 acres, one of which contains 65 acres and the other 95½ acres. The second alleges such failure as to 125 acres of the 200-acre tract. In these three tracts, 65 acres, 95½ acres, and 125 acres, one of the lessors had only an estate for his life and the other none at all. They had belonged to a deceased wife of W. H. Campbell, whose subsequent wife, Elizabeth Campbell, joined him in the two leases. After the death of W. H. Campbell, an assignee of one of the former wife's heirs, instituted and successfully prosecuted a suit in equity for partition of the said three tracts of land, and for cancellation of the leases in question as constituting clouds upon the title of the plaintiff in said suit and the heirs of the deceased wife.

As to the 750-acre tract of land, the plaintiff covenanted in the lease to complete a well thereon, on or before October 27, 1909, or to pay to the lessors, in advance, \$187.50 for each period of three months during which the completion of such well should be delayed. It was further provided that payments of the delay rentals might be made direct to the lessors, their heirs or assigns, or deposited to their credit in the Bank of Grantsville, or by checks mailed to W. H. Campbell at his post office. Thirteen of such payments were made to W. H. Campbell, within his lifetime. After his death, which occurred in October, 1912, and which was not known to the lessee, for some time thereafter, 5 quarterly payments were placed to his credit in the Bank of Grantsville. After knowledge of his death, 8 additional payments were made, by deposit in said bank to the credit of Elizabeth Campbell and the devisees of W. H. Campbell, which last-mentioned 13 payments, amounting to \$2,437.50, the administrator with the will annexed of said W. H. Campbell accepted and withdrew

from said bank. As to the 200-acre tract of land, the provisions of the lease were the same as those of the lease of the 750-acre tract, except as to the amount of the delay rental, which was \$50 per quarter. W. H. Campbell, in his lifetime, received and accepted 13 such payments, amounting to \$650, and after his death his administrator received and accepted 11 such payments.

Each of the special counts, charges partial failure of consideration, occasioned by lack of title in the lessors, to portions of the leased lands as aforesaid, and breach of the implied covenant that the lessee should have right to enter upon the land and peaceably and quietly possess the same, occasioned by such lack of title, adjudication thereof, and cancellation of the leases. Each of them asserts right of recovery, not of the full amount of the rentals paid, but only of such proportions thereof as the lands lost bear to the entire areas leased. In neither of them is there an allegation of total failure of consideration, nor of a breach of covenant going to the entire tract of land. The bill of particulars conforms to the theory of said counts. It charges payments and interest amounting to \$8,069.71, and credits thereon the amounts mathematically apportionable to the lands to which the lessors had good title.

The demurrer to the special counts proceeds upon the theory of inconsistency between the principles declared in *Philadelphia Co. v. Shackelford*, 83 W. Va. 280, 98 S. E. 568, and those enunciated in *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744, *Kilcoyne v. Southern Oil Co.*, 61 W. Va. 538, 56 S. E. 888, *Gaffney v. Stowers*, 73 W. Va. 420, 80 S. E. 501, and *Ford v. Ball*, 76 W. Va. 683, 86 S. E. 562, and virtual repudiation of those stated in the last-named cases. The position taken by the defendant involves a manifestly obvious misapprehension of the scope and effect of the decision in *Philadelphia Co. v. Shackelford*. The declaration in that case contained only the common counts and a special count alleging rescission of the contract and total failure of consideration. It contained no special count charging partial failure of consideration or partial breach of the implied covenant for peaceable and quiet possession. If it had contained such count, right in the plaintiff to recover something would have been upheld. Point 4 of the syllabus, as well as the opinion, distinctly admits right of recovery in such case, upon a proper declaration. In the opinion the decision in *Gaffney v. Stowers* is referred to without disapproval, and is impliedly approved.

Repetition of the well-grounded principles, arguments, and conclusions set forth and elaborated in *Knotts v. McGregor* and the

subsequent cases above mentioned is altogether unnecessary. Nothing of value can be added. They are clear and emphatic and nothing inconsistent therewith is found in *Philadelphia Co. v. Shackelford*. It is consistent with them in holding that, in such cases, recovery for partial failure of consideration cannot be had on the common counts, nor upon a special count alleging entire failure of consideration. It is equally consistent with them in impliedly holding that there may be recovery on a special count charging such partial failure of consideration as is alleged in this declaration.

Viewed in the light of these principles and conclusions, the special counts are clearly sufficient for recovery of money paid upon a consideration that has partially failed. They are also sufficient for recovery of damages for breaches of the covenants. A direct adjudication against the lessee of failure of titles of the lessor and the lessee and cancellation of the lease are legally equivalent to an actual ouster from the premises. *Knotts v. McGregor*, cited; *Rex v. Creel*, 22 W. Va. 373. The recovery cannot be multiplied by reason of the existence of the two grounds of action, however.

Upon a demurrer to a declaration, it is neither necessary nor proper to enter upon any inquiry as to the measure of damages or the amount of the recovery that may be had. It suffices to say that there is right of recovery of some damages or of some of the money demanded.

In our opinion, the trial court properly overruled the demurrer, and our order will so certify.

(88 W. Va. 352)

LAWRENCE et al. v. MONTGOMERY GAS CO. et al. (No. 4181.)

(Supreme Court of Appeals of West Virginia.
March 24, 1921. Rehearing Denied
May 10, 1921.)

(Syllabus by the Court.)

1. Corporations §191, 296(1)—Quorum of directors or stockholders in regular meeting after due notice necessary for legal corporate action.

Corporate action can not be lawfully expressed or made binding by less than a quorum of directors or stockholders acting jointly in a meeting thereof regularly called and after due notice as provided by law or by-law of the corporation.

2. Attorney and client §70—Attorney appearing and filing pleading presumed to have authority duly conferred.

Where an attorney appears in a cause and files an answer or other pleading, being an officer of the court, he is presumed to have authority, and that what he does in relation thereto has been done with authority duly conferred.

3. Corporations ¶410—Officer's authority to transact ordinary business will not impose liability on corporation for extraordinary contracts.

The authority of the president or other officer of a corporation to transact the ordinary business of the corporation will not imply liability upon the corporation for extraordinary contracts, as the sale and disposition of a material part of its plant or other property owned and employed by it in the conduct of its business.

4. Corporations ¶425(5)—One seeking to estop corporation by conduct of officers or agents must have been misled to his injury.

To estop a corporation by its conduct from denying the authority of its officers or agents, the one seeking to enforce the estoppel must have been misled thereby to his injury.

Appeal from Circuit Court, Kanawha County.

Suit by A. C. Lawrence and others against the Montgomery Gas Company and others. Decree for complainants, and defendants appeal. Reversed and remanded.

L. B. O'Neal, of Montgomery, Davis & Davis, of Charleston, Williams, Scott & Lovett, of Huntington, and Koontz & Hurlbutt, of Charleston, for appellants.

W. E. R. Byrne, Fred O. Blue, Maynard F. Stiles, and C. J. Van Fleet, all of Charleston, for appellees.

MILLER, J. On a former appeal in this cause from a decree appointing a special receiver of the property, an alleged contract which plaintiffs sought to have specifically performed, and upon questions certified to us by the circuit court on the sufficiency of defendants' answers, exceptions to which were interposed by plaintiffs, we were of opinion, on the prima facie case then presented, to affirm the decree below appointing the special receiver and to remand the cause for further proceedings. 84 W. Va. 382, 99 S. E. 496.

The basis of our former decision, as will appear from the opinion then delivered and the mandate therewith certified to the circuit court, was that although the answers denied the authority of the officers and directors of the defendant company to enter into the contract in writing with plaintiffs and to execute and deliver in escrow a deed to them for the property sued for, the same being signed, acknowledged and sealed by and on behalf of defendant company by Henderson, its president, swearing that he was thereunto duly authorized, the burden was thereby cast upon the Montgomery Gas Company, regardless of its denial of want of authority of its officers and directors in the premises, to prove such want of authority.

The present appeal is by the Montgomery Gas Company, the Columbian Carbon Com-

pany, a subsequent purchaser of the property, and O. J. Henderson and some thirty-eight others, officers, directors and stockholders of the Montgomery Gas Company, from a decree below pronounced on July 20, 1920, specifically executing said contract and setting aside the subsequent deed for the property to the Columbian Carbon Company, pronounced upon full hearing upon bill, answers, replications, and depositions and proofs taken, the evidence principally relating to the main issue of alleged want of authority of the officers and directors who undertook to enter into said contract of sale and to execute and deliver said deed, and also upon the theory of an alleged holding out by said company of its officers and directors as being clothed with such authority estopping them from denying the same.

While the result of our former decision was to place the burden upon the defendants to show want of authority in the officers and directors in the premises, we now perceive that the fact of such lack of authority for want of corporate action being established, the burden would be recast upon plaintiffs to show such holding out or ratification of the unauthorized act as would bind and conclude the principal.

The facts and circumstances attending the entering into said contract and the execution, whether or not, strictly speaking, in escrow of the deed, and what occurred subsequently, with slight colorings in their favor, not affecting the merits of the case, are very clearly stated by appellants' counsel as follows:

"On July 5, 1918, Kennedy appeared in the town of Montgomery and proposed to O. J. Henderson, H. Lane, J. F. Burgess and D. C. Smallridge, four of the nine members of the board, to buy from the company the Burke lot and well for Twenty Thousand (\$20,000) Dollars. The board was not in session and was not convened, but as a result of this negotiation, and on the evening of the 25th of July, a written contract was prepared and signed by these four gentlemen in the name of the Montgomery Gas Company (but not under corporate seal), whereby the Montgomery Gas Company agreed to sell Lawrence and Kennedy the Burke lot and well for \$20,000, \$10,000 to be paid on the signing and delivery of the proper deed, and \$10,000 within sixty (60) days thereafter, with interest, to be secured by endorsement approved by seller, this contract providing that the deed was to be delivered as soon as could be prepared. To this contract they affixed the name of the Montgomery Gas Company by O. J. Henderson, Pres., D. C. Smallridge, Secy.-Treas. and director, by H. Lane, director, and by J. F. Burgess, director. On the following morning, Kennedy having remained in Montgomery, there still having been no meeting of the board called or held, the signature of S. S. Wallace, a director, was added, Wallace not being present when any of the others signed, and only one of the parties who had already signed, viz.: H. Lane, being present when Wallace signed, in the

store of Lane. Kennedy, at the time of negotiating the contract, stated that the money was on deposit in Kanawha Valley Bank and would be paid as soon as the deed was presented. This was proven by defendants and Kennedy did not testify.

"During the day of July 26, Henderson procured to be drawn a deed, by which the Montgomery Gas Company purported to convey the Burke lot and well to the plaintiffs, and the seal of the company was attached to the deed; it was acknowledged by Henderson in form required of corporations, and Henderson, on the following day, July 27th, brought the deed to Charleston to the Kanawha Valley Bank, to which place plaintiffs had directed him to come with the deed and receive the consideration, the cash and note. No arrangements had been made at the bank for the payment of the money or the receipt of the deed, and Henderson went to the office of plaintiff Lawrence, where Lawrence examined the deed, with his attorney, approved it and requested Henderson to meet him at said bank in the afternoon of that day. At the appointed hour Henderson went to the bank, where he found the money had not been deposited. Later on the same day Lawrence and Henderson went together to the bank, and finding its cashier not there, Lawrence told Henderson that immediately upon the return of the cashier the money would be deposited. Henderson left the deed with the bank with directions to the latter to collect the \$10,000 and note as called for and deliver the deed, Lawrence promising immediate payment of the money and assuring that it had been arranged for. Henderson then left the city. The plaintiffs did not make the cash payment or execute the note on July 27th, as they had agreed to do (July 28th being Sunday), or on July 28th.

"On July 30, 1918, Henderson, Lane, Burgess and Smalridge in Montgomery, learning by 'phone from Kanawha Valley Bank that the deed had not been taken up, called in L. Burke O'Neal, an attorney, and directed him to send to plaintiffs a letter advising them that the contract of July 25th was canceled and the deed withdrawn, since the same was to have been an immediate one, was not a time option, and time was of the essence thereof, and the plaintiffs had wholly refused to comply on their part by passing the consideration and taking up the deed at the time and in the manner agreed upon. This action, like all prior acts of these four gentlemen touching the purported sale to plaintiffs, was taken by them as individuals, no meeting of the board having been held. On the morning of July 30th, about 10:30 or 11:00 o'clock, immediately after Henderson notified the bank not to deliver the deed, Henderson sought to get Lawrence by telephone to give him personal notice, and, though unable to get either Lawrence or Kennedy in person, got and talked with C. J. Van Fleet, the attorney for the plaintiffs in this transaction, owner of an interest in the claim set up by Lawrence and Kennedy in this suit, and who occupied an adjoining and connecting office to that of plaintiff Lawrence, and advised his attorney that the contract was canceled and requested him to notify the plaintiffs. On July 30th, after the O'Neal letter had been dispatched, some stockholders of the company who lived in Montgomery discussed

the matter of drilling the Burke well, and at their request a meeting of the board of directors was called for the following day, July 31st, at which these gentlemen intended to propose that the company itself drill the well. H. Lane, one of the directors, began to make inquiries where derricks and machinery for drilling could be found and called on the telephone, among others, the office of the Columbian Carbon Company in Charleston. J. D. Pribble, superintendent of the Columbian Carbon Company, after replying to Lane's inquiries as to derricks, said to Lane that he would like to make an offer for the purchase of the Burke lot by his company, the Columbian Carbon Company. Lane replied that his company was to have a meeting next morning and that he thought they would decide to drill the well. Pribble suggested that he would like to submit a proposition to the company, and Lane replied in effect that it would probably be useless, but that a directors' meeting was being held in the morning of the following day, at which Pribble, if he saw fit, could appear.

"This meeting of the board convened on July 31st, for the purpose of considering drilling to the oil bearing sand the Burke well. Prior to this meeting all members of the board knew of the Lawrence contract. While in session Pribble appeared, was accorded a hearing, and proposed to pay for his company Thirty-Five Thousand (\$35,000) Dollars for the lot and well, provided the stockholders of the company should assent. Thereupon the directors at that meeting agreed to accept this offer, subject to the approval of the stockholders, and directed a meeting of the stockholders to be called for and held on the 10th day of August, 1918. On August 10th, the stockholders assembled in meeting. There were present 100,848 shares. A resolution was introduced, which recited the proposition of the Columbian Carbon Company, the said action of the board thereon on July 31st, the institution of this suit by Lawrence and Kennedy to enforce the contract claimed by them, the immediate necessity of drilling lest the oil be drained by wells on adjoining property, authorized and directed the sale to Columbian Carbon Company at \$35,000.00 and that this suit be actively defended and the claim of the plaintiffs resisted, and provided that the Columbian Carbon Company should, with dispatch, drill for and save the oil on the lot, and otherwise arranging the details of the sale to the Columbian Carbon Company and the payment by the Columbian Carbon Company of the purchase price when the suit should have been determined.

"This resolution was adopted by a vote of all the shares present except 8300."

The total stock outstanding at the time was 150,000 shares.

The evidence establishing these facts is quite sufficient to show that no corporate action by directors or stockholders preceded the making of the contract to Lawrence and Kennedy.

[1] The law is well settled in this state as elsewhere that corporate action can not be lawfully expressed or made binding by less than a quorum of the directors or stockholders acting jointly in a meeting thereof regularly called after due notice as provided by

law or by-law. Indeed this is the proper interpretation or construction of our statute, section 51 of chapter 53 of the Code (sec. 2883), as shown by repeated decisions of this court. In *Limer v. Traders Co.*, 44 W. Va. 175, 28 S. E. 730, we held, third point of the syllabus, that the directors of a corporation can not separately and individually give consent to or make a contract to bind the corporation; they can act only as a body, their power being not joint and several, but only joint. And as said in 3 *Thompson on Corporations*, § 3906, cited and quoted in our case just referred to, "When they [the directors] are not consulting together as a board, they are regarded as acting privately and unofficially." The rule just stated was affirmed in our cases of *Pennsylvania Lightning-Rod Co. v. Board of Education*, 20 W. Va. 360, and *Smith v. Corneliuss*, 41 W. Va. 59, 68, 28 S. E. 599, 30 L. R. A. 747, and subsequently recognized also in *Griffith v. Blackwater Boom & Lumber Co.*, 46 W. Va. 56, 64, 33 S. E. 125, and *Cunningham v. Board of Education*, 53 W. Va. 318, 320, 44 S. E. 129. There is no need of elaboration of this proposition by further reference to the authorities.

It is not contended on this hearing that the individual directors who undertook to sign and execute the contract and deed involved here did so pursuant to any authority of the board of directors thus given. The propositions now relied on are: First, that after learning of the action of these directors, the corporation through its constituted authority was not prompt to repudiate the contract; second, that there was such a holding out by the corporation and board of directors and stockholders of such plenary power and authority by a course of dealing as to estop them from denying authority of the officers and directors who undertook to act in this instance.

On the first proposition, we have the fact that the officers and directors who undertook to make the contract with plaintiffs did, through O'Neal, attorney, promptly notify plaintiffs that because of their failure to comply with the contract, as they interpreted it, it was canceled. It is true, this notice was not put upon the ground of lack of authority, but as their action in the first instance was not taken pursuant to authority of the directors, such notice could hardly be said to be any recognition of the authority assumed by them, by the directors in meeting. But when the directors did meet the following day, they in effect repudiated the contract with plaintiffs by ignoring it and entering into the contract with the Columbian Carbon Company, subject to the approval of the stockholders in a meeting called at the same session, to convene on August 10th following, the earliest day such meeting could be convened; and when the stockholders did meet, they were prompt to repudiate the

prior action of the officers and directors who had undertaken to act in the premises, and authorized this suit to be vigorously defended.

[2] Moreover, in the answer of the defendant company to the bill, under the seal of the corporation, and sworn to by Henderson, President, filed on August 7th, and signed by counsel, want of authority of these officers was distinctly alleged. True, it is said these officers undertook in good faith to carry out said contract, but their authority was denied; and it was denied that their action was at any time or in any manner ratified or approved by the corporation; and these facts are fully established by the evidence. Besides, the answer of defendants, signed by counsel, which we must assume was made with corporate authority, was of itself prompt repudiation of the contract and deed. Where an attorney institutes a suit or appears in defense of a suit brought against his client, being an officer of the court, he is presumed to have authority, and that what he does is on behalf of his client with authority duly given. *Low v. Settle*, 22 W. Va. 387; *Fisher v. March*, 26 *Grat. (Va.)* 765; *Marling v. Robrecht*, 18 W. Va. 440; *McGinnis v. Curry*, 13 W. Va. 29; *County Court v. Duty*, 77 W. Va. 17, 87 S. E. 256; *Marshall v. McDermitt*, 79 W. Va. 245, 90 S. E. 830, L. R. A. 1917C, 883.

[3] On the second proposition relied on, that of a holding out of the officers and directors entering into the contract in this case, there is not a particle of evidence of such conduct as would preclude or estop the defendants. Indeed, the plaintiffs do not claim that they were induced to deal with the president and directors who undertook to sell them the Burke well by any previous conduct on the part of the corporation. On the contrary the record shows that one of the plaintiffs, A. C. Lawrence, since the institution of this suit visited Montgomery, where the offices of the company are located, in search of evidence of such holding out to others, and found none, at least none which they were induced to offer in support of their present contention. They also appeal to the minutes of the directors and stockholders. These appear to have been very irregularly kept prior to the year 1915; after that time all important business of the company seems to have been transacted by the board of directors; and certainly the minutes do not show any recognition of authority of individual officers or directors to sell or dispose of the corporate property without authority of directors or stockholders. A particular instance relied on is that of a contract with the Virginian Power Company for a large quantity of gas; but the company was engaged in supplying the public with gas, and the right to make sale thereof by the managing officers might be implied; but the fact is that there was a minute of authority of the

officers to sell the surplus gas sold to the power company, but not to that company, the officers electing to do so, however, because of the better price thus obtained. Because of the ratification of this contract, however, not known to plaintiffs, it can not be said that they were misled thereby, nor will one ratification of an unauthorized act conclude the principal from repudiating another. Our decisions say that authority of the president or other officer to transact the ordinary business of the corporation will not impose liability on the corporation for extraordinary contracts made by them, involving expenditure of large sums of money for supplies or machinery, or the disposition of its plant or property, not implied by the nature of the business. *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 70 W. Va. 169, 73 S. E. 321. And to be binding as a ratification of the unauthorized act of an officer or other agent of a corporation, the board of directors must not have been ignorant of the facts in relation thereto. *Flanagan v. Flanagan Coal Co.*, 77 W. Va. 757, 88 S. E. 397.

[4] It is a cardinal rule of the law of estoppel by conduct or holding out, applicable alike to corporations and individuals, that the one seeking to enforce the estoppel must have been misled by such conduct or action to his injury, else he can not rely thereon. *Koontz v. Mylius*, 77 W. Va. 499, 87 S. E. 851; 16 Cyc. Law & Proc. 744, 745, 746.

For the foregoing reasons we are of opinion to reverse the decree below, and to remand the cause with directions to restore the property now in the hands of the special receiver to the Columbian Carbon Company, to discharge the special receiver, settle his accounts, and upon such settlement to distribute the money in his hands to the persons entitled thereto; and the appellants will recover of A. C. Lawrence and W. A. Kennedy, appellees, the costs incurred by them upon this appeal, as well as those incurred by them in the circuit court in their defense therein.

(88 W. Va. 400)

STATE v. McKINNEY. (No. 4131.)

(Supreme Court of Appeals of West Virginia.
April 12, 1921.)

(Syllabus by the Court.)

1. Criminal law §386—Evidence of trailing of accused by bloodhounds held admissible.

Evidence of the trailing of a person accused of the commission of an offense, from the place of the perpetration thereof to the place of his arrest, by bloodhounds shown to be of pure blood, to have acuteness of scent and power of discrimination between persons by means thereof, to have been trained in the trailing of human beings, and to have successfully trailed and identified other persons ac-

cused of crime as having been at the scene of commission thereof, is admissible on an issue as to his identity as a person who had been at the place of the perpetration of the offense of which he is accused at or near the time thereof.

2. Criminal law §386—Admissibility of trailing of accused by bloodhounds held not precluded by issue of whether accused traveled on foot or horseback.

Admissibility thereof is not precluded by another issue as to whether the accused traveled on horseback or afoot, there being evidence tending to prove each hypothesis, nor by a preponderance of evidence, if any, in favor of the former.

3. Criminal law §383—If evidence tends to prove facts relevant to any issue it is admissible.

Upon an inquiry as to the admissibility of evidence, its weight or probative value is not the criterion or test. If it tends, even slightly, to prove a fact relevant to any issue in the case and material or forceful in the determination thereof, it is admissible.

4. Criminal law §364(6), 413(1)—Admission by accused of commission of offense some hours later, stating motive therefor, held inadmissible as self-serving and not part of res gestæ.

A statement of one accused of an offense, made some hours after the act in question, admitting it and stating the motive for commission thereof, is inadmissible; it being no part of the res gestæ and being a self-serving declaration.

5. Criminal law §368(2)—Evidence that the person shot had driven his wife from home, and that she came to the home of accused, held improperly excluded.

Upon the trial of a person charged with having maliciously shot the husband of his sister, in which there is evidence tending to prove facts which might be deemed by the jury to amount to provocation generating heat of blood, or to justification of the shooting on the ground of self-defense, it is improper and prejudicial to exclude evidence tending to prove that the wife, on coming to the home of the accused, shortly before the shooting, was in a bruised and lacerated condition and had said her husband had beaten her and driven her from home, offered in connection with evidence that the accused had gone to the home of the victim, at the request of the wife, on a humane and proper mission, in the attempt to perform which the shooting occurred.

6. Criminal law §814(2)—Slight evidence sufficient to justify instructions submitting hypotheses it tends to prove.

Slight evidence is sufficient to justify the giving of instructions submitting the hypotheses it tends to prove.

7. Criminal law §798(1)—Instruction as to reasonable doubt of any juror should be given.

An instruction on the subject of the legal requirement of unanimity of the jury in the finding of a verdict, which, if given, would advise the jury that, if any juror, after due

consideration of the evidence and consultation with his fellows, has reasonable doubt of the guilt of the accused in a criminal case, it is his duty not to surrender his own convictions simply because the other jurors are of a different opinion, is correct, and should be given upon request, unless its subject is covered by some other instruction given in the case.

Error to Circuit Court, Summers County.

London McKinney was convicted of malicious shooting, and he brings error. Reversed and remanded.

T. N. Read and R. F. Dunlap, both of Hinton, for plaintiff in error.

E. T. England, Atty. Gen., and R. A. Blessing, Asst. Atty. Gen., for the State.

POFFENBARGER, J. Having been convicted of the malicious shooting of J. G. McKinney, the plaintiff in error, London McKinney, complains of the judgment entered on the verdict, which imposes upon him imprisonment in the penitentiary of this state for the period of six years.

An assignment of error is based upon the overruling of a motion to quash the indictment, but nothing is said in argument in support thereof. The indictment is in the usual form, and no defect therein is perceived.

A statement of the peculiar facts of the case is necessary to a clear comprehension of the other rulings complained of. While on his porch, early in a November evening, but after dark, J. G. McKinney was shot in the face; the ball striking the right cheek, knocking out some teeth, breaking the jawbone, and, divided into parts, lodging in various places in the neck and head. The shot came from the neighborhood of his gate, and, at the time, his dogs were at that point apparently resisting entrance, and he had hissed them on and may possibly have thrown a stick, which, the accused says, struck him before he fired the shot. J. G. McKinney says he hissed the dogs under the impression that the attempted intruder into the yard was an old sow of his, that had been in the habit of breaking in. He saw nobody at the gate and the identity of the person who did the shooting was not discovered until later. At the time of the injury he was alone on his porch, but his children, five or six in number, were in the house. The age of the oldest of them was about 14 years. After the injury he called them and they managed to get him in the house. Neighbors and officers, being notified, came in to render assistance. The aid of a man having two young bloodhounds was secured. The bloodhounds were taken to the point from which the shot seemed to have come, and there they took up the trail and followed it for a distance of about eight miles, to the home of Luke McKinney, the father of the accused. In their pursuit of the trail, the dogs were accompanied by several persons, among whom were two deputy sheriffs, two constables, a justice of the

peace, and the owner of the dogs. Having led the crowd to the front door of the home of Luke McKinney, the dogs were taken behind the house and kept there until London McKinney was aroused and taken from his bed and to a point 75 or 100 yards from the house. Then they were again put upon his trail, and went to him and gave manifestations of their identity of him as the person they had been trailing. Thereupon he admitted he had been at the house of J. G. McKinney on the previous evening, at about 7 o'clock or 7:30, and also that he had fired the shot. After this confession he was placed under arrest, and subsequently repeated the admissions. On the trial he testified in his own favor, and there admitted that he had done the shooting with a 22-caliber Winchester rifle having a magazine capacity of 16 cartridges, which he had carried from his home and back to it.

There is conflict in the evidence as to what preceded the tragedy, led up to it, and may have entered into the purposes and mental attitude of the accused. Before noon of the day of the shooting, the wife of J. G. McKinney, who was also the sister of the accused, came to the home of Luke McKinney and remained there until after the shooting. She and her husband both claim she went there merely to visit her father and others of the family. The accused offered to prove she had come to her father's house with bruises on her face, loosened teeth, a severe laceration of the knee, and other injuries, and stated that her husband had beaten her and driven her from home. He was not permitted to prove her physical condition at that time. The court, however, permitted him to prove she had said her husband had accused her of things she was not guilty of, and had told her to go to her father's home and stay a few days, until they could get things fixed up; that she had told them of some little troubles she and her husband had had; that she had then asked her father to go and see her husband and endeavor to obtain his consent to her return and effect a reconciliation; that he had refused to do so; and that she had then requested her brother, the accused, to do so, and also to see if her husband was there, and, if not, to take care of the children for the night. He was also permitted to prove the communication by the wife, on that occasion, of threats made by her husband against her and all of her family. The threats were to the effect that he had expressed an inclination to go down there and call them all out and shoot them down, one at a time, and that he intended to send her home and get them all together and kill them by blowing up the house with dynamite.

On the witness stand the wife denied communication of such threats, the making thereof, and any trouble between herself and her husband. She also denied having re-

requested either her father or her brother to go to her house that night, and knowledge of his having gone there. She admitted she knew he had left the house in the evening, but denied that she knew where he had gone. Although the father and unmarried sister say they knew he had been requested to go, they denied knowledge of his having gone. He himself said he did not promise to go when requested, but had afterwards concluded to do so, and had gone without giving notice of his intention so to do.

He says he made the trip both ways on horseback, and, having hitched his horse at the road, started to the house. Just before he reached the gate, which stood about 15 or 20 feet from the porch, the dogs became aroused and endeavored to break through. Knowing they were vicious, he kept his eye on them, and just as he was about to place his hand on the gate a stick of wood thrown from the porch struck the gate and himself, making a slight bruise below one of his eyes. He further says that, after having recovered slightly from the blow thus received, he saw J. G. McKinney, by means of the light from a window, stoop as if he were picking up something and partially rise with a gun in his hands, as he thought. Thereupon he fired the shot. Not knowing the result thereof and fearing to venture into the unknown situation, he walked back to the road, mounted his horse and returned home, arriving there about nine o'clock. The father and sister were apprised of the shooting before his return, and the former says he had left home for the purpose of obtaining information about it and rendering assistance, and met the son on the road, as he was returning, but he was not then informed that he had done the shooting.

[1] Although the accused and other witnesses swore he had ridden a certain horse on the night of the tragedy, witnesses for the state say they discovered no horse tracks at the point at which he says he hitched the horse, and also that the hounds, in their trailing, seemed to follow the tracks of a man, and not those of a horse. Under these circumstances, whether the accused made the trip on horseback or on foot was a question for jury determination. In view of this conflict, it was not improper to admit the evidence of the trailing of the accused by the bloodhounds, if it was sufficiently shown that they were such hounds, that they had acuteness of scent, and power of discrimination between persons, and had been trained to trail human beings. *Pedigo v. Commonwealth*, 103 Ky. 41, 44 S. W. 143, 42 L. R. A. 432, 82 Am. St. Rep. 566; *Hodge v. State*, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17; *Simpson v. State*, 111 Ala. 6, 20 South. 573; 1 Wigmore, Evidence, § 177, p. 226. The owner of the dogs testified that they were of pure blood, that they had acuteness of scent, that they had been trained to track

human beings, and, that, on more than one occasion, they had successfully trailed and identified persons accused of crime.

[2] Less definiteness and positiveness in the evidence for the state, as to how the accused traveled, than in that adduced by him, does not render the bloodhound evidence inadmissible. It suffices that there is some evidence of his having traveled on foot. Nor does his evidence as to the time of his return bar it. Whether he and his witnesses stated it correctly was a question for the jury. He may have been able to walk or run the distance stated in about two hours. If not, the evidence that he traveled afoot tends to prove he did return by 9 o'clock.

[3] In this ruling we are not dealing with the probative value of such evidence. Whether it alone would be sufficient for identification of the accused as a person who had been at the scene of the shooting immediately before is an entirely different question. In view of the admission of the accused, it cannot arise here. On a question of mere admissibility of evidence, its tendency to prove a relevant and material fact, not its weight or value, is the sole inquiry.

Mrs. J. G. McKinney's denial of communication of threats of her husband against her and her family to John Cyrus and Mrs. Ruth Taylor was not excluded. It was at first, probably on account of the form of the question, but it was immediately afterwards admitted, and Cyrus and Mrs. Taylor were permitted to contradict her.

[4] The offer to prove the accused had confessed the shooting to his sister on his return was properly rejected. Having been made hours after the shooting, the confession was no part of the *res gestæ*. Besides, it was a mere self-serving declaration.

[5] Refusal to admit evidence tending to prove the physical condition of Mrs. J. G. McKinney on her arrival at the home of her parents, indicating cruel and abusive treatment, and her statement that it had just been inflicted by her husband, was erroneous. Such condition, if it existed, and the declaration, if made, were facts and circumstances constituting in part, according to the theory of the defense, inducement to the admitted conduct of the accused, including the act on his part, of which the state complains. All such facts, whether probative of guilt or innocence, are part and parcel of the transaction, and, if they have any probative value at all, in either direction, they are admissible. *State v. Prater*, 52 W. Va. 132, 43 S. E. 230; *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; *Whar. Ev.* § 259.

Taken in connection with the relationship of the parties, including previous unbroken friendship between the accused and his victim, these circumstances have important bearing upon the mental attitude and intent of the former. They enter into the motive

with which he made the trip to the home of the latter and his estimate of the situation in which he suddenly found himself at the time of the shooting. The immediately preceding violence of J. G. McKinney toward his wife, and his banishment of her from his home, if proved, make out an entirely different case from that which was presented to the jury. He went on a mission to a man who had partially executed his threat upon one member of the family, not a man who had merely made a possibly idle threat. He went to intercede for a badly abused sister and to protect her young children, if he should find them deserted, not to a husband and father who had merely had a few unpleasant words with his wife and ordered her to leave home. If he went upon such a mission, under such circumstances, the fact that he went armed takes upon itself a character and coloring it would not have in the case of a visit to a quarrelsome, but harmless, man, for such a purpose. The previous anger, inhumanity, and enmity, if any, taken in connection with the suddenness and violence of the assault, as described by the accused, may have been a considerable factor in his determination of the question of imminent danger to himself and the necessity of resort to measures of protection.

Again, the shot may have been the result of an impulse suddenly aroused by the hissing of the dogs and the blow, in a mind perfectly free from malice and engaged in the execution of a manifestly humane and proper purpose, having a broader and deeper basis in the violence inflicted upon the sister than it could otherwise have had. Whether the accused, if guilty of an offense, fired the shot maliciously or merely in heat of blood, arising upon sufficient provocation, is a very important inquiry in the case, since the punishment of the two offenses are radically different, and his motive, determinable in part by the information in the light of which he acted, has obvious and important bearing upon it. His visit with a good purpose would be very different from one made with an evil purpose, and the purpose, whatever it was, constituted an element of his mental attitude at the moment of the assault upon him, whether intended or not, and his defensive or retaliatory act. For these reasons, the ruling in question was both erroneous and prejudicial.

[8] That the accused was struck with a stick of wood or other missile thrown by his victim is not uncontroverted. Evidence was adduced of an admission on his part that the bruise below his eye was caused by an ac-

cident in the cutting of firewood, not an unusual occurrence with persons cutting stove wood and kindling. Hence the state's instruction No. 4, submitting, among others, the issue as to provocation for the shooting, did not improperly require a finding as to its existence. For the same reason, the court did not err in the giving of the state's instruction No. 6, submitting, among others, an inquiry as to whether there was an overt act on the part of J. G. McKinney, indicative of hostile and dangerous intent and purpose toward the accused. He neither denied nor admitted the throwing of a stick, but the court was not bound to assume the truth of the evidence of the accused as to that issue. However it might be in the absence of contradiction of such testimony, the contradiction thereof found in the evidence of his inconsistent admission made the issue one for jury determination.

Instruction No. 11 requested by the defendant was properly refused. If given, it would have told the jury there could be no conviction, if they believed the shooting occurred in an affray and malice did not exist in the mind of the accused at the beginning of the affray. In this it manifestly deviates from the law. Malice may arise in the course of an affray. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

[7] No good reason is perceived for refusal of instruction No. 4 requested by the defendant, unless it falls within the scope of some other instruction given. Its subject-matter was the legal requirement of unanimity of the jury in the finding of the verdict, and it would have advised them that, if any juror, after due consideration of the evidence and consultation with his fellow jurors, should entertain a reasonable doubt of the guilt of the accused, it was his duty not to surrender his own convictions simply because the others were of a different opinion. No misleading element is found in it, and it does not import justification or encouragement of obduracy or arbitrariness on the part of an individual juror. A majority of the court are of the opinion, however, that the subject is sufficiently covered by instruction No. 2 given for the accused. I do not think so, because the primary subject of that instruction was presumption of innocence, and the requirement of unanimity in the verdict is a subordinate, if not an incidental, subject or element thereof.

For the erroneous exclusion of evidence herein noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(88 W. Va. 386)

JONES v. HEBDO. (No. 4154.)(Supreme Court of Appeals of West Virginia.
April 12, 1921.)*(Syllabus by the Court.)*

1. Appeal and error \S 971(1)—Court's discretion as to examination of witnesses will not be reversed except for abuse.

A trial court has wide latitude in the conduct of a trial, and particularly in matters pertaining to the examination of witnesses, and its rulings in relation thereto will not be reversed except when there has been a plain abuse of its discretion.

2. Trial \S 68(1)—Refusal to admit evidence after conclusion of introduction of evidence to admit contradictory or cumulative testimony not an abuse of discretion.

And when the evidence in chief and in rebuttal have been concluded on both sides and the case is about to be submitted to the jury, the refusal of the court to open up the evidence to admit the testimony of other witnesses known but not summoned and whose evidence is but contradictory or cumulative of some other evidence will not ordinarily constitute abuse of the court's discretion or reversible error.

3. False imprisonment \S 36—\$2,725 not excessive damages.

Where in an action for damages for assault and unlawful arrest and imprisonment the evidence shows that defendant falsely and without any grounds whatsoever swore out a warrant charging plaintiff with a heinous crime, and while in transit from this state to a distant state accompanied by her daughter causes her to be arrested in the nighttime, taken from the train on which she is traveling and conducted through the public streets of a city and before a magistrate and delayed from four to six hours, and then to be discharged by the magistrate without offering any evidence of the truth or falsity of his accusation, and her journey is thereby broken and she is greatly disturbed in mind and body, a verdict of \$2,725.00 will not be set aside as excessive and unwarranted by the evidence.

4. False imprisonment \S 34, 35—Mental suffering ground for compensatory and punitive damages.

In such case mental pain and suffering and the insult, indignity and humiliation inflicted upon plaintiff by the wrongful and unlawful act of the defendant constitute just bases for compensatory damages, to which, if the jury believe from the evidence the sum found therefor is not sufficient to punish the defendant for his wrongful and unlawful conduct, the jury in their discretion may add such additional sum as will constitute sufficient punishment therefor.

Error to Circuit Court, Wood County.

Action by Mary E. Jones against Simon Hebdo. Judgment for plaintiff, and defendant brings error. Affirmed.

Chas. J. Schuck, of Wheeling, and R. E. Bills and O. M. Hanna, both of Parkersburg, for plaintiff in error.

Fred L. Shinn, of Clarksburg, and James S. Wade, of Parkersburg, for defendant in error.

MILLER, J. In an action by plaintiff against defendant for assault, false arrest and imprisonment, and for damages sustained because of the alleged injuries, she obtained a verdict and judgment for \$2,725.00, which judgment defendant would have us reverse on the present writ of error.

The declaration is in two counts. The first charges that the defendant with force and arms, on July 6, 1918, in the city of Parkersburg, in Wood County, assaulted plaintiff, and then and there wrongfully seized and laid hold of her, and then and there wrongfully and against her will forced her to go from and out of a railway train of the Baltimore and Ohio Railroad Company, then standing at the Sixth Street station in said city, and upon which she was then and there lawfully being conveyed as a passenger from the city of Clarksburg in said state to the city of St. Louis in the state of Missouri, to a certain police station in said city of Parkersburg, and then and there in said police station wrongfully imprisoned her by force and against her will, without any reasonable or probable cause therefor, for the space of about four hours, and there wrongfully forced and compelled her to go from said police station to and along divers public streets in said city of Parkersburg to the office of a certain justice of the peace therein situated, and then and there wrongfully kept and detained her by force and against her will, without any reasonable or probable cause, for the space of two hours then following, where she was discharged from custody by said justice upon the motion of defendant without any trial being had, contrary to the law of the State of West Virginia, and whereby she was not only greatly hurt, mortified and outraged, but also greatly injured in her credit, standing and good name, and suffered greatly therefrom in both body and mind, to her damage \$10,000.00.

By the second count it is charged that while so in said train lawfully as alleged in the first count and en route from said city of Clarksburg to the town of Eldorado, Kansas, about the hour of 8:30 a. m. of the said day, defendant and divers other persons to plaintiff unknown, but who were then and there under the direction and control of defendant, entered the coach of said train in which she was so riding as a passenger, and with force and arms, without any probable cause therefor, and without any right or authority of law therefor, and without any justification or excuse therefor, and against her will and in utter disregard of and in

violation of her constitutional right of personal liberty, unlawfully and maliciously did arrest her and by force remove her from said coach against her will, and detained and imprisoned her, and did unlawfully and maliciously and without probable cause or right or authority of law cause her to be imprisoned and detained against her will in said police station for the period of four hours, and therefore and as alleged in the first count, caused her to go along the public streets of said city of Parkersburg in the custody of divers persons, then under the control and direction and orders of defendant, to the office of a certain justice of the peace located in said city of Parkersburg, who did then and there further detain her against her will unlawfully and maliciously and without right or authority of law for a long space of time, to-wit, for the space of two hours, when she was discharged from the custody of said justice, on motion of defendant by his attorney, without any trial being had, by reason of which she was detained and imprisoned and was greatly humiliated and embarrassed, and was greatly injured in her good name, fame, credit and reputation, and by reason of which she was detained in her journey to join her husband, and was compelled to remain over in the city of Parkersburg until she could arrange for her transportation on a later train, and by reason of which delay she was required to pay and did pay out large sums of money for her board and for railroad transportation, and divers other sums for counsel fees and court expenses and other charges growing out of her arrest, detention and unlawful imprisonment, and was otherwise greatly injured and damaged, in the sum of \$10,000.00.

On the trial, on the issue joined on the plea of not guilty, the jury found on evidence which justified them in so finding, that plaintiff was arrested and taken off the train on a warrant sworn out by the defendant before said justice charging her with the offense of being then engaged in transporting out of this state to the state of Missouri her daughter, then a girl of about seventeen years of age, and who had recently become the wife of one James Joseph, a nephew of the defendant, for the purpose of prostitution or other immoral purposes; that said charge was false and unfounded; that defendant was present at the time and delivered the warrant to a policeman, one Yoho, and directed him to go upon the train and serve the warrant, which called for the arrest of the plaintiff and her daughter, and to take them off the train; that Hebdo accompanied the policeman and the prisoners to the police station, where both were turned over to the desk clerk, one O'Neal; and that plaintiff was left in the police station and her daughter taken by Yoho the policeman and delivered to the jail-or of the county, and the daughter detained there until the next morning, when she and

her mother, the latter having demanded a trial, were taken before the justice, and the plaintiff discharged without trial, on the motion of Hebdo or his attorney; that the swearing out of the warrant falsely accusing plaintiff of a grave offense was a scheme or plan of defendant or his advisors to aid his nephew Joseph to capture plaintiff's daughter, who had foolishly married him a short time before, and who soon afterwards went with him to Wheeling, where he practically abandoned her, going into the army and making no provisions for her, but left her to shift for herself, and she finally was obliged to return to her father and mother.

Some effort was made on the trial to disconnect defendant with the warrant, and he and his nephew swear that he was not present at the justice's office or at the train where the warrant was executed, and that the nephew, not Hebdo, obtained the warrant. But the transcript of the justice and the testimony of the officer who made the arrest, as well as the evidence of plaintiff and her daughter and others, show clearly that both were at least mistaken. The policeman who executed the warrant swears that Hebdo gave him the warrant at the train and directed him what to do with it; that he followed Hebdo's instruction and arrested both plaintiff and her daughter; that after getting them both off the train Hebdo may have said to plaintiff she might go on, as the train started; but that the warrant called for both, and he said she could not go, and they took both to the police station and there turned them over to the desk clerk, and afterwards took the daughter to the jail and delivered her to the turnkey.

We have recited so much of the pleadings and evidence to show the application of the points of error relied on. The first is that the court erred in refusing to allow defendant to examine as a witness O. E. Boice after the parties had introduced their evidence in chief and in rebuttal, but before the jury had retired, the court ruling it out on the ground that the offer came too late and after the evidence in the case had been closed on both sides. According to the proffer then made defendant proposed to prove by the witness that Boice was with Yoho at the time that Mrs. Jones and her daughter Mrs. Joseph left the train at Parkersburg, and that both left the train of their own accord, neither being arrested, and that when Mrs. Joseph found her husband at the station platform she left the train and her mother followed her, and that Mrs. Jones was never placed under arrest. The bill of exceptions shows that defendant had never had this witness summoned, although it recites he had been duly summoned, it is likely meant that he had been summoned by the other party.

Two grounds are relied on by plaintiff's counsel to sustain the ruling of the court: First, the lack of diligence on the part of

defendant in procuring the presence of the witness before the close of the evidence; second, that the evidence of the witness as proffered was merely cumulative of other evidence on the same subject.

[1, 2] That defendant was wanting in proper effort to obtain the witness seems manifest. He must have known that Boice was present at the time of the alleged arrest, and it was his duty to look him up and obtain his presence. Our decisions say that the court has wide latitude in matters pertaining to the examination of witnesses, and the rulings of the trial court will not be reversed unless there has been a plain violation of its discretion. *Tully v. Despard*, 31 W. Va. 370, 6 S. E. 927, where the rule was applied in a case where counsel had omitted to request certain instructions after the jury had been directed to retire. *Dowler v. Gas Co.*, 71 W. Va. 417, 76 S. E. 845, Ann. Cas. 1914C, 341, where the rule was applied on the recalling of a witness to give further evidence. *Burns et al. v. Morrison*, 36 W. Va. 423, 15 S. E. 62, where the rule of wide discretion in the trial court was applied without reversible error in allowing the withdrawal of a joinder in the demurrer to the evidence. The record does not here present a case of an omission to produce evidence under a misapprehension of law calling for the opening of the case and receipt of additional or other evidence such as was presented in *Cook v. Raleigh Lumber Co.*, 74 W. Va. 508, 82 S. E. 327, cited and relied on by defendant's counsel. The case here is one of pure neglect to produce a witness in time to give evidence on facts testified to by other witnesses on a vital issue in the case, of which defendant must be presumed to have had knowledge. And citing the cases already referred to, we said in *Daniels v. Thacker Fuel Co.*, 79 W. Va. 255, 90 S. E. 840, applying the same rule, that in matters pertaining to the conduct of the trial, including joinder and withdrawal of demurrers to evidence, we will not reverse such discretionary action unless the same has been exercised in a manner plainly arbitrary or otherwise obviously improper. In *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 483, we held, in accordance with the cases cited, that we would not disturb a verdict and judgment because of the refusal of the trial court to admit evidence offered after the conclusion of the introduction of evidence of both plaintiff and defendant, unless it appears that the trial court in so doing abuses its discretionary powers by refusing to allow the act in the furtherance of justice. In the case at bar, where the warrant for the arrest of the plaintiff and her daughter was sworn out by the defendant and placed in the hands of the officer, and the officer swears he executed the same by arresting the parties accused, and they are both taken before the officer issuing the warrant and dismissed in the manner admitted and shown in the record, the evi-

dence of Boice, if he had been allowed to testify as proposed, could have had little if any weight with the jury. Moreover, the ruling of the court was proper because the proposed evidence was merely contradictory or cumulative of other evidence already before the jury. It introduced no new facts. Defendant undertook to prove by his witnesses Joseph Hebdo, James Joseph, Samuel Plaine and P. E. Gaynor that Mrs. Jones was at no time under arrest, that both she and her daughter voluntarily got off the train, and that Mrs. Jones was told that she was not under arrest etc. The jury did not believe these witnesses. It may be that after getting plaintiff off the train by means of the warrant of arrest and arresting her as the officer says he did, defendant and his co-workers would have been glad to get rid of her; but that is not material, and the jury were not convinced that she was not arrested as she and the other witnesses say she was. We can not see that the court abused the discretion which it was entitled to exercise on the trial and that its ruling on the proposed evidence of Boice was erroneous.

The next ground of error is that the court should have sustained defendant's motion for a new trial: (a) Because the verdict was contrary to the evidence; (b) because it was excessive; and (c) because of the refusal of the court to admit the evidence of the witness Boice, the question just disposed of.

That defendant was unlawfully arrested there can be no doubt. The evidence on the question is overwhelmingly in plaintiff's favor. Indeed there was no attempt to justify her arrest; the only attempt was to evade the fact of her arrest at the instance and on the motion of defendant. The jury has settled that question of fact against him.

[3] The principal point of attack is upon the alleged excessiveness of the verdict. It is contended that as plaintiff offered no evidence of the amount of expenses incurred or money paid out for board, railroad transportation, counsel fees, court costs, etc., nor of damages sustained by the delay, the damages awarded by the jury must be regarded as mainly punitive or vindictive, in an amount not justified by the evidence, and so evidencing partiality and prejudice against the defendant on account of nationality or some other cause not justified in law. But plaintiff was necessarily outraged and distressed in body and mind by the false charges and the manner in which she was arrested. The purpose of capturing her daughter was no justification for the outrage committed upon her.

[4] What elements are proper to be considered in estimating compensatory damages as distinguished from punitive or vindictive damages in such cases? According to our holdings compensatory damages include allowance for mental anguish and pain and suffering in addition to mere pecuniary loss

when accompanied by injury from assault, indignity or injury to reputation etc. Davis v. Telegraph Co., 46 W. Va. 48, 53, 32 S. E. 1026; Johnson v. N. & W. Ry. Co., 82 W. Va. 692, 97 S. E. 189, 6 A. L. R. 1469; Hess v. Marinari, 81 W. Va. 500, 503, 94 S. E. 963. Here the jury were not required by any instruction or otherwise to separate the compensatory from the vindictive or punitive damages, if any, included in their verdict, as was the case in Pendleton v. N. & W. Ry. Co., 82 W. Va. 270, 95 S. E. 941. So that we have to determine whether the evidence justifies the amount of the verdict on the theory of compensatory and punitive damages which may have been found by the jury. In cases like this damages assessed for mental pain and suffering, for insult, indignity and humiliation inflicted, resulting from the wrongful and unlawful act of the defendant, constitute the bases for compensatory damages, and if these in the judgment of the jury be not sufficient for adequate punishment, the jury are then allowed to add a sufficient sum properly proportionate to the actual or compensatory damages as in their judgment will constitute sufficient punishment to act as a deterrent to wrongdoers. The amount of such damages being in their nature indeterminate, are peculiarly within the province of the jury, and their verdict will not ordinarily be disturbed unless so small or so gross as to evidence partiality, prejudice or misconduct. Burdette v. Goldenburg, 104 S. E. 270; Gibbard v. Evans, 106 S. E. 37.

The amount of the verdict in this case no doubt seems large, but can it properly be set aside under the rules of practice obtaining in this state? Defendant made groundless charges against plaintiff, caused her to be arrested thereon and to be taken in the nighttime from a railway train to a police station, her journey broken, and to be detained unlawfully. This was a wilful and wanton act on his part, and in total disregard of her lawful rights. For all of this she was entitled to adequate compensation, and if this was not sufficient to adequately punish him, to such additional damages as will furnish such punishment. Pendleton v. N. & W. Ry. Co., supra, 82 W. Va. 270, 276, 95 S. E. 941.

On the question of the amount of the verdict defendant cites and relies on Ogg v. Murdock, 25 W. Va. 139, a case involving an attachment in a civil suit for debt, the court holding that defendant was justified in believing plaintiff was about to leave the state without paying his debt, but was mistaken, no malice or intentional wrong being intended. There a verdict of \$475.00 was set aside for the reason indicated. In the case of Johnson v. Railway Co., supra, a verdict of \$1000.00 was sustained where there was controversy whether the plaintiff was in fact arrested or detained, and where no indignity or humiliation of consequence was inflicted upon her.

She was accused by the agent of the railway company of having in her possession in a suit case shipped as baggage intoxicating liquors. In Turk v. N. & W. Ry. Co., 75 W. Va. 623, 84 S. E. 569, L. R. A. 1915E, 145, we sustained a judgment on a verdict in a similar case for \$500.00 compensatory damages and \$1,000.00 punitive damages. In this case the evidence warrants the conclusion that defendant's action was wanton and wilful, if not malicious. In 11 R. C. L. 821, § 38, it is said:

"If the wrong was done maliciously or wantonly, vindictive damages are recoverable, and as to these the extent of the jury's discretion is even wider than in the case of compensatory damages. Malice, as used in this connection, does not necessarily mean anger, or a malevolent or vindictive feeling toward plaintiff; but a wrongful act without reasonable excuse is malicious within the legal meaning of the term."

No doubt the jury in this case, as expressed by their verdict, were influenced by the utter want of justification for the arrest and detention of plaintiff. One of the officers required to make the arrest said, that when asked what the plaintiff had done Hebdo said, "Nothing." The financial circumstances of defendant are not shown, and it does not clearly appear just what amount would be necessary to properly punish him for his wrong. It does appear that he was a merchant of some sort in Parkersburg, probably engaged in the business of confectioner and fruit dealer. But following the rules governing in cases of this kind, we are not disposed to reverse the judgment on account of the magnitude of the verdict. It will therefore be affirmed.

(151 Ga. 367)

DE LAY et al. v. LATIMER. (No. 2170.)

(Supreme Court of Georgia. April 13, 1921.)

(Syllabus by the Court.)

Dismissal and nonsuit ⇨ 24—Plaintiff may discontinue foreclosure suit as to defendant not asking affirmative relief.

The plaintiff may, as a matter of right strike the name of one of several defendants, where such defendant prays for no relief against the plaintiff, or any codefendant.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by W. Carroll Latimer against L. V. De Lay and another. Judgment for plaintiff, and defendants bring error. Affirmed. See, also, 106 S. E. 903.

W. Carroll Latimer, as assignee of a mortgage on realty dated in 1899, sought to foreclose it in equity against the mortgagor, J.

M. De Lay, a nonresident of the state, making the latter's wife, L. V. De Lay, codefendant. The petition alleged, among other matters, that the wife, subsequently to the execution of the mortgage and the creation of the debt it was given to secure, had the realty set apart to her and the minor children of herself and husband as a homestead out of his estate; that there was a waiver of homestead in the notes secured by the mortgage, which were of even date with it; that the minors are of age, the wife occupies the dwelling on the mortgaged premises, which is in a dilapidated condition, and she is unable to make any repairs; and that the property is deteriorating in value. The prayers are for judgment against the defendants for the debt, with interest; that the mortgage be declared a lien upon the premises for the principal and interest of the debt as set out; that the mortgage be foreclosed, the equity of redemption barred, and the land be sold to pay the debt; and that process issue against the defendants. Under the order of court, service was perfected by publication upon the nonresident mortgagor.

Mrs. De Lay demurred to the petition, on the grounds: (1) It sets out no cause of action against her. (2) There is no equity in it. (3) There is an adequate remedy at law. (4) On special grounds to several paragraphs. The special grounds of demurrer were met by amendment, grounds 1, 2, and 3 were overruled, and the demurrant filed exceptions pendente lite to this ruling, and assigned error thereon in a bill of exceptions. Mrs. De Lay in her original answer avers that the mortgaged property was purchased with her money; title thereto taken in the name of her husband without her knowledge or consent, and mortgaged without her knowledge or consent; that upon learning these facts as to the deed and mortgage, being advised by counsel that she could obtain a homestead in the property, which would take precedence over the mortgage, and being apprehensive that, if she should seek to assert her perfect equity in the property, her husband would be prosecuted criminally, she applied for a homestead, and had it set apart in the mortgaged premises as the property of her husband.

"And she alleges that on account of the position of duress in which she was placed, and the bona fide mistake about her rights under the homestead, she ought not now to be precluded from setting up her equity in the land."

Further, she alleges she took the homestead to prevent the property from being sold under foreclosure of the mortgage, this purpose being known to the mortgagee, who was duly notified of her application for homestead and made no objection. She took possession of the homestead property with the understanding that her homestead was su-

perior to the mortgage, which claim of hers was known to the mortgagee, and she has been in the peaceable, continuous, and adverse possession of the property for more than seven years, and therefore says that the lien of the mortgage cannot now be asserted as against her right. Furthermore she avers that petitioner and those under whom he claims have been guilty of laches, by acquiescence for so long a time in the enjoyment by the defendant of her homestead rights, and they have thereby waived their claim of priority by reason of the alleged waiver of homestead in the notes secured by the mortgage, and ought not now to be allowed to assert the lien of the mortgage.

At the trial term the wife amended her answer by setting up usury in the notes secured by the mortgage, and averring that therefore the waivers of homestead in the notes and mortgage are void, and that the mortgage cannot prevail against the homestead rights of the defendant. After the allowance of the amendment, petitioner moved to strike the wife's name as a party defendant, and to dismiss the case as to her. This motion was sustained by the court, over objection of the wife:

"That she had the right to have a trial and an adjudication of the court upon the issues made by her pleadings, so as to determine whether the plaintiff's mortgage was superior to her homestead, or whether, by reason of the facts alleged in her pleading, her homestead was superior to the plaintiff's mortgage."

On the order dismissing her from the case she assigned error in a bill of exceptions, on the grounds that the mortgagor was not served personally, but by publication; that he entered no appearance, made no defense to the suit, and therefore—

"the case was a contest in rem between the alleged holder of the mortgage, who was the plaintiff, and the claimant of the homestead, to wit, the defendant. * * * Wherefore the court could not, on a mere request or motion of the plaintiff, without any legal reason therefor, and over the objection of the defendant, * * * dismiss her as a party to the suit."

The trial proceeded against the mortgagor alone, and resulted in a verdict of foreclosure of the mortgage for the principal and interest due on the note, and barring the equity of redemption.

A. H. Davis, of Atlanta, for plaintiffs in error.

Albert E. Mayer and W. Carroll Latimer, both of Atlanta, for defendant in error.

FISH, O. J. (after stating the facts as above). The Civil Code of 1910, § 5688, provides that, when two or more persons are sued in the same action either on a contract or for a tort, the plaintiff may amend his decla-

ration by striking out one or more of such defendants, and proceed against the remaining defendant or defendants, if there is no other legal difficulty in the case. The defendant dismissed from the suit set up various grounds in her original answer and the amendment thereto why the petitioner's claim to foreclose the mortgage should be denied, but she prayed for no affirmative relief, either against the plaintiff or her codefendant, and therefore no legal difficulty is presented why the petitioner should not exercise his statutory right to discontinue the case as to her by having her name stricken as a defendant. *Bower v. Cohen*, 126 Ga. 35, 37, 54 S. E. 918; *Pearson v. Courson*, 129 Ga. 656 (5), 59 S. E. 907.

As the defendant in her answer prayed for no relief, the fact that the suit to foreclose the mortgage may in the circumstances be a proceeding in rem does not affect the ruling made.

Judgment affirmed.

All the Justices concur.

(151 Ga. 370)

DE LAY v. LATIMER. (No. 2171.)

(Supreme Court of Georgia. April 13, 1921.)

(Syllabus by Editorial Staff.)

Homestead §112—Attempted conveyance by head of family without order of court does not confer reversionary interest.

Since the adoption of the Constitution of 1877, lands set apart as a homestead cannot be conveyed by the head of a family pending the homestead, except by order of court as prescribed in the statute, and an attempted sale is invalid, and does not convey the reversionary interest.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by W. Carroll Latimer against J. M. De Lay and another. Judgment refusing to allow M. L. De Lay to intervene, and he brings error. Affirmed.

A. H. Davis, of Atlanta, for plaintiff in error.

Albert B. Mayer and W. Carroll Latimer, both of Atlanta, for defendant in error.

FISH, C. J. M. L. De Lay presented his petition to be allowed to intervene in the case of W. Carroll Latimer against J. M. De Lay and Mrs. L. V. De Lay, an equitable petition to foreclose a mortgage on realty, the facts of the case being set forth in *De Lay v. Latimer*, 106 S. E. 901, this day decided. The petition for intervention was based upon the allegation that J. M. De Lay, on August 24, 1918, conveyed to petitioner by warranty deed the premises which J. M. De

Lay mortgaged in 1890, and which were set apart to Mrs. L. V. De Lay, the mortgagor's wife, as a homestead in 1900. The court refused to allow the intervention, and the petitioner excepted. Held:

Since the adoption of the Constitution of 1877, land set apart as a homestead cannot be conveyed by the head of a family, pending the homestead, except by order of court, as prescribed in the statute, and an effort to sell it does not result in a conveyance of the "reversionary interest," but is simply invalid. *Denson v. Keys*, 140 Ga. 184, 78 S. E. 768.

As, under the facts stated, the alleged deed to the petitioner for intervention was void, the court did not err in refusing to allow him to intervene.

Judgment affirmed.

All the Justices concur.

(151 Ga. 338)

LANGSTON v. STATE. (No. 2277.)

(Supreme Court of Georgia. April 13, 1921.)

(Syllabus by the Court.)

1. Criminal law §534(1,2), 535(2)—Uncorroborated confession will not support conviction; exhibition of money said to have been taken from person killed, does not corroborate confession; proof of death, not shown to have been due to criminal agency, does not corroborate; evidence insufficient to show criminal agency.

On the trial of an accused person charged with murder, a confession alone, uncorroborated by other evidence, will not justify a conviction.

(a) Proof that the accused exhibited money to a witness will not suffice to corroborate a confession that the accused killed the deceased for the purpose of robbery and took the money from his person, there being no other evidence tending to show that the deceased had any money about his person at the time of the alleged homicide.

(b) On such a trial, proof of the death of the person alleged to have been slain, and that his body was found at a particular place, was insufficient to corroborate a confession of the accused that he killed the deceased at the place where his body was found, for the purpose of robbery; there being no extraneous evidence sufficient to show that death was caused by any criminal agency.

(Additional Syllabus by Editorial Staff.)

2. Homicide §149—Death presumed due to natural causes.

On a trial for murder, the presumption is that deceased came to his death by natural causes.

Error from Superior Court, Morgan County; Jas. B. Park, Judge.

Henry Langston, Jr., was convicted of murder, and he brings error. Reversed.

Henry Langston, Jr., and John Henry Brady were charged with the murder of Henry Moody by "shooting with a rifle and striking with an axe the said Henry Moody," thereby inflicting the mortal wound. On the separate trial of Langston, it appeared that the deceased, a colored man 70 or 80 years of age, lived alone on a plantation in a hut, situated in a pine thicket about one-fourth of a mile from the house of any other person. He was last seen alive Wednesday afternoon while working for his employer. His body was found on the floor in his house Friday afternoon next ensuing. Langston was a young colored man, had lived in the neighborhood several years, and was acquainted with deceased.

Evidence was introduced as to certain confessions alleged to have been made by Langston, to the effect that on Wednesday, while he and Brady were working in a field together, they agreed "to go over there that night and kill Uncle Henry." They reached his house about 8 o'clock and found him "getting supper—scraping out the tray." Defendant took his [deceased's] army rifle off the bed and shot him in the back of the head, and Brady "hit him with the ax." They then ran out of doors, and later came back and "robbed him." Langston got \$83, and gave Brady \$3. When asked why they killed him, Langston said, "We wanted the money." Also a colored boy, with whom Langston had been a companion for several years, testified that "two or three days after the killing" he and the accused were walking along the road, and, without being questioned, the latter exhibited "about \$85," which he had "in an old pocket handkerchief," which was counted in witness' presence; and Langston said "he had killed old man Henry Moody and took the money off of him; * * * he said it was on a Wednesday night." The same witness also testified:

"Henry Moody is dead. I have not seen him. I remember about the time" he "was killed."

The employee of Moody testified that Friday afternoon, on being informed by another employee of the discovery of Moody's body, he and others went to the house of Moody. The witness thus described the scene:

"When I got there, I didn't go in the house; when the door was opened, I saw him lying on the floor. I did not inspect the place where he was wounded; a great many of them did, though. He was dead when I saw him. * * * I went as close to the door as from here to you. I made no examination of him at all. I don't know what killed him. Of my own knowledge, I don't know how he came to his death. I believe he was killed on Wednesday night."

Williford & Lambert, of Madison, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Cle-

ment, both of Monticello, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

ATKINSON, J. It is declared in Penal Code, § 1031:

"All admissions should be scanned with care, and confessions of guilt should be received with great caution. A confession alone, uncorroborated by other evidence, will not justify a conviction."

In *Lee v. State*, 76 Ga. 498, it was said:

"In a criminal case, the corpus delicti should be established beyond a reasonable doubt, or a conviction should not be had."

In defining "corpus delicti" Wharton says:

"It is made up of two elements: (1) That a certain result has been produced, as that a man has died, or a building has been burned, or a piece of property is not in the owner's possession. (2) That some one is criminally responsible for the result; e. g., on a charge of homicide, it is necessary to prove that the person alleged in the indictment to have been killed is (1) actually dead, as by producing his dead body; (2) that his death was caused or accomplished by violence, or other direct criminal agency of some other human being." 1 Whar. Cr. L. (11th Ed.) § 347.

In 1 Wharton's Criminal Evidence (10th Ed.) § 325d, it is said:

"The general rule in homicide is that the criminal agency—the cause of the death, the second element of the corpus delicti—may always be shown by circumstantial evidence. To sustain a conviction, proof of the criminal agency is as indispensable as the proof of death. The fact of death is not sufficient; it must affirmatively appear that the death was not accidental, that it was not due to natural causes, and that it was not due to the act of the deceased. * * * It must affirmatively appear that death resulted from criminal agency. But the criminal agency is sufficiently shown, where a dead body is found with injuries apparently sufficient to cause death, under circumstances which exclude inference of accident or suicide," etc.

In harmony with and in recognition of the principles stated in the foregoing excerpts taken from Wharton are numerous decisions of this court. In *Thomas v. State*, 67 Ga. 460, it was said:

"A dead body, found with a knife thrust across the throat and breast, sufficient to have caused death, and with no signs of accident or suicide about it, is sufficient to prove the corpus delicti of murder."

In *Holsenbake v. State*, 45 Ga. 43, 56, it was said:

"Our Code provides that 'a confession alone, uncorroborated by other evidence, will not justify a conviction.' It is contended that, by this clause of the Code, it is necessary there shall be corroboration of the confession in that part of it which acknowledges that the prisoner committed the crime. To make out any case of

guilt, there are two essential ingredients: First, a crime, must be committed; and the person charged must be the party who committed it. One of these elements is just as essential as the other. If one confesses that he has committed a crime, that is not sufficient to convict. But, if it be proven that just such a crime as he acknowledges was in fact committed, does not this corroborate his confession? The Code does not fix the amount of corroboration. It does not say that it shall be corroborated in a number of particulars, but simply that a confession alone, uncorroborated by other evidence, shall not be sufficient. To require a confession to be corroborated in every particular would be to say that a confession is not sufficient, unless there be other evidence, sufficient without the confession, which would be absurd. We do not feel authorized to draw any line. The confession must be corroborated; but how far, and in what particulars, is not said. That there has been an unlawful killing is, in a case of a charge of murder, one particular, and an important one. Each case must stand on its own footing, the jury being the judges. And if they convict on a confession which is corroborated by only one circumstance, the rule is complied with; the strength of that circumstance is to be judged of by the jury, according to the case. In the case before us, the confession is in fact corroborated in several particulars. The prisoner admits enmity to the deceased; the killing was with the weapons mentioned; it was an assassination, as mentioned," etc.

See, also, *Brown v. State*, 105 Ga. 640, 31 S. E. 557. In *Murray v. State*, 43 Ga. 256, where, in a trial for arson in burning a gin-house, there was proof that the prisoner had confessed his guilt, saying that he had "put fire to it at 1 o'clock at night," and no corroborating circumstance was proved, except that the house was consumed by fire about the hour of 1 o'clock at night, and that the prisoner resided about a mile from the spot, it was held that such evidence did not justify a conviction and was insufficient to sustain a verdict of guilty. In *Bines v. State*, 118 Ga. 320, 323, 45 S. E. 376, 68 L. R. A. 33, it is said:

"Before there can be a lawful conviction of a crime, the corpus delicti—that is, that the crime charged has been committed by some one—must be proved."

In *Williams v. State*, 125 Ga. 741, 54 S. E. 661, it was said:

"When a house is consumed by fire, and nothing appears but that fact, the law rather implies that the fire was the result of accident, or some providential cause, than of a criminal design." *Phillips v. State*, 29 Ga. 105. * * * In the present case, when the confessions of the accused are eliminated, the other evidence is not sufficient to show beyond a reasonable doubt that there was a wilful and malicious burning of the house which was destroyed by fire."

See, also, *Epps v. State*, 149 Ga. 484, 100 S. E. 568.

[1, 2] Applying the foregoing principles to the evidence in the case under consideration, was the verdict finding the defendant guilty of murder sustained? The confession alone by the defendant on trial would not suffice, under the plain language of the Penal Code, unless it was corroborated by other evidence. The evidence as to exhibition of money by the defendant, under the circumstances detailed by the witness, would not corroborate the confession of the crime of murder, for several reasons; one reason being that there was no evidence that Henry Moody had any money at the time of the alleged homicide. With that question out of the way, the only remaining possible corroboration of the confession is the evidence as to the corpus delicti—that is, that the murder was committed. The evidence as to the finding of the dead body was sufficient to show the first element to be proved. The second element—that is, that the death of Henry Moody was caused by a criminal agency—was not sufficiently proved. One witness testified:

"I saw Henry Moody after he was killed."

Another witness, in testifying as to a confession, said:

"This was something like two or three days after the killing."

The employer of the deceased testified:

"I did not inspect the place where he was wounded; a great many of them did though. He was dead when I saw him. * * * I made no examination of him at all. I don't know what killed him."

The expressions above quoted were by witnesses who did not witness the alleged homicide, and are not to be construed as showing an intention upon the part of the witnesses to testify that the deceased was "killed," or that the witness saw wounds on the body of deceased, or that there were any wounds on the body of the deceased which would tend to show that they caused his death by any criminal agency. The presumption is that the deceased came to his death by natural causes, and the evidence submitted was insufficient to overcome such presumption. The mere fact that the body was found on the floor was consistent with the theory of death by natural causes. Applying the rule that, "in a criminal case, the corpus delicti should be established beyond a reasonable doubt, or a conviction should not be had," the evidence was insufficient. Omitting from consideration the confession of the accused, as it should be, because it was not corroborated, the verdict finding the defendant guilty was unauthorized by the evidence, and the judge erred in refusing a new trial.

Judgment reversed.

All the Justices concur.

(151 Ga. 367)

NEAL v. STATE. (No. 2442.)

(Supreme Court of Georgia. April 12, 1921.)

(Syllabus by Editorial Staff.)

Criminal law \S 824(4)—Failure to charge without request to acquit if killing was accident, as contended by defendant, held not error.

Where defendant charged with murder relied on the defense of misfortune or accident, and the trial judge correctly charged thereon, it was not error, in the absence of a written request, to fail to charge that, if the jury believed the killing was an accident as contended for by defendant in his statement, they should find a verdict of not guilty.

Error from Superior Court, Houston County; H. A. Mathews, Judge.

Miller Neal was convicted of homicide, and he brings error. Affirmed.

John B. Cooper and W. O. Cooper, Jr., both of Macon, and Marx Kunz, of Perry, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

GILBERT, J. 1. Where one who is charged with the murder of his wife relies upon the defense of misfortune or accident, and the trial judge has correctly given in charge to the jury the law on that subject, it is not error, in the absence of a written request so to do, for the court to fail to instruct the jury that, if they believe the killing was an accident as contended for by the defendant in his statement, the jury should find a verdict of not guilty. *Josey v. State*, 137 Ga. 769 (3), 74 S. E. 282; *Jones v. State*, 147 Ga. 356 (2), 94 S. E. 248.

2. None of the excerpts from the charge of the court upon which error is assigned, when considered in connection with the charge in its entirety, were erroneous. Assignments of error on failures of the court to charge are without merit.

3. The verdict is supported by evidence. The court did not err in overruling the motion for a new trial.

Judgment affirmed.

All the Justices concur.

(151 Ga. 361)

KING v. KING. (No. 2141.)

(Supreme Court of Georgia. April 12, 1921.)

(Syllabus by the Court.)

1. Divorce \S 255—Judgment denying divorce to either party held not to bar wife's subsequent action for alimony.

Where a husband brought a libel for divorce against his wife, and the wife in a cross-

action prayed for a divorce from the husband and for temporary and permanent alimony, and the jury on the first trial of the divorce suit returned a verdict against a divorce for both parties, and the suit thereupon terminated in a judgment denying to both the husband and the wife a divorce as prayed, the verdict and judgment in the divorce suit is no bar to a suit for permanent alimony subsequently brought by the wife for herself and minor child against the husband, although the grounds set up in such suit for alimony were pleaded as grounds for divorce and alimony in the cross-action filed by the wife to the husband's libel for divorce.

2. Sufficiency of evidence and motion for new trial.

The verdict for permanent alimony for the wife and minor child is supported by the evidence. The judgment overruling the defendant's motion for new trial is not erroneous for any reason assigned.

Error from Superior Court, Whitfield County; M. O. Tarver, Judge.

Action by Essie King against O. L. King. Judgment for plaintiff, and defendant brings error. Affirmed.

M. B. Eubanks, of Rome, and R. H. House, of Donaldsonville, for plaintiff in error.

Maddox, McCamy & Shumate and F. K. McCutchen, all of Dalton, for defendant in error.

GEORGE, J. O. L. King filed a libel for divorce against his wife, Mrs. Essie King, to the July term, 1919, of Whitfield superior court. Mrs. King filed a cross-petition praying for a divorce and for temporary as well as permanent alimony for herself and minor child. On the first trial of the action the jury returned a verdict finding against the divorce for both parties. Upon this verdict the court rendered a judgment denying to both parties the relief prayed. Subsequently Mrs. King brought an action for alimony for herself and minor child; and the defendant, O. L. King, contested her right to alimony, pleading the judgment in the divorce suit in bar of her right to prosecute the suit for alimony. In her suit for alimony Mrs. King alleged the same facts pleaded in her cross-action for divorce and alimony. Upon motion the court amended the judgment in the divorce suit, and the judgment as amended merely denied to both parties the divorce prayed. Thereafter the court dismissed the plea of *res adjudicata* as insufficient, and the ruling of the court in dismissing this plea is the controlling question presented by this record.

[1] Civil Code 1910, \S 2954, provides, among other things, that—

"The jury rendering the final verdict in the cause [that is to say, in a libel for divorce] may provide permanent alimony for the wife,

either from the corpus of the estate or otherwise, according to the condition of the husband and the source from which the property came into the coverture."

Section 2981 provides:

"If the jury, on the second or final verdict, find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support."

From the foregoing sections it is obvious that the wife's claim for alimony was not involved in the first trial of the divorce suit. Her claim for alimony could only be considered by the jury upon the final or second trial of the divorce suit. Inasmuch as the decree or judgment in the divorce suit was rendered on the first verdict of the jury in that action, the question of permanent alimony for the wife and minor child was not affected by the decree or judgment. Her claim for alimony, as set forth in her cross-petition for divorce, was based upon the allegation that a suit for divorce was pending between the parties. We are of the opinion, therefore, that the verdict and judgment in the divorce suit is not a bar to the wife's suit for permanent alimony, although in her cross-petition in the divorce suit she had pleaded the same matter as ground for divorce, and as a basis for her claim of alimony for herself and child, as she now pleads in her alimony suit. See *Mitchell v. Mitchell*, 97 Ga. 795, 25 S. E. 385; *Sumner v. Sumner*, 121 Ga. 1, 48 S. E. 727; *Bishop v. Bishop*, 124 Ga. 293, 52 S. E. 743.

[3] The further assignments of error contained in the bill of exceptions afford no reason for setting aside the verdict finding permanent alimony for the wife and minor child, and are not of such character as to require discussion.

Judgment affirmed.

All the Justices concur.

(151 Ga. 386)

ROE v. WATSON. (No. 2225.)

(Supreme Court of Georgia. April 12, 1921.)

(Syllabus by the Court.)

1. Divorce \Leftrightarrow 269(10)—Motion to dismiss unsworn petition to punish for nonpayment of alimony properly denied.

Where there was a judgment awarding alimony, which the husband subsequently failed to pay in the monthly installments as provided in the judgment, and a petition was filed by the wife, praying that the husband be required to show cause why he should not pay the alimony or be punished for contempt, it was not error to refuse to dismiss such petition on the ground that it is not sworn to.

2. Divorce \Leftrightarrow 269(2, 13)—Nonpayment of alimony may be punished as contempt; husband could not complain of time allowed for payment.

The judgment requiring the payment of alimony within the time specified, and in default of such payment that the defendant be incarcerated, was authorized under the pleadings and the evidence.

Error from Superior Court, Berrien County; R. G. Dickerson, Judge.

Application of A. R. Watson against Jacob Roe for attachment for contempt. Judgment requiring defendant to pay arrears of alimony within 60 days, and he brings error. Affirmed.

Story & Story, of Nashville, for plaintiff in error.

W. D. Bule, of Nashville, for defendant in error.

BECK, P. J. Amy Roe Watson made her application to the superior court for the issuance of a rule to require Jacob Roe to show cause why he should not be attached for contempt because of his failure to comply with an order and judgment of the court previously granted, awarding alimony to the applicant. It was alleged that the movant had been awarded in said court the sum of \$17.50 permanent alimony to be paid monthly, that after a few payments of this sum the defendant failed and refused to make further payments, and that he was in arrears at the time of filing the petition, in the amount of \$157.50. The court issued a rule nisi calling upon the defendant to show cause why he should not be attached for contempt, etc. At the hearing the respondent made a motion to dismiss the petition or application, on the ground that it was not sworn to, which motion was overruled; and after hearing evidence the court further adjudged that the defendant should pay the amount of the alimony for which he was in arrears within 60 days, and, upon his failure and refusal to do so, that he should be confined in jail. The respondent excepted to the judgment denying his motion to dismiss the petition, and also to the order requiring the sheriff, in the event of failure to pay the alimony within 60 days, to incarcerate the respondent.

[1, 2] There was no error in refusing to dismiss the application for the issuance of the rule nisi. There is no provision in the statute requiring such petitions or applications or motions to be sworn to. Civil Code, § 5431; 6 R. C. L. 531. It might be proper for the judge, before issuing the rule nisi, to require an applicant to make a showing upon oath that the facts stated in the petition for such a rule nisi were true; but where he issues the rule upon the written representations of an applicant, and there is proper service, and

the respondent is brought before the court, the court may, upon sufficient evidence showing that the respondent has failed and refused to comply with the decree awarding alimony, adjudge him in contempt; and further, that in the event of his failure to comply with the judgment, he be incarcerated. The fact that in the present case the judge allowed the defendant 60 days within which to pay the amount of alimony in arrears at the time of the judgment was not a matter of which the respondent could complain.

Under the evidence submitted, the judge was authorized to find that the plaintiff in error was in contempt, and that he had not purged himself thereof.

Judgment affirmed.

All the Justices concur.

(151 Ga. 378)

CARROLL v. ATLANTIC STEEL CO.
(No. 2195.)

(Supreme Court of Georgia. April 13, 1921.)

(Syllabus by the Court.)

1. **Infants \S 110**—Consent judgment for damages for injuries vacated where proceedings were formal and without judicial investigation.

Where proceedings in court for a minor by next friend to recover damages for injuries sustained by the minor from alleged negligence of the defendant are merely formal and are brought in the name of the minor by an attorney employed by a company which has insured the defendant against damages resulting from injuries to defendant's employees, only to effectuate a settlement alleged to have been agreed upon between the parties, and where in such case verdict and judgment for a nominal amount are taken for the plaintiff, and there is no judicial investigation of the facts upon which the right or extent of the recovery is based, a judgment rendered in pursuance of such agreement, even if by consent, is only colorable, and will be set aside in a proper proceeding, when its effect, if allowed to stand, would be to bar the infant's substantial rights.

2. **Nonsuit held erroneous.**

The court erred, under the pleadings and the evidence, in awarding a nonsuit.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Clarence Carroll, by his next friend, Odessa Carroll, against the Atlantic Steel Company. Judgment of nonsuit, and plaintiff brings error. Reversed.

Clarence Carroll, suing by Odessa Carroll, as his next friend, brought an equitable petition against the Atlantic Steel Company, and alleged in substance as follows:

About May 13, 1918, while employed by the defendant, the plaintiff was injured and damaged in the sum of \$25,000, having lost his left leg through the defendant's negligence. About September 3, 1918, the plaintiff believed that he effected a valid settlement of his damages by having received a contract for permanent employment with the defendant, and continued in such belief until about May 1, 1919, when he was discharged by the defendant; and, having employed counsel, he has been told that on September 3, 1918, a judgment was rendered in the city court of Atlanta in his favor as plaintiff against the defendant for the sum of \$450, by which it was attempted to fully satisfy plaintiff's claim. The judgment was obtained by fraud by the defendant and is void; and the present suit is brought for the purpose of setting aside the judgment, and for damages for the tort referred to.

The fraud complained of was as follows: On May 13, 1918, the plaintiff received an injury while working for the defendant, which resulted in the amputation of his left leg. After several weeks, and after plaintiff had partially recovered from his injuries, the superintendent of the defendant sent for the mother of plaintiff, for the purpose of making a settlement. Plaintiff and his mother went to the plant of the defendant, where they met the superintendent and the insurance adjuster hereinafter referred to. A settlement was agreed upon by the superintendent and plaintiff's mother, upon the following terms: Defendant was to pay plaintiff's mother \$350 in full settlement for her damages (\$50 of which had already been paid), and give permanent employment to plaintiff, and an artificial leg as soon as he was fully grown. Plaintiff and his mother were then told by the superintendent to get into defendant's automobile in company with its physician and go to the office of defendant's attorney, who would pay the \$300. The defendant carried insurance against loss for damages to employees with the Travelers' Insurance Company. The adjuster for the insurance company had employed the attorney of defendant before their arrival at his office. The insurance company, through its adjuster, gave instructions to the attorney as to what to do regarding the settlement; and the attorney followed the instructions, and his employment was from the insurance company acting for the defendant, and not for plaintiff or his mother, and he was paid by the insurance company, and he recognized and considered that he was representing the insurance company, and not plaintiff or his mother. The defendant and the insurance adjuster fraudulently withheld from the attorney the information regarding the lifetime employment for plaintiff. The attorney gave plaintiff's mother \$10 to bind the settlement

with her, and told her to return in September and he would pay her the balance of \$290. Plaintiff alleges that he and his mother relied on the confidence and the honesty of the agents of the defendant, because they were ignorant in such matters, could not read or write, and were not able to understand the methods necessary to effect a valid settlement on the terms mentioned. Plaintiff's mother in September, 1918, received \$290 in accordance with the terms of settlement. Neither plaintiff nor his mother was told by defendant or by the attorney that a suit was to be brought; and the suit referred to was wholly without the authority, knowledge, or consent of plaintiff or his mother. The defendant did give plaintiff employment for a few months, but about May 1, 1919, without cause discharged him. He and his mother did not know that the contract relating to employment should have been entered into in writing and made a part of the judgment of the court, and they accepted the money believing that the other terms of the settlement were binding on the defendant and would be carried out in good faith with plaintiff.

There was great disparity between the mental ability of plaintiff and his mother and the agents of the defendant, and especially the adjuster. This fact, coupled with the other fact that defendant only paid \$350 to satisfy a just claim of \$25,000, is fraud; and the plaintiff sets this up as an additional ground for disregarding the judgment herein referred to. He has been advised by counsel that a named attorney on June 27, 1918, filed a suit in behalf of plaintiff by his mother, as next friend, against the defendant, for the sum of \$25,000, a copy of which petition is annexed hereto. The defendant filed its answer to the suit, copy of which is also attached. The name of W. P. Tillinghast appears as defendant's attorney. Plaintiff is advised that Tillinghast was really one of the insurance adjusters for the Travelers' Insurance Company, and had no retainer or authority as attorney directly from the defendant, and that on September 3, 1918, a consent verdict and judgment were taken in the case for \$450 and cost, a copy of which verdict and judgment are attached to this petition. The named attorney who filed the suit on June 27, 1918, filed with the clerk of the superior court a next friend's bond, and furnished as security a clerk employed by the attorney at that time. The filing of the suit, the taking of the verdict and judgment, and the executing of the bond were all without the knowledge, authority, or consent of plaintiff and his mother. The effect of the action of the defendant through its agents employing the named attorney and not carrying out the contract of settlement made was a fraud upon plaintiff. Plaintiff has just discovered the fraud, and comes into a court of equity and asks relief against such judgment. The

money received by his mother was tendered back to the defendant.

The merits of his action against the defendant arise out of the following facts: The defendant is a corporation engaged in the manufacture of iron and steel products; and to this end it uses in and about its plant locomotives, cars, and railroad tracks. On May 13, 1918, the plaintiff was in the employment of the defendant at its plant. The particular work which he was employed to do was to clean pans from engines in the yard; and this was a safe place at which to work. It was specifically agreed between his mother (he being a minor and under her care and custody) and the superintendent of the defendant that plaintiff was not to be given dangerous employment; and his mother warned the superintendent not to place her son at work on the cars or engines of the railroad, and it was then agreed by the superintendent that he should not be so placed. He was young and inexperienced, being 17 years of age and small for his age, being of the size and development of a boy about 14 or 15 years of age. He did not know the dangers incident to coupling and switching cars and performing the duties of a switchman; and on account of his inexperience and immature judgment he was not cognizant of the obvious danger to which he was exposed, and did not appreciate the same. Although the defendant knew of his youth, inexperience, and inability to comprehend the dangers of his employment, and knew that he was not cognizant of the dangers, he received no instructions and was not warned of the danger. On the date of the injury he was placed at work coupling cars in the yards where there was an engine known as a "dinkey engine" used in switching cars. The cars being switched were equipped with pans in which were loaded scrap iron. Usually a car has four pans which extend up to either end of the car, and the engine is coupled to cars by means of a bolt or rod about three feet long, which fits over a catch or device which thus attaches the engine to the cars. On the night the injury occurred the "dinkey engine" was backing up to take on a train of about three cars which had just been set in from an adjoining track. Plaintiff gave the signal for the engineer to back up so as to get close enough to make the coupling. The engine came back, but owing to defective brakes it could not be stopped by the engineer in time; and while plaintiff was holding the three-foot coupling bolt and was ready to fit it in place so as to complete the coupling, and while in the exercise of his duty in that regard, the force of the engine, which was beyond the control of the engineer because of the defective brakes, drove the bolt and the engine up to, against, and upon the car in such a way as to catch plaintiff's leg and almost sever it from his body. The car next

to the "dinkey engine" was a three-pan car, and there was room for the engine to be pushed upon it so as to be on the space usually occupied by the pan. There was no escape from being caught. The engine came suddenly and unexpectedly, and plaintiff could not have avoided the accident. The engine should have been equipped with bumpers, or other device designed to protect persons who couple cars. Plaintiff objected to the new employment, and asked to remain on his old job; but he was told by the foreman that he could do the work all right, and that he must do it or be discharged; and, disregarding the agreement with his mother, defendant forced him from a safe place, that of cleaning pans, to a place as switchman coupling cars at night in the railroad yards operated by the defendant. A number of acts of negligence on the part of the defendant are alleged.

Plaintiff was without fault, and his injuries were the result of negligence and carelessness on the part of the defendant. At the time of the injuries plaintiff was strong and healthy, and earning the sum of \$2.50 a day; and but for the injury he would now be able to earn at least \$4 per day. His injuries are permanent, and he will always be a cripple; his earning capacity has been diminished at least one-half as the result of losing his leg; he has suffered much pain and agony, and continues to suffer pain. The prayer is that the verdict and judgment for the sum of \$450 and costs in favor of the plaintiff be declared a nullity, and that he have judgment in the sum of \$25,000 for his damages.

The defendant filed an answer in which it denied all the material allegations of the petition, and averred that the claim of the plaintiff for the injuries sustained was settled by defendant with plaintiff and his mother, that his suit was filed to legally effect said settlement, that the attorney in that suit was regularly employed by plaintiff and his mother and represented them, and that in and about the suit and the settlement there was no fraud or misrepresentation of any kind; and defendant pleads the verdict and judgment in that suit in full settlement and satisfaction of the alleged claim set forth in the present suit and in bar of any recovery. After evidence was offered by the plaintiff the court awarded a nonsuit, and the plaintiff excepted.

W. S. Dillon, C. M. Lancaster, and Wm. J. Davis, Jr., all of Atlanta, for plaintiff in error.

C. T. & J. L. Hopkins and McDaniel & Black, all of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above). [1] This was an equitable action brought by Clarence Carroll, a minor, by his mother as next friend, to set aside a judgment rendered

in the city court of Atlanta on September 3, 1918, in his favor against the Atlantic Steel Company as defendant, in which a verdict and judgment were entered for \$450, by which it was attempted to fully satisfy the plaintiff's claim for damages against the defendant, alleged to have been sustained by him while an employee of the defendant. The petition also had for its purpose the recovery of damages to the amount of \$25,000. One of the questions to be determined in the case is whether, under the allegations of the petition and the evidence thereunder, the verdict and judgment of the city court should be set aside on the ground of fraud in their procurement, and the plaintiff be allowed to go to the jury on the questions at issue in the case.

The case of *Missouri Pacific Ry. Co. v. Charles Lasca*, 79 Kan. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338, 17 Ann. Cas. 605, was similar in its facts to the instant case. There, in a suit commenced by Charles Lasca, a minor six years of age, by Nick Lasca, his father and next friend, to set aside a judgment rendered in the same court in favor of Nick Lasca and Anna Lasca, father and mother and next friends of Charles Lasca, a minor, plaintiff, against the Missouri Pacific Railway Company, defendant, for \$95 and costs, the petition alleged that the defendant caused the judgment to be rendered against itself; that there was no trial upon the pleadings and proofs, nor upon the merits of the case, and no proof was made and no evidence offered and no damages assessed by the court; that the proceeding was without the knowledge or consent of Nick Lasca or Anna Lasca, and the judgment was obtained for the purpose of defrauding the plaintiff by barring the cause of action set up in the petition therein; that the plaintiff had a good cause of action for injuries caused by the negligence of the defendant, and still had such cause of action, unless barred by the judgment, which he asked to have set aside accordingly. The defendant answered by a general denial and a plea to the jurisdiction of the court. Upon the trial of that case the court made findings of fact from which it appears that Nick Lasca, an Italian employee of the Missouri Pacific Railway Company, with Anna, his wife, and their son, Charles, about 18 months of age, were living in a bunk car on a side track. Another car, upon which was a water tank, was standing near by on another side track. Mrs. Lasca went to the water tank to draw water for domestic use, leaving the boy with his grandmother in the bunk car. While the mother was thus absent the boy left the bunk car, went to the other side track, and put his hands on the rail near the tank car. Just at that time an incoming freight train moved the tank car so that a wheel passed over the boy's hands, crushing and bruising them. Negotiations were opened between the defendant's claim

agent and the parents of the child, resulting in an agreement in writing whereby the parents agreed to accept \$100 from the defendant in full of all claims for the injury, to be paid through a friendly suit to be instituted in a certain court. This sum was to cover all claims of the parents as well as of Charles Lasca, and was to be divided as the attorneys for the defendant might deem proper. In pursuance of this agreement the parents went to the office of the defendant's attorney at the request of the claim agent, and there met the company's attorneys and Pittman, another attorney, who was then in the office, with whom they consulted about the matter. The petition, answer, and reply in the proposed action had been prepared by the defendant's attorneys. The petition and reply were signed by Pittman as attorney for the plaintiff; the papers being entitled "Nick Lasca and Anna Lasca, Father and Mother and Next Friends of Charles Lasca, a Minor, Plaintiff, v. The Missouri Pacific Railway Company, Defendant." The petition stated a cause of action for the injuries to Charles Lasca, and prayed for a judgment for \$100. The answer contained a general denial and a plea of contributory negligence, and was signed by the defendant's attorneys. Nick Lasca and Anna Lasca and the attorneys named then proceeded to the court of common pleas, filed the papers, and presented them to the court; and the attorney for the defendant informed the court that this was a friendly suit for the settlement of the claim against the company, and that he wished to have judgment entered against the company, in accordance with the settlement, for \$95 and cost. The judge, the court being regularly in session, then called Nick Lasca and Anna Lasca and inquired of them whether the settlement was satisfactory. They stated that it was, and that they desired to have judgment entered accordingly. The judge informed them that, if a judgment was entered, it would cut off all claims of the child for further damages; and thereupon judgment was entered for \$95 and costs, by consent of the parties. There was no trial of the issues; and no evidence was introduced, except the statement of the parties present to the effect that the child had been injured by the defendant company, and that the parents had effected a compromise and settlement, and that the amount agreed upon was satisfactory. The judge made an entry upon his trial docket as follows:

"September 9, 1901. Judgment for plaintiff for \$95 and costs, by consent and agreement of all parties."

Thereupon a judgment was entered upon the journal of the court in ordinary form, etc. In affirming a later ruling of the trial court setting aside this judgment, the Supreme Court of Kansas, speaking through Benson, J., said:

"While in this case the court did exercise some supervision over the agreement, it did not judicially examine the facts to determine whether the agreement was reasonable and proper. The court merely approved what the next friend had done, not because it found that it was for the best interests of the infant, but because the consent of the parents had been given and they were still satisfied. The duty of the court, stated in many decisions, and referred to in the recent case of *Crapster v. Taylor*, 74 Kan. 771, 87 Pac. 1138, to protect the interests of infants, was not performed by inquiring of the parents if they were satisfied with the agreement. It may be that some of the cases above cited have carried the doctrine to an extreme limit. The next friend must not be denied such necessary incidental powers as will facilitate the fair adjudication of the infant's rights. This is necessary to their proper vindication, both in prosecution and defense. Where a compromise is fairly incidental to an action regularly brought, and is upon due judicial examination approved, the judgment, if not otherwise impeached, may be conclusive as in the case of adults; but where the proceedings in court are merely formal and instituted and carried on only to give an apparent sanction to the agreement, and there is no judicial investigation of the facts upon which the right or extent of the recovery is based, the judgment so entered by consent is only colorable, and must be set aside in a proper proceeding when its effect, if allowed to stand, would be to bar the infant's rights. In such a case the proceeding in court should be regarded 'as but merely formal and as intended solely to employ the functions and powers of the court to give validity to the prior agreement.' *Pittsburg, C. & St. L. R. R. Co. v. Haley*, supra, 170 Ill. 610, 48 N. E. 920. See, also, *Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638; *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671, and note; *Gooch v. Green*, 102 Ill. 507; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 208. The conclusion of the trial court that no fraud in fact was committed in this transaction cannot affect the right of the infant to relief. The judgment so set aside would have been an absolute bar to the prosecution of his claim, and thus he would have been deprived of his legal rights without authority. The motive of the actors does not avoid the consequences of the act. The parents had no power to consent to the judgment; having no other sanction, it cannot stand."

And see, to the same effect, *Leslie v. Proctor & Gamble Mfg. Co.*, 102 Kan. 159, 169 Pac. 193, L. R. A. 1918C, 55, and notes. In the latter case it was held that—

"Where a minor has sustained personal injuries, which his father and the wrongdoer settled for an inadequate sum, such minor on attaining his majority may bring an action against the wrongdoer for his injuries, notwithstanding the settlement negotiated by his father."

See, also, as to the powers and duties of next friends and guardians ad litem, 14 R. C. L. 288, 289, § 56, and cases cited.

Without adopting the views of the court in the Lasca Case, *supra*, in extenso, we think the ruling upon the question we are now considering is sound. This is not a case where a lawyer is really employed by the parties and a judgment is entered under a bona fide agreement of settlement. The attorney in this case, while nominally representing the plaintiffs, was, as a matter of fact, employed by the adjuster of the insurance company to effect the settlement for the steel company. The attorney testified that—

"Mr. Coppix [the insurance adjuster] phoned me that he had a case that he wanted to give me, and I told him I would be glad to get it. He said he had a boy injured by the steel company, and they had agreed upon a settlement of the case, and that it would be necessary, he being a minor, to take a consent verdict in it, and that he would send the boy to my office, which he did. In about an hour after that they came to my office. I had never seen them before, and didn't know anything about them until that occurred. They told me the same that Mr. Coppix had, and wanted the suit filed so they could get their money; and I took the case for the steel company. Mr. Coppix said he would pay my fees in addition to what he would pay them, which he did. Mr. Coppix told me they had agreed upon a settlement of \$300. * * * I think my fee was \$150. I did not introduce any evidence in behalf of the plaintiff to the court and jury when the verdict was taken. No, sir; the court did not ask the plaintiff any questions as to the merits of the case. Odessa Carroll and Clarence Carroll were not present at the trial when the verdict was taken. No, sir; I did not notify Odessa Carroll or Clarence Carroll to be in court that day; it wasn't necessary; they knew when the court was to meet," etc.

It will be observed that in the Lasca Case, *supra*, the parents of the minor child did go before the court and stated that they desired to have judgment entered according to the agreement they had entered into. But in the present case the record shows that neither the plaintiff nor his mother, who was acting as next friend for him, went before the court, and no testimony was offered as to the merits of the case, and these were not inquired into by the court. The petition in the case alleges a cause of action, and under it the plaintiff sought to recover \$25,000 damages for the loss of his leg. The damages alleged were far in excess of the amount paid. The evidence of the plaintiff was sufficient to authorize a jury to find for the plaintiff in some substantial amount for the injury alleged to have been sustained by him. Besides the amount which was actually paid, the sum of \$300 was paid to the mother as next friend, and not to the plaintiff. The evidence of the plaintiff was to the effect that in the agreement of settlement he was to receive a life-

time job with the defendant; and in corroboration of this contention on the part of the plaintiff he was given employment after he had recovered from the amputation of his leg. He was receiving the sum of \$3.50 per day as wages when hurt, and \$2.80 per day when he was discharged, and received no further compensation for his injury. It is true that the evidence is conflicting upon the question as to whether, under the terms of the settlement, the plaintiff was to receive a lifetime job with the defendant; and this being so, we think the case should have been submitted to a jury under proper instructions. Under the facts of this case we hold that no settlement was made that had judicial sanction. The settlement was made out of court, and the verdict and judgment were purely perfunctory, and no investigation was made before the court and jury as to the reasonableness of the settlement and as to whether the verdict and the judgment covered the agreement which was really made between the plaintiff and the defendant. And we think that in such a case, where the proceedings in court are merely formal and are instituted and carried out in order to give an apparent sanction to the settlement, and there is no judicial investigation of the facts upon which the right or extent of the recovery of damages by a minor is based, such a judgment entered in pursuance of the agreement and by consent merely is only colorable, and will be set aside in a proper proceeding, when its effect, if allowed to stand, would be to bar the infant's substantial rights. *Mo. Pac. Ry. Co. v. Lasca*.

[2] From what has been said we conclude that the court erred in awarding a nonsuit. Judgment reversed. All the Justices concur.

(151 Ga. 388)

CARROLL v. ATLANTIC STEEL CO.
(No. 2196.)

(Supreme Court of Georgia. April 13, 1921.)

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Odessa Carroll against the Atlantic Steel Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. S. Dillon, C. M. Lancaster, and Wm. J. Davis, Jr., all of Atlanta, for plaintiff in error.
C. T. & J. L. Hopkins, and McDaniel & Black, all of Atlanta, for defendant in error.

HILL, J. This case is controlled by the principle ruled in the preceding case of *Carroll v. Atlantic Steel Co.*, 106 S. E. 908.

Judgment reversed.

All the Justices concur.

(26 Ga. App. 615)

WADDELL et al. v. WARD et al.
(No. 12095.)(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)*(Syllabus by Editorial Staff.)***Private roads §2(1)—Facts held not to show existence of right.**

Where there was no evidence of a gift or dedication to the public of the land over which an alleged private road leading to a creek ran, and the creek itself could have been fenced, and there was no evidence that the alleged private way was not over 15 feet wide, it was error to order the removal of obstructions.

Error from Superior Court, Decatur County; John R. Wilson, Judge.

Proceeding by H. T. Ward and others against Clarence Waddell and others. Judgment for plaintiffs, and certiorari overruled by the Superior Court, and defendants bring error. Reversed.

W. V. Custer, of Bainbridge, for plaintiffs in error.

Hartsfield & Conger, of Bainbridge, for defendants in error.

PER CURIAM. This case arose upon a petition to the ordinary to require the defendants to remove obstructions from an alleged private way. The evidence shows that the defendants were the owners of certain lands and to the run of a creek over which people in the community had been traveling to reach the creek for picnicking, fishing, bathing, and for the purpose of baptizing converts of several churches in the neighborhood. The evidence shows that several of the plaintiffs had leased this way from the owners, but that the lease had expired before this proceeding was begun. The evidence further showed that in addition to this short alleged private way, there was a public road which reached the creek a short distance from the particular point at which the alleged private way touched the creek. It appeared from the evidence that the owners of the land fenced up this alleged private way into their inclosed lands, for the purpose of keeping their stock from running at large. It further appeared from the evidence that this alleged private way had been used from 15 to 25 years for the purposes hereinbefore set out. The ordinary, on the trial of this issue, passed an order requiring the removal of the fence which closed the alleged private way. The defendants presented to the judge of the superior court a petition for certiorari, which he sanctioned, and upon the answer of the ordinary, which adopted the petition for certiorari as true, the judge overruled and denied the certiorari. Error is assigned on this judgment. Held, an ex-

amination of the evidence in this case does not show that the plaintiffs were entitled to have removed, by order of court, the obstructions from the alleged private way. There was no evidence which implied a gift or a dedication to the public of the land over which this alleged private way ran. In fact, the leasing of it by certain of the plaintiffs indicated that no prescriptive rights had accrued to the public. The creek, which was used for fishing and bathing and as a baptizing place, certainly could have been fenced, and the very use which the plaintiffs claimed they had for it would have been defeated. It appeared from the evidence that there were other places on the creek which could be used for fishing, bathing, and baptizing. There was also a public road which reached the creek a short distance from the particular point. In connection with what we have here held, see Ga. R. R. & Banking Co. v. City of Atlanta, 118 Ga. 486, 45 S. E. 256. In addition to what we have said the evidence did not show that the alleged private way was not over 15 feet wide. It follows that it was error to overrule the certiorari. Judgment reversed.

BROYLES, C. J., and LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 647)

NEAL v. STATE. (No. 12189.)(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)*(Syllabus by Editorial Staff.)*

1. Criminal law §805(1)—Correct instruction not erroneous because of failure to charge some other legal principle.

A charge which is abstractly correct is not rendered erroneous by a failure to charge some other legal principle applicable to the case.

2. Criminal law §828—Failure to charge that burden was on state to prove guilt beyond reasonable doubt not error without written request.

Where the charge on reasonable doubt sufficiently informed the jury that the burden was on the state, the failure to charge specifically that the burden was on the state to establish defendant's guilt beyond a reasonable doubt was not error in the absence of a timely and appropriate written request.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

John Neal was convicted of an offense, and he brings error. Affirmed.

B. J. Fowler, John R. Cooper, and W. O. Cooper, Jr., all of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

BLOODWORTH, J. [1] 1. The charge of which complaint is made in ground 1 of the amendment to the motion for a new trial contains an abstractly correct principle of law and "a charge which is abstractly correct is not rendered erroneous by a failure to charge some other legal principle applicable to the case." *Gunn v. State*, 23 Ga. App. 545 (3), 99 S. E. 62, and cases cited; *Atlanta & West Point Railroad Co. v. Miller*, 23 Ga. App. 347(3), 98 S. E. 248, and cases cited.

[2] 2. "In the absence of a timely and appropriate written request, the court did not err in failing to charge the jury specifically that the burden was on the state to establish the guilt of the defendant beyond a reasonable doubt. The charge of the court on the subject of a reasonable doubt sufficiently informed the jury that that burden was on the state. *Thomas v. State*, 129 Ga. 419 (4), 59 S. E. 246." *Finch v. State*, 24 Ga. App. 339 (2), 100 S. E. 798. This disposes of the second ground of the amendment to the motion for a new trial.

3. There was ample evidence to support the finding of the jury, which has the approval of the trial judge, and the judgment is affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 585)

J. E. DUNSON & BROS. CO. v. J. C. SMITH SEED CO. et al. (No. 17715.)

(Court of Appeals of Georgia, Division No. 1. April 18, 1921.)

(Syllabus by Editorial Staff.)

1. Contracts \Leftrightarrow 10(4)—When there is written order and written acceptance it is not a unilateral contract.

A contract, consisting of a written and signed order for specified goods at stated prices and a signed acceptance of the order, is not unilateral under Park's Ann. Civ. Code, § 4230.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unilateral Contract.]

2. Evidence \Leftrightarrow 419(15)—Real consideration may be inquired into as between maker and payee.

Where a promissory note contains no recital of consideration except the words "for value received," the real consideration may be inquired into in a suit by the payee against the maker, as far as may be necessary to the defense pleaded.

3. Evidence \Leftrightarrow 419(15)—Parol agreement that note for money actually received was to be set off against maker's claims cannot be shown.

Though a note recites no consideration except "value received," where it was given for money actually received by the maker from the payee, a parol agreement that it was to be

set off against the maker's demands against the payee cannot be ingrafted thereon under Civ. Code 1910, §§ 4268, 5788, 5791, relative to parol evidence.

4. Sales \Leftrightarrow 353(2)—Seller suing for price of rejected goods must allege that he retained and stored them for buyer.

Where the buyer refused to take and pay for goods, the seller cannot recover the entire purchase price in an action on the contract, and not for its breach, without alleging that he stored or retained them for the buyer pursuant to Civ. Code 1910, § 4131.

5. Pleading \Leftrightarrow 352—Proceedings subsequent to erroneous refusal to strike plea are nugatory.

Where the court erred in failing to strike defendant's plea on motion, all subsequent proceedings in the case were nugatory.

Error from Superior Court, Muscogee County; G. H. Howard, Judge.

Action by J. E. Dunson & Bros. Company against the J. C. Smith Seed Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

M. U. Mooty, of La Grange, and Love & Fort, of Columbus, for plaintiff in error.

McCutchen & Bowden, of Columbus, for defendants in error.

LUKE, J. [1] 1. A contract is not unilateral where it consists of a written and signed order for specified goods at stated prices and of the addressee's written and signed acceptance of the order. See Park's Ann. Code, § 4230, with annotations under the catchword "Unilateral."

[2] 2. Where a promissory note recites no consideration except in the words "for value received," and suit is brought thereon by the payee against the maker, the real consideration of the note may be inquired into as far as may be necessary to the defense pleaded.

[3] 3. But in a suit by the payee against the maker of a promissory note reciting that it was given "for value received," a contemporaneous parol agreement cannot be ingrafted thereon by the defendant by testimony to the effect that, while the defendant at the time of executing the note, actually received from the plaintiff the principal sum thereof, yet the defendant had a prior cause of action against the plaintiff, "and said note was to be a set off against the demands of said [defendant] against said [plaintiff] in this case, and was so understood at the time of the execution and delivery of said note." Civil Code 1910, §§ 4268, 5788, 5791; *Chamberlin & Co. v. Beck, Gregg & Co.*, 68 Ga. 346 (5). The alleged parol agreement being inconsistent with the unambiguous terms of the note sued on, the portion of the plea above indicated set forth no defense.

[4] 4. The remainder of the plea being a cross-action upon a contract, and not an ac-

tion for a breach thereof, to recover the entire purchase price of goods which the plaintiff had bought from the defendant, but had refused to take and pay for, and it being nowhere alleged that defendant had stored or retained the property for the vendee, in accordance with the terms of section 4131 of Civil Code 1910, the plea as a whole set forth no valid defense, and was subject to the motion to dismiss, presented at the trial of the case. *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 42 S. E. 878, 59 L. R. A. 122, 94 Am. St. Rep. 112.

[8] 5. The court having erred in failing to strike the defendant's plea on motion, all the subsequent proceedings in the case were nugatory.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(26 Ga. App. 604)

BOYD v. BLAND et al. (No. 12081.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

1. Trial \S 170—Verdict properly directed when demanded.

Where a verdict for plaintiff for the full amount of the principal and interest sued for was demanded by the pleadings and evidence, it was not error to direct a verdict.

2. Bills and notes \S 534—Attorney's fees not recoverable when notice not given 10 days before filing suit.

In an action on a note providing for attorney's fees, such fees are not recoverable under Civ. Code 1910, \S 4252, where suit was filed 8 days after notice was given that suit would be brought, though the notice was given more than 10 days before the return day of the term of court stated therein.

Error from Superior Court, Candler County; R. N. Hardeman, Judge.

Action by Ella Bland and others against J. P. Boyd. Judgment for plaintiffs, and defendant brings error. Affirmed on condition.

Lanier, Deal & Renfro and R. Lee Moore, all of Statesboro, and Hines, Hardwick & Jordan, of Atlanta, for plaintiff in error.

Brannen & Booth and F. B. Hunter, all of Statesboro, and Kirkland & Kirkland, of Metter, for defendants in error.

BROYLES, C. J. [1] 1. Under the pleadings and the evidence a verdict in favor of the plaintiffs for the full amount of the principal and interest sued for was demanded, and the court did not err in so directing.

[2] 2. The note sued upon contained the usual stipulations as to the payment of attorney's fees, and it was alleged in the peti-

tion that 10 days before the filing of the suit written notice was given the defendant that suit upon the note would be filed, returnable to the May term, 1919, of Candler superior court, and that the plaintiffs would claim the 10 per cent. attorney's fees stipulated in the note. Upon the trial, however, it was shown that the suit was filed 3 days after the above notice was given the defendant, although the notice was given more than 10 days before the return day of the term of court stated. The defendant not having been given the notice 10 days before the suit was brought, the plaintiffs were not entitled to collect any attorney's fees, and the court erred in including such fees in his directed verdict in favor of the plaintiffs. Civil Code, \S 4252; *Finch v. Cox*, 18 Ga. App. 284(1), 89 S. E. 459; *Stone v. Marshall & Co.*, 137 Ga. 544, 73 S. E. 826.

3. Under the rulings in the preceding notes the judgment is affirmed on condition that at the time the remittitur is made the judgment of the lower court the plaintiffs write off from the verdict and judgment the sum of \$224.75, the amount of the attorney's fees found by the jury; otherwise the judgment is reversed.

Judgment affirmed on condition.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 703)

ELROD v. CHAMBLEE. (No. 11816.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by Editorial Staff.)

1. Trial \S 250—Charge should be relevant to pleadings and evidence.

The charge should be relevant, and so adjusted to the pleadings and the evidence as not to interject any principle or theory not authorized thereby.

2. Trial \S 134—Determination of questions of fact is for the jury.

The determination of any issuable question of fact lies within the province of the jury.

3. Trial \S 192—Charge may, but need not, state or assume that undisputed fact has been proved.

When the evidence on a question is undisputed, the judge in the charge may, but is not required to, state or assume that such fact has been proved.

4. Appeal and error \S 1068(4)—Charge as to costs on defendant's theory harmless, where jury rejected such theory.

In a proceeding under a distress warrant, an instruction that, if the jury found in accordance with the tenant's contention as to the amount of rent due, and that prior to the institution of the distress warrant he had tendered that amount, he would not be liable for the costs, if erroneous, was immaterial, where the

jury found in accordance with the landlord's contention as to the amount due.

Error from Superior Court, DeKalb County; John B. Hutcheson, Judge.

Proceeding under distress warrant by H. W. Chamblee against V. E. Elrod. Judgment for plaintiff, and defendant brings error. Affirmed.

A. M. Brand, of Lithonia, for plaintiff in error.

L. J. Steele, of Decatur, for defendant in error.

JENKINS, P. J. [1, 2] 1. This was a proceeding under a distress warrant. The landlord claimed that the amount due under the rent contract was 1,000 pounds of lint cotton, and that its value was 32½ cents a pound at the time it became due. The tenant claimed that the agreed rental was \$225 in money. The tenant testified that he had tendered the \$225 in cash to the landlord before the issuance of the distress warrant. The landlord, while admitting the tender, testified that he did not remember whether it was made just before or just after the issuance of the distress warrant. The jury found for the landlord a sum in accordance with his contention as to the terms of the contract. The defendant excepted to a portion of the charge of the court, which was to the effect that, if the jury should find in accordance with the defendant's contention as to the amount of rent due, and that prior to the institution of the distress warrant he had tendered that amount, he would not be liable for the costs. Held, while a charge should be relevant and so adjusted to the pleadings and the evidence as not to interject any principle or theory not thus authorized (*McConnell Bros. v. Slappey*, 134 Ga. 95 [7], 67 S. E. 440; *Peagler v. Davis*, 143 Ga. 11 [6], 84 S. E. 59, Ann. Cas. 1917A, 232; *Atlantic Coast Line R. Co. v. Arant*, 143 Ga. 561, 85 S. E. 709; *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620, 37 S. E. 873), the determination of any issuable question of fact lies within the province of the jury.

[3] Where the evidence on such a question is undisputed, the judge may, but is not required to, state or assume that such a fact has been proved. *New Ware Furniture Co. v. Reynolds*, 16 Ga. App. 19 (1, a), 84 S. E. 491; *Jones v. Wall*, 22 Ga. App. 513 (2), 96 S. E. 344; *Ga. Fla. & Ala. Ry. Co. v. Jernigan*, 128 Ga. 501 (1), 57 S. E. 791.

[4] Furthermore, the charge complained of could not in any possible event be accounted as reversible error, since the verdict, in accordance with the plaintiff's contention as to the amount of rent due under the contract, rendered entirely immaterial the charge governing the costs of the case under the defendant's tender of the lesser amount.

2. The verdict was warranted by the evidence, there being positive testimony by the plaintiff both as to the amount of cotton due under the contract as rental and the market value thereof when the rent became due.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 713)

J. J. WILLIAMSON & CO. v. MORGAN.
(No. 11987.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 173(6) — Defense is waived unless made by demurrer or plea, and cannot be set up for first time on appeal.

The statute of frauds is a personal defense, and, unless made by demurrer, plea, or answer, will be treated as having been waived. It cannot be set up for the first time in the Court of Appeals.

2. Frauds, statute of \S 115(3)—Written confirmation by party sought to be charged of previous verbal agreement is sufficient.

Where "the party to be charged therewith" admits, in a signed, written confirmation, the making by him of a previous verbal agreement complete in all the usual elements of a contract, this constitutes a compliance with the statute of frauds.

3. Contracts \S 10(1, 4)—Contract confirmed by seller in writing not unilateral; contract must have two or more parties and be binding on all.

A verbal contract was entered into, showing the sale and purchase of a specified number of bales of cotton of a definite grade and at a definite price, delivery to be made according to the prevailing custom in ten days after the date of the sale, and immediately after the verbal contract was made a written confirmation thereof was signed by the seller and delivered to the purchaser and accepted by him. The contract was not unilateral, as being only an offer or promise to sell the cotton, but it was an executed contract of sale, with constructive delivery of the cotton, and was mutually binding.

(Additional Syllabus by Editorial Staff.)

4. Frauds, statute of \S 144—Defendant's admission of contract when sued held to take it out of statute.

Where defendant, sued on a contract for the sale of cotton, by his plea admitted making the contract and confirming it in writing and the consideration therefor, and claimed a breach on the part of plaintiff, this, in itself, was sufficient to take the contract out of the statute.

Error from City Court of Polk County; John L. Tison, Judge.

Action by J. J. Williamson & Co. against J. A. Morgan. Judgment for defendant, and plaintiff brings error. Reversed.

In this suit J. J. Williamson & Co. sought to recover as damages the difference between the contract price and the market price in the purchase and sale of 150 bales of cotton alleged to have been purchased by them from the defendant, J. A. Morgan. The facts, briefly stated, make the following case:

Both parties were engaged in the business of buying and selling cotton. On October 22, 1918, the plaintiffs' agent, at Rockmart, bought for them from the defendant, by a parol contract, 150 bales of cotton, and the contract was confirmed by the defendant on the same day, by letter, as follows:

"Rockmart, Ga., Oct. 22, 1918. Messrs. J. J. Williamson & Co., Atlanta, Ga.—Dear Sirs: Beg to confirm the sale of 150 bales of cotton sold to you to-day at 37½ basis Atlanta 4's Atlanta grades and differences, f. o. b. Rockmart. Yours truly, J. A. Morgan."

No actual date of delivery of the cotton is fixed by the contract. The evidence of the plaintiffs shows, however, that in the territory where this contract was made it was the custom for the purchaser to take up deliveries within ten days after purchase, and, according to their agent, the seller knew, at the time of making the contract, that the purchasers, through their agent, would not take the cotton for some days, as the agent was then leaving Rockmart to inspect and receive cotton bought at other points. On the afternoon of October 27, five days afterwards, the plaintiff in Atlanta called up the defendant over the telephone, and asked what date would be agreeable to deliver and pay for the cotton. The defendant answered that the time for such delivery would expire that day at sundown; and that if the cotton were not called for and paid for before that time the trade would be off. It was then too late for the plaintiffs to reach Rockmart by any train that afternoon, and the defendant was notified that the plaintiffs considered the trade still binding and would call for the cotton the next day and their agent went by the next morning's train with the money to receive and pay for the cotton. On arriving at Rockmart the agent found that the defendant had already sold the cotton and was in the act of delivering it to another party, and refused to carry out the contract with the plaintiffs. The evidence is uncontradicted that the difference in the contract price and the market price was \$1,312.50, for which amount the suit was brought. According to the testimony of the plaintiffs' agent, he asked the defendant at Rockmart if he (the defendant) was offering any cotton that day, and the defendant announced that he had offered 150 bales at 37½ cents that day, and the agent asked if the defendant

would allow him to make that offer if the other party did not take it.

The agent testified:

After a while "he said I might make the offer. I went over to the hotel and offered it to my house at 37½ cents and they took it. I went back and told him they would take it and wrote out a confirmation. I gave it to him and he said it was all right."

This refers to the confirmation heretofore set out in full in this statement. The defendant in his testimony admitted substantially the facts as stated above. He admitted the sale of the cotton, the confirmation of the sale of the cotton, and all that took place subsequently, but denied that there was a custom to give ten days for delivery by the seller to the purchaser of the cotton bought; stating that he did not know of any such custom, but that usually, in making sales in Rockmart, time was specified for delivery, unless the cotton was taken up at the time of the sale, and as to this sale it was understood by the plaintiffs' agent and himself that the 150 bales of cotton which had been sold on October 22 would be taken up "any time during the week or any time during the day of October 28, Tuesday." There was no mention of any custom or reasonable time to take up the cotton. At the conclusion of the evidence, on motion of the defendant, a nonsuit was awarded.

The plaintiffs' motion for a new trial, based upon the usual general grounds, was overruled, and they excepted.

E. S. Ault, of Cedartown, and Frank A. Hooper & Son, of Atlanta, for plaintiff in error.

Mundy & Watkins, of Cedartown, for defendant in error.

HILL, J. (after stating the facts as above). Counsel for the plaintiffs and the defendant differ as to the grounds upon which the nonsuit was based, counsel for the plaintiffs insisting that the only ground upon which the motion for a nonsuit was made and the only ground that was considered by the court was that the contract sued upon was unilateral, and counsel for the defendant insisting that it was also insisted by the defendant that the contract was not in writing as required by the statute of frauds and falls within section 3222 of the Civil Code 1910, which is a codification of that statute.

[1] Whatever may be the fact as to this, the record shows that the statute of frauds was not properly before the trial court. It has been frequently held in this state that the statute of frauds must be set up in the trial court by a special plea, and that the defendant waives this defense if it is not expressly pleaded. *Marks v. Talmadge*, 8 Ga. App. 559, 69 S. E. 1131, and cases cited.

[4] Another reason why the statute of

frauds was not in the case in the court below and is not in it here is that the defendant's plea admits the making of the contract, admits the confirmation of the contract by him in writing, admits the consideration of the contract, and claims a breach upon the part of the plaintiff in not taking up or receiving the cotton and paying for it within the period alleged by the defendant; and this would be sufficient of itself to take the case out of the operation of the statute of frauds. *Capital City Brick Co. v. Atlanta Ice Co.*, 5 Ga. App. 443, 63 S. E. 562, and decisions cited.

[2] Still another reason why the judgment of nonsuit was not based upon the statute of frauds is the fact, shown by the record, that the statute of frauds was complied with by the defendant, who was the party to be charged. The statute of frauds does not require that the contract shall be signed by both parties to the contract. The statute of frauds provides that, to make the obligations there mentioned binding on the promisor, the promise must be in writing, "signed by the party charged therewith, or some person by him lawfully authorized." Civil Code, § 3222. In other words, it is not necessary that both parties shall sign the contract to bring it within the statute, but only that the party sought to be bound by it shall have signed it. The contract might be created by a verbal agreement, and, if subsequently recognized in writing signed by the party to be charged therewith, showing that the contract created orally was in fact made, the statute would be complied with, provided, of course, that it be shown by the subsequent writing or series of writings that the contract was made and was fully intelligible without parol evidence. *Capital City Brick Co. v. Atlanta Ice Co.*, supra. The evidence in this case shows that the defendant admitted the creation of the contract to which the agent of the plaintiffs testified, and that almost contemporaneously therewith the defendant, the party to be charged, confirmed the parol contract explicitly and fully, and the confirmation showed an agreement coextensive with the stipulations of the parol contract.

[3] Was the contract unilateral? This expression, frequently used by the courts and the text-writers, is a contradiction in terms. A contract must have two or more parties in full accord as to all of its terms, and must be binding upon all parties thereto. A writing or paper alleged to be a contract, binding only upon one party and not binding the other, is not a contract at all. It is simply "a scrap of paper." Parties to a contract may not be bound in the same way or to the same extent, but each party to the contract must be bound according to the terms of the contract, and, of course, in all contracts a consideration is a necessary condition precedent to the legality of the contract, although a promise is a valid consideration for a prom-

ise. Leaving out of the question therefore the statute of frauds, and not confusing it with the subsequent grounds of discussion, does the evidence show a valid contract in this case, or does the evidence merely show an offer to make a contract, which could be withdrawn by the offerer at any time prior to the other party doing some act which will bind him? It is insisted by the defendant that there was no binding contract, because the plaintiffs were not bound; that he entered into the obligation to sell the cotton, but that the plaintiffs made no obligation to pay for it or to take it when it was offered, and therefore the contract was not mutual.

Here there was no promise to sell cotton and no promise to take the cotton in the future, but there was a positive present sale of 150 bales of cotton by the defendant to the plaintiffs, through the agent of the plaintiffs, at a definite price and of a definite grade. In other words, it was a cash sale of spot cotton. True, there was no delivery of the cotton, but, according to the plaintiffs' evidence, there was a custom existing in the territory that a delivery made within ten days was a full compliance with that feature of the contract. Immediately after this parol contract was entered into it was confirmed in writing specifically identifying the parol contract in all its terms, and this confirmation by the defendant was delivered to the plaintiffs and accepted by them. Both parties to the contract were bound by its terms; one to deliver the cotton so sold, within ten days, to the purchasers and the other to receive and pay for the cotton when delivered or when offered within ten days. Could it be doubted that the obligation to accept and pay for it according to the terms of the contract was binding upon the purchasers, as well as that the obligation to deliver within ten days was binding upon the seller?

Without extending this discussion, we think that under the evidence in this case the contract upon which the suit is predicated was first created as a parol contract to which both parties assented; that the confirmation in writing subsequently made by the defendant and accepted by the plaintiffs did not affect the nature of the contract, but simply furnished evidence of its previous oral creation; and that the contract was binding upon both parties, provided the jury on the trial of the case should find that there existed a general custom relating to the sale of cotton in that territory which gave ten days to the purchaser to receive and pay for the cotton, and that if the plaintiffs did actually offer to receive it and pay for it within ten days, the custom existing, it was a duty, arising under the contract, for the defendant to deliver the cotton and accept the money. After the cotton had been purchased by the plaintiffs through their agent, and before the expiration of the ten days, if it had been offered to them by the defendant and they

had refused to accept it and pay for it, can it be doubted that they would have been responsible to the plaintiff for any damages resulting from such breach of the contract? Not only had the plaintiffs and the defendant made the contract, but the plaintiff had asked the defendant for a written confirmation of the contract, which confirmation was made by him and accepted by them; and if after these things were done they had refused to receive the cotton and pay for it, if tendered within ten days by the defendant, relying upon his contract with them, and the price of cotton had gone down in the meantime, he could have recovered for their breach of the contract.

The case should have been submitted to the jury, and the court erred in granting a nonsuit and refusing to grant the plaintiffs' motion for a new trial.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 426)

CRAYTON v. STATE. (No. 12014.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 1129(1)—Error on exceptions pendente lite must be assigned on exceptions, and not on judgment complained of.

Before exceptions pendente lite can be considered by the appellate court, error must have been assigned in the main bill of exceptions on the exceptions pendente lite, and not merely on the judgment complained of in the exceptions pendente lite, or such an assignment must be made by the permission of the court before the argument of the case in the appellate court.

2. Master and servant \S 67—Offense under Labor Contract Act properly defined by charge.

In a prosecution for violation of the Labor Contract Act of 1903, court did not err in charging the jury that "the intent to defraud must have existed at the time the money was advanced before the defendant would be guilty under this section; before you would be authorized to find the defendant guilty, you would have to believe that the money charged in this accusation, \$3, was received by the defendant in this case, at the time he did receive it, with the intent to defraud the prosecutor."

3. Criminal law \S 762(3)—Charge held not to express opinion of court.

In a prosecution for violation of the Labor Contract Act, an instruction that, before the jury would be authorized to find the defendant guilty, they would have to believe that the money charged in the accusation, "\$3, was received by the defendant in this case, at the time he did receive it," with the intent to defraud the prosecutor, was not erroneous, in that court expressed an opinion to the jury

as to what had been proven by using the phrase "\$3, was received by the defendant in this case, at the time he did receive it."

4. Master and servant \S 67—Evidence insufficient to show violation of Labor Contract Act.

In a prosecution for violation of the Labor Contract Act of 1903, the burden of proving that the accused did not have good cause for his failure to carry out his contract is upon the state, and this burden is not carried by the testimony of the hirer that the accused had no good and sufficient reason for not performing the services agreed on, or for not returning the articles of value advanced by the hirer on the strength of the contract, such testimony amounting to a mere opinion or conclusion, and is worthless, unless supported by proof of sufficient facts to give it probative value.

Error from City Court of Sparta; R. H. Lewis, Judge.

Mack Crayton was convicted of a violation of the Labor Contract Act, and brings error. Reversed.

The defendant, in his amended motion for a new trial, contended that the court erred in charging the jury as follows:

"The intent to defraud must have existed at the time the money was advanced before the defendant would be guilty under this section; before you would be authorized to find the defendant guilty, you would have to believe that the money charged in this accusation, \$3, was received by the defendant in this case, at the time he did receive it, with the intent to defraud the prosecutor."

He also contended that the court erred in giving said charge, for the reason that, in so doing, the court expressed an opinion to the jury as to what had been proven, by using in said excerpt of the charge the phrase, "\$3, was received by the defendant in this case, at the time he did receive it."—Statement by editor.

G. L. Dickens, of Sparta, for plaintiff in error.

R. L. Merritt, of Sparta, for the State.

BROYLES, C. J. [1] 1. Before exceptions pendente lite can be considered by this court, error must have been assigned in the main bill of exceptions upon the exceptions pendente lite, and not merely upon the judgment complained of in the exceptions pendente lite, or such an assignment must be made, by the permission of this court, before the argument of the case here. *Ponder v. State*, 25 Ga. App. 768, 105 S. E. 318, and authorities cited. Under this ruling the bill of exceptions in the instant case contained no proper assignment of error upon the exceptions pendente lite, and they therefore cannot be considered.

[2, 3] 2. The amendment to the motion for a new trial is without merit.

[4] 3. In a prosecution for violation of the "Labor Contract Act" of 1903 (Penal Code 1910, § 715), the burden of proving that the accused did not have good cause for his failure to carry out his contract is upon the state; and this burden is not carried by the testimony of the hirer that the accused had no good and sufficient reason for not performing the services agreed upon, or for not returning the articles of value advanced by the hirer upon the strength of the contract. Such testimony amounts to a mere opinion or conclusion of the witness, and is worthless, unless supported by proof of sufficient facts to give it probative value. *Ashley v. State*, 22 Ga. App. 626, 97 S. E. 82. Under this ruling, and the facts of the instant case, the verdict was not authorized by the evidence, and the court erred in overruling the motion for a new trial.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 587)

MCCRAY v. BLEDSOE & HOLMES.
(No. 11921.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

1. Sales \S 467 — When conditional contract duly attested and recorded, title does not pass until payment.

Where personal property is delivered to the buyer under a written contract of conditional sale, which is duly attested and recorded as required by Civ. Code 1910, §§ 3318, 3319, the legal title does not vest in the purchaser until payment of the purchase price.

2. Sales \S 473 (2) — Property sold conditionally held subject to attachment in action for price, notwithstanding sale to third person.

Where one to whom property was sold under a contract of conditional sale, duly attested and recorded, sold the property to claimant and absconded, without paying the price, the property was subject to attachment in an action for the purchase money, notwithstanding the sale to claimant.

Error from City Court of Carrollton; James Beall, Judge.

Proceeding on a claim by Harvey McCray to property attached by Bledsoe & Holmes. Judgment for plaintiff in attachment, and the claimant appeals. Affirmed.

Taylor Smith, of Bremen, and Boykin & Boykin, of Carrollton, for plaintiff in error. Smith & Smith, of Carrollton, for defendant in error.

BLOODWORTH, J. [1, 2] Where personal property was delivered to the buyer under a contract of conditional sale, which is in writ-

ing and duly attested and recorded as required by law (Civ. Code 1910, §§ 3318, 3319), the legal title will not vest in the purchaser until the purchase price has been paid (*Atkinson v. Brunswick-Balke-Collender Co.*, 144 Ga. 694, 87 S. E. 891), and where such purchaser sold the property, and absconded without paying any portion of the purchase price, and an attachment for the purchase money was issued and levied, and a claim was filed by one to whom the first purchaser has sold the property, and on the trial of the claim case these facts appeared without contradiction, the court did not err either in overruling the motion "to direct a verdict in favor of the claimant and dismiss the levy of the attachment," or in thereafter directing the jury to return a verdict in favor of the plaintiff, finding the property subject. The plaintiff in error cites and relies on the decision in the case of *McNabb v. Brice*, 120 Ga. 747, 48 S. E. 199. In that case, as shown by the record in the office of the clerk of the Supreme Court, the note given for the purchase money of the property, and in which it was sought to retain the title thereto, was never recorded.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 631)

CHANCE v. STATE. (No. 12142.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

Criminal law \S 959 — Denial of continuance and dismissal of motion for new trial because defendant not ready held not error.

Where defendant was not ready for a hearing on his extraordinary motion for a new trial at the time it was set for hearing, the refusal of a continuance and dismissal of the motion held not error.

Error from City Court of Carrollton; Leon Hood, Judge.

Marvin Chance was convicted of an offense, and he brings error. Affirmed.

Smith & Millican, of Carrollton, for plaintiff in error.

Willis Smith, Sol., of Carrollton, for the State.

BLOODWORTH, J. The plaintiff in error filed an extraordinary motion for a new trial, alleging, in part, that on June 14, 1920, he was tried and convicted of a misdemeanor; that during the same term of the court he filed a motion for a new trial on the general grounds; that on November 5 his motion for a new trial was dismissed; that "the reason that he did not prepare and file a brief

of evidence in said case prior to the time it was dismissed was that the state's counsel had a part of the evidence which was adduced on the trial of the case, and would not produce the same, and movant was unable to prepare and file a brief of evidence without the documentary evidence introduced in said case, which was held in possession of counsel for the state"; that he did not have any notice of the date fixed for the hearing by the court when the original motion was dismissed; and that the alleged errors complained of in the original motion have never been determined by the court. In the extraordinary motion it was prayed "that state's counsel be required to turn over to movant, for the purpose of preparing and filing said brief, the documentary evidence adduced on the trial of said cause." This extraordinary motion for a new trial was set for a hearing at 9 o'clock a. m. on January 8, 1921. At that time the defendant's counsel moved for a continuance, on the ground that he was not ready for the hearing, and the court refused the continuance, and on the same day passed the following order:

"The within and foregoing motion coming on for a hearing, and, no brief of evidence having been filed and approved, the within motion is hereby dismissed."

Held, that the court did not err in overruling the motion for a continuance or in dismissing the extraordinary motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 704)

HINES, Director General, v. VANN.
(No. 11819.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by the Court.)

1. Carriers \S 205—Excuses for nondelivery or delivery in damaged condition specified.

"When a carrier fails to deliver the goods intrusted to his care, or delivers them in a damaged condition, no excuse avails him, unless it was occasioned by the act of God, the public enemy, an inherent vice or natural deterioration of the object carried, or, in case of live stock, the viciousness of the animals, or that he is excused by special contract made with the shipper, by statute, or by negligence of the shipper." Louisville & Nashville R. Co. v. Warfield & Lee, 129 Ga. 478(2), 477, 59 S. E. 234; Ga. R. Co. v. Spears, 66 Ga. 485(1), 489, 42 Am. Rep. 81; Cooper v. Raleigh & Gaston R. Co., 110 Ga. 659(2, 3) 661, 36 S. E. 240; Civ. Code 1910, \S 2712, 2713.

2. Appeal and error \S 1005(2)—Carriers \S 228(5)—Approved verdict not set aside when contrary verdict not demanded; evidence held not to demand finding that cow died from injuries inflicted by another cow.

The trial judge, in the exercise of his discretion, approved the finding of the jury; and, since the evidence does not absolutely demand a finding for the defendant, this court is unauthorized to set the verdict aside.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by H. H. Vann against W. D. Hines, Director General. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet & Branch, of Quitman, and Merrill & Moore, of Thomasville, for plaintiff in error.

B. B. Earle, of Thomasville, for defendant in error.

JENKINS, P. J. [1, 2] This is a suit for the value of a cow, which died while in the hands of the defendant carrier. In support of its special plea, the carrier sought to overcome the presumption of liability against it by showing, from circumstantial evidence, that the cow must have died on account of injuries inflicted by another animal belonging to the plaintiff and shipped in the same car. In our opinion the evidence thus adduced, while strong, did not absolutely demand such a conclusion. Although the conductor of the train testified that "some of the animals in the car were fighting," he "did not notice which one was the aggressor or the victim." There was evidence that the cow "had an ugly gash in the back of her flank, of the sort that could have been made by another animal's horn." One witness also testified that the cow died, "he is satisfied, from the injury in her flank"; but this witness was not an expert, and testified only by way of opinion, after refreshing his recollection from records made at the time of the occurrence, about a year previous; and neither this witness nor any other witness gives any sort of evidence as to the depth, nature, or character of this wound. Besides, there was evidence from defendant's witnesses that the knees of the cow, "both front and back," were "skinned and bruised, and one of her hips skinned," which tended to disprove the carrier's evidence to the effect that there were no unusual jerks or jars or anything in the handling of the train which could have caused the injury, and to support the theory of the plaintiff that negligence in this respect contributed to the death of the animal. Furthermore, while the defendant sought to remove the presumption against it by showing the absence of unusual and unnecessary jolts and jars in the handling of its car, no evidence was adduced for the purpose of showing diligence in loading and

unloading the animal, in furnishing a proper car and equipment, and in the attention given it while in the hands of the defendant carrier.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(23 Ga. App. 700)

ROSE & DASHER v. TAYLOR, LOWENSTEIN & CO. (No. 11808.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by the Court.)

1. Pleading \S 231—Plaintiff entitled to amend by adding new count on same cause of action.

If the original petition contain enough to amend by, a plaintiff may, at any stage of the cause, as matter of right, amend his petition by adding another and separate count based upon the same cause of action. Civil Code 1910, §§ 5681-5683; Maxwell v. Harrison, 8 Ga. 61 (2), 52 Am. Dec. 385; Gainesville Ry. Co. v. Austin, 122 Ga. 823, 824(8), 50 S. E. 983; Cooper v. Portner Brewing Co., 112 Ga. 894 (3), 900, 88 S. E. 91; Southern Ry. Co. v. Chambers, 126 Ga. 404(5), 55 S. E. 37, 7 L. R. A. (N. S.) 926; National Surety Co. v. Farmers' Bank, 145 Ga. 461(1), 89 S. E. 581; 81 Cyc. 400; 6 Stand. Enc. Procedure, 710.

2. Pleading \S 225(2) — Disallowance of amendment setting up new count conforming to court's construction of contract in deciding demurrer held error.

Where, in order to prevent a dismissal of the plaintiffs' petition, under an order of the court sustaining a demurrer, setting up a different construction of the contract sued on, the plaintiffs tendered an amendment, as permitted by the order of the court and conforming to the court's construction of the contract, but made in the form of a second and independent count, it was error to disallow such an amendment and dismiss the petition, where the construction of the contract as thus sued on was the proper and correct one. In such a case it is unnecessary to determine whether or not, after offering such an amendment, as in compliance with the court's order on the demurrer, the plaintiffs might not only complain that the court erred in dismissing the petition as amended by the second count, but also that the petition was good on the original count. See Glover v. Savannah Ry. Co., 107 Ga. 34(3), 32 S. E. 876; Farrer v. Edwards, 144 Ga. 553(1), 87 S. E. 777; McConnell v. Frank E. Block Co., 26 Ga. App. —, 106 S. E. 617; Gainesville Ry. Co. v. Austin, 127 Ga. 120(1), 56 S. E. 254; Hay v. Collins, 118 Ga. 243(2), 44 S. E. 1002; Southern Ry. Co. v. Chambers, 126 Ga. 404(5), 55 S. E. 37, 7 L. R. A. (N. S.) 926; National Surety Co. v. Farmers' Bank, 145 Ga. 461, 467, 89 S. E. 581.

3. Sales \S 76—Contract construed as to price in case of delay in furnishing cars.

The court did not err in its construction of the contract, but erred in refusing to allow the proffered amendment by which the plaintiffs sought to add to the petition a count in accordance with such construction, and in dismissing the petition.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Rose & Dasher against Taylor, Lowenstein & Co. Judgment dismissing the petition, and plaintiffs bring error. Reversed.

Plaintiffs filed a declaration in attachment to recover the purchase price of a tank car of turpentine shipped to the defendants under a written contract. The amount claimed was "eight cents per gallon in bulk below the official closing, Savannah, Georgia, market * * * on date of bill of lading," June 6, 1919, when the "full tank" car was "loaded" and delivered to the carrier at Bannockburn, Ga., for shipment to the defendants at Savannah. The clauses of the contract upon which plaintiffs rely are as follows:

"Place of Delivery.—The turpentine to be delivered into tank cars of the buyer * * * by the seller, all f. o. b. Bannockburn, Ga., free of expenses to the buyer."

"Price.—For turpentine to be eight cents per gallon in bulk, below the official closing Savannah, Ga., market * * * on date of bill of lading when full tank cars are loaded."

"Terms.—The buyer is to remit for proceeds of all shipments promptly after receipt of signed bills of lading and detailed weights."

Defendants demurred to the declaration as originally filed and as amended, upon the ground that the written contract, which was attached to the declaration, did not warrant a recovery of the amount sued for, viz. the market price of the turpentine based upon the Savannah market as of the date of the bill of lading issued when the car was loaded by plaintiffs, on June 6, 1919; but they claimed a lesser liability under other clauses of the contract, viz. the market price based on the Savannah market 10 days after the day they received written instructions from plaintiffs to furnish the tank car in question, which was the price on May 29, 1919. The clauses upon which defendants rely are as follows:

"Tank Cars: Empty tank cars are to be furnished by buyer within a reasonable time after written instructions are given that same are needed and can be loaded promptly. The ten days is to be considered a reasonable time, and if tank cars are not furnished within ten days, the price of said turpentine is to be based on the price of the tenth day after receipt of such written notice by the buyer."

The court construed the contract in accordance with defendants' construction, and sustained their demurrers, but with leave given the plaintiffs to amend the petition accordingly. The plaintiffs, within the prescribed time, tendered an amendment in the form of a second and independent count, conforming to the court's construction of the contract. The court disallowed the amendment and dismissed the petition.

Oliver & Oliver, of Savannah, and Dan R. Brice, of Valdosta, for plaintiffs in error.

Lawrence & Abrahams, of Savannah, for defendants in error.

JENKINS, P. J. (after stating the facts as above). [1-3] The language of the contract fixing the price of turpentine according to its quoted value on the tenth day after notice to furnish tank cars had been given must, in our opinion, not only be taken as the measure of damages for any negligent failure to promptly furnish the cars, but must also be taken and construed as an agreement fixing the price of the turpentine in accordance with the conditions and emergencies causing delays for which defendants might not be in any way responsible. While in some cases the market price based upon such 10-day period might be favorable to the defendants, it is just as likely that such an agreement would operate in favor of the plaintiffs. It is not alleged that the delay in furnishing the car was occasioned by any fraud, or even by negligence, of the defendants, and it may have resulted from the act of some third party. So far as the record discloses, the situation arising from the delayed arrival of the car was simply such as was naturally to be anticipated, and as appears to have been in the minds of the parties when the agreement was entered upon.

Judgment reversed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 631)

HUTCHINS v. STATE. (No. 12140.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(*Syllabus by Editorial Staff.*)

Criminal law §935(1)—New trial properly denied when evidence sufficient.

Where there was abundant evidence of defendant's guilt, the overruling of a motion for new trial was not error.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Homer Hutchins was convicted of an offense, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

LUKE, J. This case is here for review upon the sole assignment of error that the evidence does not authorize the verdict. The evidence is abundant to show the guilt of the defendant of the crime with which he was charged. It was not error to overrule the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 648)

CULBERSON v. STATE. (No. 12199.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(*Syllabus by Editorial Staff.*)

1. Criminal law §1064(6)—Motion for new trial, complaining of court's examination of witnesses, held too vague.

A motion for a new trial, complaining that after a witness for defendant had been examined and cross-examined and excused the judge "asked several questions of the said witness, being an unusual practice," was too vague and indefinite to raise anything for consideration in the Court of Appeals.

2. Criminal law §935(2)—New trial improperly denied when evidence insufficient.

When there was no evidence to authorize defendant's conviction, the overruling of a motion for a new trial was error.

Error from City Court of Hall County; W. B. Sloan, Judge.

J. H. Culberston was convicted of an offense, and he brings error. Reversed.

J. B. G. Logan, of Homer, for plaintiff in error.

E. D. Kenyon, Sol., of Gainesville, for the State.

BROYLES, C. J. [1] 1. The amendment to the motion for a new trial is as follows:

"Because upon the trial of said case the court erred in the following point and particular: What happened is as follows: After the witness for the defendant had been examined and cross-examined by the solicitor of said court, the solicitor having excused the witnesses, the judge then, at the conclusion of the evidence of each of the said witnesses for the defendant, asked several questions of the said witness, being an unusual practice of said court."

This ground is too vague and indefinite to raise any question for the consideration of this court.

[2] 2. As disclosed by the record, there was no evidence to authorize the defendant's

conviction, and the court erred in overruling the motion for a new trial.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(26 Ga. App. 424)

JACKSON v. STATE. (No. 12013.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1921.)

(Syllabus by Editorial Staff.)

1. Criminal law §768(1)—Charge as to effect of plea of not guilty on two counts of indictment held not misleading.

In a prosecution for forgery under an indictment in two counts charge that defendant's plea of not guilty has the effect of defendant saying, "He is not guilty under either count, and that makes the issue for you to determine whether he is guilty under the first count, or whether he is guilty under the second count, or whether he may be guilty under one count and not guilty under the other count," held not misleading as instructing jury to find him guilty under one count or the other.

2. Forgery §48—Charge that conviction might be had under count setting out unindorsed check, though evidence showed an indorsed check held not error.

In a prosecution for forgery under an indictment in two counts, the first setting out an indorsed check and the second an unindorsed check, charge that conviction might be had on second count, if check in evidence corresponded in all particulars with that set out in the second count, except that check was indorsed, held not error.

3. Criminal law §1178—Grounds of motion for new trial, not argued, not considered.

In a prosecution for forgery, grounds of the motion for a new trial, not argued, will not be considered on writ of error.

Error from Superior Court, Barrow County; Andrew J. Cobb, Judge.

Roy Jackson was convicted of forgery, with recommendation that he be punished as for a misdemeanor, and he brings error. Affirmed.

The amended motion for new trial, as to grounds considered by the court, was as follows:

(4) Because the court erred in charging the jury as follows:

"To this indictment Roy Jackson enters his plea of not guilty. He, at this time, is alone on trial. The effect of that plea is that he says that he is not guilty under either count, and that makes the issue for you to determine, whether he is guilty under the first count, or whether he is guilty under the second count, or whether he may be guilty under one count and not guilty under the other count. His general plea of not guilty makes the issue with the state, which he says is not guilty at all under either count."

This charge was error for the following reasons:

(a) Its wording was so confused and ambiguous that the said charge did not clearly present to the jury the issues to be tried in said case, nor give to them any proper instructions as to what issue they were to determine in this case.

(b) The language of said charge was such that in effect it instructed the jury that the defendant was guilty of at least one of the offenses charged in the indictment, and the only question submitted to the jury by said charge was whether the defendant should be found guilty of either one or more of the offenses charged in the indictment; said charge absolutely excluding from the jury the question of the defendant's innocence of all of the offenses charged in the presentment. In other words, the effect of the said charge was to direct a verdict of "guilty," and leaving the only issue to be determined by the jury whether he was guilty of only one or more of the offenses charged in the indictment.

(c) The said charge was error, for the reason that it instructed the jury "that the defendant said his plea of not guilty made the issue with the state that he was not guilty at all under either count in the indictment, but did not instruct the jury that this was really the issue made by said plea; in other words, the said charge instructed the jury that the defendant himself said that such was the effect of his plea of not guilty, but did not even intimate that the court instructed the jury that this claim of the defendant was a correct or proper claim. Nowhere in his charge did the court correct the errors above alleged, by proper instructions to the jury."

(7) Because the court erred in charging the jury as follows:

"Now, gentlemen of the jury, you will find in the first count of the indictment that the check described therein is a check which is alleged in the indictment to have been indorsed, and you will determine whether the check which has been indorsed, in evidence before you, corresponds in all material particulars to the check which is described in the count. You will find that the check which is described in the second count is not described as having been indorsed, and if you find that the check, which was indorsed, in evidence before you, corresponds with the check which is described in the second count in all particulars, except that the check as described in the second count does not refer to the indorsement, I charge you there still may be a conviction under the second count, if the check in evidence before you corresponds in all other particulars with the check described; that the indorsement of the check would not be a material matter under the allegations in the second count."

The above set forth charge was error, for the reason that the indorsement on the check was a material matter under the allegations in the second count in the indictment, and the fact that the indictment in its second count described an unindorsed check, and the check offered in the evidence was an indorsed check, constituted a material and fatal variance between the allegations of the second count of said indictment and the said check introduced

as evidence to support said count of said indictment.

—Statement by editor.

Lewis C. Russell and Jos. D. Quillian, both of Winder, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, for the State.

BLOODWORTH, J. [1-3] The court did not err in charging the jury as complained of in grounds 4 and 7 of the amendment to the motion for a new trial. The other grounds of the motion are not argued. There is evidence to support the verdict, and the judgment is affirmed.

BROYLES, C. J., and LUKE, J., concur.

(26 Ga. App. 608)

PARKS v. STEVENS. (No. 12072.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

1. Bills and notes \S 365(1)—Equities between original parties not good against innocent holder for value.

In an action on a note by an innocent holder for value, evidence showing equities existing between the maker and the original payee was properly excluded.

2. Bills and notes \S 369—That promise to pay was conditional cannot be shown against innocent holder.

In an action on a note by an innocent holder for value, the maker cannot testify to a state of facts rendering the note a conditional promise to pay.

3. Bills and notes \S 370—Failure of consideration no defense against innocent holder.

In an action on a note by an innocent holder for value, a failure of consideration is not a defense.

Error from City Court of Hall County; J. B. Jones, Judge.

Action by F. L. Stevens against E. T. Parks. Judgment for plaintiff, and defendant brings error. Affirmed.

H. V. Johnson and B. P. Gaillard, Jr., both of Gainesville, for plaintiff in error.

Joseph G. Collins, of Gainesville, for defendant in error.

LUKE, J. In this case the maker of the note sued on sought to set up a defense which might have been good against the original payee, but was not good as against an innocent bona fide holder for value. The court excluded evidence which undertook to show equities existing between the maker and the original payee.

[1-3] Held: It was not error to exclude such evidence. The maker of the note could

not, as against the holder who was suing, and who by the evidence was shown to be an innocent holder for value, testify to a state of facts which would render the note a conditional promise to pay. If there was a failure of consideration in the note, the subsequent taker, the plaintiff in this case, in the court below, was protected against such defense. See *Burch v. Pope*, 114 Ga. 334 (1), 40 S. E. 227. It was not error for the court to direct a verdict against the defendant for the sum sued for.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 726)

BYRD v. HINES, Director General.
(No. 12129.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by Editorial Staff.)

Railroads \S 5½, New, vol. 6A, Key-No. Series—Amendment by striking name of director general and substituting company held improperly disallowed.

In an action against the director general of railroads for an injury occurring prior to the federal operation of railroads, where the petition and process were served both on the director general and the railroad company, and the petition as amended alleged a cause of action against the company, a proposed amendment to the process striking the name of the director general and substituting the name of the company as defendant was improperly disallowed.

Error from City Court of Macon; Will Gunn, Judge.

Action by C. A. Byrd against W. D. Hines, Director General. Judgment for defendant, and plaintiff brings error. Reversed.

Robt. L. Berner, of Macon, for plaintiff in error.

Jordan & Moore, of Macon, for defendant in error.

HILL, J. When an injury occurred to an employee of the Central of Georgia Railway Company prior to the date of the President's proclamation and the Act of Congress of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½p), placing the railroads of the country into the hands of a Director General for operation, and subsequently, while the Central of Georgia Railway Company, in pursuance of the terms of the said proclamation and act, was in the possession and control of the Director General, suit was brought by the injured employee of the corporation against the Director General of Railroads, to recover damages for the injuries received during his employ-

ment by the corporation, and the allegations of the petition, after an amendment had been allowed striking the Director General's name as defendant, set forth a cause of action for the injury against the railway corporation. and petition and process were served both upon the Director General and the railway company, although the process was directed to the former alone, it was error not to allow an amendment to the process, presented by the plaintiff, striking the name of the Director General and substituting as the defendant the name of the railway corporation as the defendant, the suit being in effect one against said corporation. *Robinson v. Central of Georgia Ry. Co., et al.*, 150 Ga. 41, 102 S. E. 532.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(26 Ga. App. 705)

BOWDEN v. KING. (No. 11825.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)

(Syllabus by the Court.)

Exchange of property \S 111—Right to rescind dependent on agreement or existence of fraud; deaf mule not "sound and all right," within agreement for exchange.

"The right to rescind a horse swap exists only by virtue of such special terms of the contract of sale as may so authorize, or, in the absence of any such agreement, by reason of knowingly false and fraudulent misrepresentation of existing facts, made to the complaining party, whereby he was induced to act to his injury." *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 188; *Newkirk v. Burts*, 25 Ga. App. 689, 104 S. E. 456; *Battle v. Livingston*, 21 Ga. App. 809, 95 S. E. 314; *Houze v. Blackwell*, 144 Ga. 700 (2), 87 S. E. 1054; *Stovall & Strickland v. McBrayer*, 20 Ga. App. 93, 92 S. E. 543. Under these principles of law, the verdict for the plaintiff was authorized by the evidence.

Error from City Court of Greensboro; Jos. P. Brown, Judge.

Action by J. T. King against D. H. Bowden. Judgment for plaintiff, and defendant brings error. Affirmed.

The exceptions entered by the defendant are on the general grounds only. According to the plaintiff's evidence, he and the defendant had exchanged mules upon the express agreement that, if the defendant's mule "was not sound and all right, it was no trade," and that, in the event the mule received by the plaintiff in exchange failed to come up to these requirements, then the mule which he had delivered to the defendant was to be again his, and vice versa. The

mule received by the plaintiff proved to be deaf, and, immediately on his discovery of such defect, plaintiff sought to restore the original status. The only contention made in the brief of counsel for defendant in defense of the suit, as based on this agreement, is that the deafness of the mule could not be accounted "unsoundness," or be taken as such a defect as would prevent the animal from being considered "sound and all right."

J. G. Faust, of Greensboro, for plaintiff in error.

Noel P. Park, of Greensboro, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(26 Ga. App. 634)

ANDERSON v. STATE. (No. 12157.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1921.)

(Syllabus by Editorial Staff.)

Criminal law \S 1160—Verdict, supported by evidence and approved by trial judge, not disturbed.

Where there was evidence to support the verdict, and it was approved by the trial judge, the judgment overruling a motion for a new trial must be affirmed.

Error from City Court of Washington; C. E. Sutton, Judge.

John Anderson was convicted of having a pistol in his possession, etc., and he brings error. Affirmed.

F. W. Gilbert, F. H. Colley, and Hugh E. Combs, all of Washington, Ga., for plaintiff in error.

Geo. M. Du Bose, Sol., of Washington, Ga., for the State.

LUKE, J. This case is here for review upon the ground that the evidence does not authorize the verdict. Upon conflicting evidence the jury convicted the defendant, Anderson, of having in his possession a pistol, not at his home or place of business, within the meaning of the statute—*Park's Ann. Pen. Code, § 348(a)*—without first having procured a license from the ordinary. There being evidence to support the verdict, and the verdict being approved by the trial judge, the judgment overruling the motion for a new trial must be affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(26 Ga. App. 706)

(106 S.E.)

WIGGINS v. L. JONAS & CO. (No. 11829.)

O. J. Taylor, of Valdosta, for defendant in error.

(Court of Appeals of Georgia, Division No. 2.
April 14, 1921.)*(Syllabus by Editorial Staff.)***1. Attachment \Leftrightarrow 243—Party moving to dismiss must point out defects in bond.**

Where a defendant in attachment moves to dismiss the attachment proceeding on the ground that plaintiff's bond is void, he must specifically point out its defects.

2. Attachment \Leftrightarrow 243—Objections to bond on motion to dismiss held too general.

On motion to dismiss an attachment proceeding, objections on the ground that the law has not been complied with by plaintiff before the issuance of the attachment as to the giving of the necessary bond and because the paper purporting to be a bond is not sufficient under the law are too general.

3. Appeal and error \Leftrightarrow 1052(8)—Admission of evidence harmless when plaintiff's case supported by undisputed evidence.

The admission of letters in evidence, even if erroneous, was harmless where plaintiff made out its case by other competent testimony, and defendant offered no evidence in denial of her liability.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Action by L. Jonas & Co. against Mrs. W. C. Wiggins. Judgment for plaintiff, and defendant brings error. Affirmed.

E. L. Smith and A. L. Miller, both of Edison, for plaintiff in error.

JENKINS, P. J. [1, 2] 1. Where a defendant in attachment moves to dismiss the attachment proceeding, upon the ground that the bond given by the plaintiff is void, he must specifically point out its defects. English v. Reed, 97 Ga. 477, 478, 25 S. E. 325. The record in the instant case fails to set forth any specific ground of objection to the bond. The grounds urged in the lower court were as follows:

(1) "Because the law has not been complied with by plaintiff before the issuance of said attachment as to the giving of the necessary bond"; and (2) "because the paper purporting to be a bond, copy of which bond is attached hereto marked Exhibit B, upon which the attachment issued, is not sufficient under the law and is ineffective as a bond under the law."

Under the authority cited such general objections must be held insufficient.

[3] 2. The defendant having offered no evidence in denial of her liability upon the open account sued on, and as the plaintiff's evidence made out its case by competent testimony, thus undisputed, irrespective of the copy letters, to the introduction of which exception was taken, their admission, even if not proper, must be treated as harmless. The objection raised to the express receipts, upon the ground that they were not identified with the goods sold to the defendant, is not sustained by the evidence disclosed by the record.

Judgment affirmed.

STEPHENS and HILL, JJ., concur.

\Leftrightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

